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Weekly Reporter,
Oct. 30, 1897.

THE

WEEKLY REPORTER,

1896-97

(FORTY-FIFTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1896, TO THE 12TH OF AUGUST, 1897.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

5316

VOL. XLV.

EDITED BY
MARTIN JOSEPH BLAKE,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the forty-fifth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest this year contains, in the same form as last year, a summary of all the cases published from the 24th of October, 1896, to the end of August, 1897, in the WEEKLY REPORTER, and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides some of those given in the Irish Law Reports. In the body of the Digest figures following the name of a case denote the page in the WEEKLY REPORTER at which it will be found. Where the name of a case has no figures attached, the case is not reported in this volume of the WEEKLY REPORTER; but the references to the case in other series of Reports will be found in the Tabular Index to the Names of Cases.

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1896—97.

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Mr. Justice Stirling	WILLIAM SCOTT THOMPSON and JAMES IRVINE STIRLING, Barristers-at-Law.
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CROWN CASES RESERVED	THOMAS REGINALD COLQUHOUN DILL, Barrister-at-Law

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A TABLE

OF

THE NAMES OF CASES

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

VOL. XLV.

NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith, Brown* v. *Jones*—this Table gives the names of such cases under both titles.

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Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — July 28.

SEAMAN *v.* BURLEY. (*a.*)

Practice—Appeal—Court of Appeal—Criminal cause or matter—Poor rate—Distress warrant—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

Where justices ordered a distress warrant to be issued to enforce payment of a poor rate, under a local Act which gave them power to order imprisonment in default of distress, but stated a case for the opinion of the court,

Held, that the judgment of the Queen's Bench Division on the case was in a criminal cause or matter, and that no appeal lay to the Court of Appeal.

Appeal from an order of a Divisional Court (Day and Lawrance, JJ.).

The appellant was summoned before the Justices of Paddington for neglecting to pay a poor rate on demand. The justices, acting under a local Act, ordered a distress warrant to be issued against the appellant. The local Act provided that the justices might enforce payment of poor rates by warrant of distress, and, in default of distress, by imprisonment. At the request of the appellant the justices stated a special case for the opinion of the Queen's Bench Division, and on the hearing of the special case the Divisional Court affirmed the order of the justices.

The appellant appealed to the Court of Appeal.

R. C. Glen (*Jelf, Q.C.*, with him), for the respondent, took a preliminary objection.—This is a criminal cause or matter, and therefore, by section 47 of the Judicature Act, 1873, no appeal lies. The order of which the appellant complains was made in proceedings which might end in his imprisonment. Where proceedings may end in imprisonment they are proceedings in a criminal cause or matter within the meaning of this section: *Payne* v. *Wright*, 40 W. R. 191, on appeal, 66 L. T. N. S. 148; *Mellor* v. *Denham*, 5 Q. B. D. 467, 28 W. R. Dig. 163; *Reg.* v. *Whitchurch*, 29 W. R. 922, 7 Q. B. D. 534; *Ex parte Schofield*, 39 W. R. 580, [1891] 2 Q. B. 428; *Reg.* v. *Tyler*, [1891] 2 Q. B. 588, 40 W. R. Dig. 178; *O'Shea* v. *O'Shea*, 38 W. R. 374, 15 P. D. 59.

Channell, Q.C. (*Naldrett* with him), for the appellant.—This is not a criminal cause or matter: *Sweetman* v. *Guest*, 16 W. R. 426, L. R. 3 Q. B. 262; *Reg.* v. *Price*, 28 W. R. 615, 5 Q. B. D. 300. The obligation to pay a poor rate is a debt which used to be barred by bankruptcy: *Reg.* v. *Master*, 17 W. R. 442, L. R. 4 Q. B. 285; *In re Wetherell*, 19 L. J. M. C. 115. The issuing of a distress warrant is merely a means of enforcing payment of the debt; it is not a step in a criminal proceeding. The cases cited by the other side are all cases where something has been done in disobedience to a statute incurring a pecuniary penalty, which penalty is ultimately enforceable by imprisonment.

Lord ESHER, M.R.—That this is entirely a question of procedure may be seen from considering the case of an assault. An assault may be dealt with either by civil process or criminal process. If a civil action is brought, an appeal lies to this court; but if criminal proceedings are taken, then, although the circumstances are the same and the evidence is the same, there is no appeal. Therefore the question whether an appeal lies does not depend on the nature of the thing complained of. Even if the obligation to pay a poor rate is a debt—as to which I have great doubt—still, if the Legislature has enacted that that debt may be realized by criminal procedure, from a judgment given in such criminal procedure there is no appeal.

Now, is the procedure in the present case criminal or civil? This court has held that where a proceeding is taken before magistrates and is a proceeding which may end—not which must end, but which may end—in imprisonment, it is for this purpose to be considered as a criminal proceeding. Here the person against whom the warrant of distress has been issued is liable to imprisonment in default of distress. The objection to hearing the appeal is fatal, and the appeal must be dismissed.

KAY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Underwood, Son, & Piper.*

Solicitor for the respondent, *J. H. Hortin.*

From Q. B. Div. (Chambers). (A. L. Smith and Rigby, L.JJ.) — July 17.

HOOD BARRS *v.* HERIOT. (*a.*)

Practice—Judgment debtor—Married woman—Inquiry as to separate estate—Examination of third person—Ord. 42, *r.* 32.

Judgment having been recovered against a married woman and not having been satisfied, the master ordered

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

that an inquiry be held as to her separate estate and that the judgment debtor do attend to be examined.

Held, that the order was made under ord. 42, *r.* 32, *and that therefore, following* Irwell *v.* Eden, 35 *W. R.* 511, 18 *Q. B. D.* 588, *there was no power to compel the attendance and examination of any person other than the judgment debtor.*

Appeal of the plaintiff from an order of Pollock, B., at chambers.

In November, 1892, a Mrs. Loftus recovered judgment against the defendant Heriot, a married woman, for £39 9s. debt, and £4 12s. costs, for goods sold and delivered.

In April, 1895, that judgment being still unsatisfied, it was assigned by Mrs. Loftus to the present plaintiff, Hood Barrs, who paid Mrs. Loftus her debt and costs, and was substituted for her in all future proceedings.

On the 12th of May, 1896, Master Macdonell ordered that "an inquiry be held as to the separate property of the judgment debtor not subject to any restraint upon anticipation for the purpose of satisfying the judgment debt and costs of this action upon the judgment, and that the judgment debtor do attend and be orally examined before a master, and that the judgment debtor do produce any books or documents in her possession relating to the inquiry, and that the costs of the inquiry be paid by the judgment debtor to the judgment creditor."

The judgment debtor was examined under this order for two days before Master Lawford. In the course of the examination it was ascertained that a sum of £486, representing dividends on certain Turkish bonds, the property of the defendant, had been paid into court in an action pending in the Chancery Division between the defendant and the executors of her father's will. The defendant stated that she had assigned this sum to her nephew, Blythe, for cash. The plaintiff, Hood Barrs, was anxious to examine Blythe as to this assignment, and he applied *ex parte* to Master Kaye for, and obtained, leave to issue a writ of *subpœna* against Blythe. Subsequently Blythe applied to Master Kaye to rescind this leave, and Master Kaye did so. The plaintiff appealed to Pollock, B., who affirmed the decision of the master. From this decision of Pollock, B., the present appeal was brought.

Ord. 42, r. 32.—"When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined as to whether any and what debts are owing to the debtor and whether the debtor has any and what other property or means of satisfying the judgment or order before a judge or an officer of the court as the court or judge shall appoint, and the court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

Bartley Denniss, for the plaintiff.—I admit that under ord. 42, r. 32, no one but the judgment debtor can be examined, for it was held in *Irwell* v. *Eden*, 35 W. R. 511, 18 Q. B. D. 588, that the words "any other person" refer only to the officer of a corporation. In this case the inquiry is as to the separate estate of a married woman, and the order is not made under ord. 42, r. 32, and in order to find out what separate estate she has the court will compel the attendance of any necessary person for examination. That was formerly the practice in such cases in the old Court of Chancery. *Bursill* v. *Tanner*, 34 W. R. 35, 16 Q. B. D. 1, is an authority in favour of the plaintiff, for in that case a solicitor was compelled to state, in an inquiry such as the present, the names of the trustees of the married woman.

Montague Shearman, for Blythe.—The only order obtained by the plaintiff is the common form order for the examination of the judgment debtor under ord. 42, r. 32; that a married woman can be a judgment debtor is shown by *Countess of Aylesford* v. *Great Western Railway Co.*, 41 W. R. 42, [1892] 2 Q. B. 626. The power of examination given by ord. 42, r. 32, is intended to be cross-examination of the severest kind, and in this case the plaintiff wants to cross-examine Blythe for the purpose of afterwards using his evidence against him in an action to set aside the assignment. That is a power which exists only in bankruptcy cases: *Ex parte Willey, In re Wright*, 31 W. R. 553, 23 Ch. D. 118. As regards the old Chancery practice the inquiry as to a married woman's separate estate was an affidavit. There was no power to subpœna or to cross-examine unwilling witnesses. *Bursill* v. *Tanner* is no authority in this case. The point was never taken there, and *Bursill* v. *Tanner* was decided two years before *Irwell* v. *Eden*, which is decisive of this case if, as I contend, the order was made under ord. 42, r. 32. But even if there is jurisdiction to compel the attendance and examination of Blythe, cause must be shown by the plaintiff. No such cause has been shown, and in the exercise of its discretion the court will not make the order asked for.

Bartley Denniss replied.

A. L. SMITH, L.J.—In my opinion the order of the 12th of May was clearly made under ord. 42, r. 32. I have not the summons before me on which the order was made, but the order is in exactly the same form as if it was against a male judgment debtor, with this sole difference, that in this case the judgment can only be satisfied out of the married woman's separate estate. It is said that the order was not made under ord. 42, r. 32, but is a general order for inquiry. That is not so. The inquiry is one in aid of execution, the object being to find out by cross-examination of the married woman what separate estate she has. The married woman was cross-examined, and she said that a certain sum of £486 in court in some other action had been assigned by her to Blythe, her nephew. The plaintiff then gets from Master Kaye leave to subpœna Blythe. Master Kaye was obviously unaware of the facts of the case, and thought it was an ordinary case under ord. 37, r. 28. He granted the leave *ex parte*, but rescinded it as soon as all the circumstances were explained to him. Pollock, B., affirmed the master, and therefore we are now in the same position as if the master had made no order.

As regards the question of jurisdiction, I am clearly of opinion that the order of the 12th of May was *de facto* in aid of execution against a married woman under ord. 42, r. 32. It is not necessary for me to read that rule in order to discuss whether any person other than the judgment can be summoned, for it has been decided in *Irwell* v. *Eden* that the words in the rule "any other person" only refer to an officer of a corporation in cases where a corporation is the judgment debtor, and do not mean any third person. So far, then, it seems that the master and judge were right, and that there is no jurisdiction to order the attendance of the witness desired by the plaintiff. But it is said on behalf of the plaintiff that it was decided otherwise in *Bursill* v. *Tanner*, and that that case shows that it is the common practice in inquiries as to the separate estate of a married woman to compel the attendance of other persons as

witnesses. I myself decided *Bursill* v. *Tanner* at chambers, and I well remember the circumstances of that case. A very well-known solicitor attended an inquiry at chambers, having with him a marriage settlement, but he refused to produce or to disclose the names of the trustees on the ground of his privilege as a solicitor; as, however, he admitted the jurisdiction of the court, I ordered him to make the disclosure. That is all that was decided in that case, and it is no authority in the present case, for the point which has been raised here was not taken there at all.

There is another point in this case which must not be lost sight of. By the order of the 12th of May the judgment debtor has to pay the costs of the inquiry. Now, just consider what has already been done. She has been cross-examined for two days, and it is now said that we are to order Blythe to come and been examined. That will cause more costs to be incurred, all of which the judgment debtor would have to pay. That was not the intention when the order was made. She was only intended to pay the cost of the inquiry as to her separate estate, information regarding which she was withholding.

There is a passage in the judgment of the late Master of the Rolls in *Ex parte Willey, In re Wright*, which is very pertinent to this case. He was there referring to the power of examination given by section 96 of the Bankruptcy Act, 1869, and he says (23 Ch. D., at p. 128): "Now, that is a very grave power to intrust to any court or any man—viz., power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised." Now, what the plaintiff wants to do here is to get evidence from Blythe in order that the title to the assignment to him may be impeached in a subsequent action. For the reasons which I have already given, I think there is no jurisdiction to compel the attendance of Blythe for examination, but even if there were, I think that the court in the exercise of its discretionary power ought to refuse to grant the application in the present case.

RIGBY, L.J.—I agree. I think that as regards that part of the order which directs the married woman to attend and be examined, the order is made under ord. 42, r. 32, and if that is so it is clear that no other person can be summoned to attend on subpœna. Then it is urged that inquiry is to be directed to the married woman's separate estate, and the conclusion which is sought to be drawn from that fact is that the attendance of any other persons as witnesses can be compelled as a matter of course. I do not understand that to be the old practice of the Court of Chancery, or the practice under the present rules. Under the old Chancery practice inquiries were taken on affidavit, and it was only under a special order that witnesses could be cross-examined. The modern practice under the Judicature Acts is that when an inquiry is ordered before a chief clerk he summons the witnesses, and their obedience to the summons can be enforced by the same penalties as in the case of a subpœna. But the chief clerk never summons witnesses for inquisitorial purposes, as is done in the case of a judgment debtor under ord. 42, r. 32, or in bankruptcy. Now, why are we to extend this power of inquisitorial examination, which under the rules exists only in the case of a judgment debtor. There is nothing special in the case of a married woman. There is no more difficulty in finding out the separate estate of a married woman than in discovering the entire property of an unmarried woman.

Whether the case is decided on the grounds of jurisdiction or of discretion, I do not think that the order asked for by the plaintiff ought to be made.

Appeal dismissed.

Solicitors for the plaintiff, *Hood Barrs.*

Solicitors for Blythe, *Rye & Eyre.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, L.J.) — June 29, 1896.

DERBYSHIRE COUNTY COUNCIL v. MAYOR, &c., OF DERBY. (a.)

Practice — Discovery — Interrogatories — Criminal or penal proceedings—Right to discovery—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.

Section 3 *of the Rivers Pollution Prevention Act,* 1876, *makes it an offence to cause or knowingly to permit any sewage matter to flow into any stream; and by section* 10 *the county court of the district has power, by summary order, to require any person to abstain from the commission of such offence, and any person making default in complying with any such requirement shall pay such sum, not exceeding* £50 *for every day during which he is in default, as the court may order, and such penalty shall be enforced in the same manner as any debt adjudged to be due by the court.*

Held, that proceedings instituted in the county court for an order requiring a person to abstain from causing or permitting sewage to flow into a river were not proceedings of a criminal or penal nature, and that an order for discovery might be made against such person.

This was an appeal from the judgment of the Divisional Court (Grantham and Collins, JJ.); reported 44 W. R. 543, [1896] 2 Q. B. 53.

The plaintiffs, the Derbyshire County Council, took proceedings in the county court, under section 10 of the Rivers Pollution Prevention Act, 1876, requiring the defendants, the Corporation of Derby, to abstain from causing or knowingly permitting sewage matter to fall or flow from their sewers into the river Derwent. The plaintiffs obtained an order for discovery of documents and for leave to deliver interrogatories.

The defendants appealed, contending that the proceedings were of a criminal or penal nature, and that therefore the order for discovery was wrong.

The Divisional Court affirmed the order of the county court judge.

The defendants appealed.

Cozens-Hardy, Q.C., and *W. Graham*, for the Corporation.

Stanger, Q.C., and *T. G. Carver*, for the County Council.

The following authorities were cited in addition to those referred to in the court below: *Harrison* v. *Southcote*, 1 Atk. 528, at p. 539; *United States of America* v. *McRae*, 16 W. R. 377, L. R. 3 Ch. App. 79; *Hobbs & Co.* v. *Hudson*, 38 W. R. 682, 25 Q. B. D. 232; *Kirkheaton Local Board* v. *Ainley*, [1892] 2

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Q. B. 274, 40 W. R. Dig. 219; and the Rivers Pollution Prevention Act, 1893 (56 & 57 Vict. c. 31), s. 1.

Lord ESHER, M.R.—I have had considerable doubts during the argument; but in the result I do not see my way to differ from the decision of the Divisional Court. That this is not a criminal matter seems to me to be quite clear. But that a penalty may become payable is equally clear, though at present there is nothing to which it can attach. This is an application for a mandatory injunction to restrain the defendants from allowing the sewage to pass through their sewers into the river. That is the whole of the present application. It is in the discretion of the judge to grant or refuse that application. I cannot help thinking that the defendants are entitled to show that the injunction ought not to be granted on the ground that they could not with reasonable means obey it. It is said that these proceedings may lead to the defendants becoming liable to a penalty. But that need not be so. Some other proceeding must intervene. There must be a substantive proceeding taken to recover the penalty, and in that proceeding it must be shown that the defendants have made default in complying with the order. I think that the defendants can then show some reason why they were unable to obey the order. There seems to me to be nothing to prevent them from showing at any time that they had done all they reasonably could to obey the order, but that circumstances arose which made it reasonably impossible for them to obey it. They would not then be in default. If it could be shown that they were guilty of wilful default, then they would be liable to a penalty. Therefore until the first order has been disobeyed so as to amount to a default, the question of a penalty does not arise, and there is nothing to prevent the judge from ordering discovery of documents and interrogatories. The appeal must therefore be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The question is whether this is a proceeding in which discovery of documents and interrogatories is permissible. It depends upon sections 3 and 10 of the Rivers Pollution Prevention Act, 1876. I may here point out that by section 14 of the Local Government Act, 1888, the County Council has jurisdiction to take proceedings under the Act of 1876. The County Council are here asking for an injunction to prevent the Corporation from sending their sewage into the river. The granting of that injunction is in the discretion of the county court judge. The application is for an injunction and nothing more. It is clear that it is not a criminal matter. It is said, however, that it is a penal proceeding, or rather one in which a penalty may ultimately be recoverable, and that therefore the case comes within the well-known rule that a person proceeding for a penalty will not be aided by the court allowing discovery. The question is whether this case comes within that rule. Undoubtedly Lord Hardwicke, in *Harrison* v. *Southcote*, did say that a man shall not be obliged to discover what may subject him to a penalty, not what must only. But that cannot apply to a case where the application is merely for an injunction, and where the evidence asked for is only wanted for the purposes of that application. The same remark applies to the case of *United States of America* v. *McRae*. This being an application for an injunction, the evidence sought for is only useful upon that application. The judge may make an order requiring the defendants to abstain from sending the sewage into the river, and may direct how that is to be done. The order may direct it to be done within a certain time. If that order were not obeyed, the evidence now sought for would not be used again before the judge, but the order would be brought before him, and proof given of the default. How can it be said that the present proceedings may result in a penalty? A new proceeding, caused by the defendants' default, is necessary before any question of a penalty can arise.

Appeal dismissed.

Solicitors for the plaintiffs, *Wynne, Holme, & Wynne*, for *Hughes-Hallett*, Derby.

Solicitors for the defendants, *Satchell & Chapple*, for *H. Gadsby*, Derby.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 25, 1896.

REG. v. JUSTICES OF KENT AND OTHERS. (a.)

Licensing Acts—Licence—Refusal to renew—Appeal to quarter sessions — Costs—"Party"—Jurisdiction to order objector to pay costs—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-section* 5.

A person, who had duly served notice of his intention to object to the renewal of a licence at the general annual licensing meeting, appeared before the licensing justices and opposed the renewal, which was refused. The licence holder appealed to quarter sessions, having served notice of appeal on the objector, and the licence was renewed. The objector did not appear on the appeal.

Held, that the objector was a "party" within section 31, *sub-section* 5, *of the Summary Jurisdiction Act*, 1879, *and the quarter sessions had jurisdiction to order him to pay the costs of the appeal.*

Reg. *v.* Justices of Gloucestershire, 41 *W. R.* 379, *approved.*

Appeal from a decision of the Queen's Bench Division (Lord Russell of Killowen, C.J., and Wright, J.) discharging a rule *nisi* for a *certiorari*; reported 44 W. R. 603, [1896] 2 Q. B. 1.

One Boulter duly served upon the holder of a public-house licence written notice of his intention to oppose the renewal of the licence at the general annual licensing meeting. Boulter appeared at the general annual licensing meeting and opposed the renewal, which was refused. The licence holder served notice of appeal to quarter sessions upon Boulter, and upon the clerk to the licensing justices. Neither Boulter nor the licensing justices appeared upon the appeal, and the quarter sessions allowed the appeal and renewed the licence, and ordered Boulter to pay the costs of the appeal.

A rule *nisi* for a *certiorari* to bring up, for the purpose of being quashed, the order of quarter sessions as to costs was obtained, but the Divisional Court discharged it.

Boulter appealed.

G. Blaiklock (*E. Owen Roberts* with him), for the appellant.—9 Geo. 4, c. 61, s. 27, gives a right of appeal from the justices' refusal to renew a licence. There does not seem to be any right of appeal to the objector if the renewal is granted. Notice of appeal need only be served on the licensing justices, and section 29 deals with the costs, and refers only to the justices. Therefore the Licensing Acts do not make the objector a party. *Reg.* v. *Justices of Glamorganshire*, 40 W. R. 436, [1892] 1 Q. B. 621, shows that the effect of section 13, sub-section 11, of the Inter-

(a.) Reported by W. F. BARRY, Esq., Barrister-at Law.

pretation Act, 1889, is to apply the provisions of the Summary Jurisdiction Acts to these licensing proceedings. By section 31, sub-section 2, of the Summary Jurisdiction Act, 1879, notice of appeal must be served on the "other party" as well as on the clerk to the justices. An objector who is exercising the right of any citizen to object to the renewal of a licence under section 42 of the Licensing Act, 1872, and who does not appear at quarter sessions and actively oppose the appeal, is not a "party" within section 31, sub-section 5, of the Summary Jurisdiction Act, 1879, against whom the quarter sessions can give costs. In *Reg.* v. *Justices of London*, 43 W. R. 387, [1895] 1 Q. B. 616, it was held that the licensing justices who do not actively oppose the appeal are not made parties so as to be liable for the costs.

He also referred to *Price* v. *James*, 41 W. R. 57, [1892] 2 Q. B. 428; and *Sharpe* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 173.

J. Lawson Walton, Q.C. (*A. H. Bodkin* with him), for the respondent.—*Reg.* v. *Justices of London* only shows that licensing justices as such are not "parties" to an appeal against their decision unless they make themselves litigants by appearing on the appeal and opposing it. In that case Lindley, L.J., suggests that the objector is the real party. In *Price* v. *James* the superintendent of police, who appeared before the licensing justices to oppose the renewal, was held properly made respondent to a special case; and in *Reg.* v. *Justices of Gloucestershire*, 41 W. R. 379, it was held that the objector must be served with notice of appeal, otherwise the quarter sessions may refuse to hear the appeal. These cases show that an objector is a "party" upon whom notice of appeal must be served, and who may be ordered to pay the costs of the appeal.

Blaiklock replied.

Lord ESHER, M.R.—In my opinion this appeal must be dismissed. The question is whether an objector to the renewal of a licence, whose objection has been sustained at the general annual licensing meeting, is a "party" to the appeal brought by the licence holder against that decision. If he is not, who is the other party to the appeal? There would seem to be none. It seems to me that the combined effect of the cases of *Reg* v. *Justices of Glamorganshire*, and *Reg* v. *Justices of London*, decisions which are binding upon this court, and *Reg* v. *Justices of Gloucestershire*, a decision of the Divisional Court with which I agree, show that an objector, by making the objection at the general annual licensing meeting and obtaining a decision in his favour, is thereby made a party to the appeal to quarter sessions against that decision. Those cases decide that the licence holder cannot launch his appeal without giving notice to the objector. That can only be upon the ground that the objector is a party. Notice must be served upon the justices, but they are not thereby made parties to the appeal. Licensing justices are a court of summary jurisdiction, and proceedings on an appeal must be regulated as in the case of appeals from a court of summary jurisdiction. The objector therefore is a party. There is thus an appellant and a respondent. The respondent did not appear upon the hearing of the appeal, and the court heard the appeal and decided in favour of the appellant. The court had jurisdiction in their discretion to order the objector to pay the costs of the appeal.

KAY, L.J.—I am of the same opinion. The ground of the application for a *certiorari* is that the quarter sessions had no jurisdiction to order Boulter to pay the costs of the appeal. Boulter gave notice of objection to the renewal of the licence, and appeared at the licensing meeting in support of his objection, and the renewal was refused. The publican appealed to quarter sessions, and served notice of appeal on the clerk to the licensing justices and on Boulter. Boulter did not appear at the quarter sessions when the appeal came on for hearing. The quarter sessions reversed the decision of the licensing justices and renewed the licence, ordering Boulter to pay the costs of the appeal. The law has been authoritatively laid down by decisions binding upon us. First, justices sitting at the general annual licensing meeting are a court of summary jurisdiction, and therefore an appeal from them is regulated by section 31 of the Summary Jurisdiction Act, 1879, and by sub-section 2 notice of appeal must be served on "the other party," and by sub-section 5 the quarter sessions may make such order as to costs to be paid by "either party" as they may think just. Therefore if Boulter was a "party," undoubtedly the quarter sessions had power to order Boulter to pay the costs of the appeal. Was Boulter a party? By section 31, sub-section 2, notice of appeal must be served on "the other party." It seems to me, apart from authority, that Boulter comes within those words. He initiated the whole litigation, and having obtained a decision in his favour he took no further notice, and said that he was not a party. It was held in *Reg.* v. *Justices of London* that mere service of the notice of appeal on the clerk of the justices does not make them parties. The object is to give them an opportunity of appearing. If they appear and actively support their decision they make themselves parties, but not otherwise. In that case Lindley, L.J., says that "if there is an objector, who is the real party, and the licensing justices, though served with notice of the appeal, either do not appear or, even if they do, yet take no part in the appeal beyond informing the Court of Appeal of the reasons for which they acted, then, in my opinion, the justices are not parties"; and A. L. Smith, L.J., seems to have agreed with that. The effect of *Reg.* v. *Justices of Glamorganshire* is that the objector must be served with notice of appeal, and in *Reg.* v. *Justices of Gloucestershire* the Divisional Court held that the omission to serve the objector is fatal. I agree with the last decision, as it seems to me to follow from the decisions of this court. The objector is therefore a "party" within section 31, sub-section 2, and he comes within sub-section 5, and the quarter sessions had jurisdiction to order him to pay the costs of the appeal.

A. L. SMITH, L.J.—I am of the same opinion. The three cases which have been referred to cover the whole ground. In the first place, brewster sessions are courts of summary jurisdiction. There were doubts about it, and the Legislature by section 7 of the Summary Jurisdiction Act, 1884, enacted that the expression court of summary jurisdiction should mean any justice or justices or magistrate, whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his or their commission, or by the common law. That section was repealed by and re-enacted in section 13, sub-section 11, of the Interpretation Act, 1889. I mention this because it is said that it is judge-made law. It is nothing of the kind. It is statute law. It is obvious that the Legislature enacted that provision to clear up doubts, and it is plain that brewster sessions come within the very terms of the enactment. Then by section 31, sub-section 2, of the Summary Jurisdiction Act, 1879, notice of appeal must be served upon "the other party." Who is the other

party? Clearly the objector. The publican cannot move a step without serving notice of appeal upon the objector. It was decided in *Reg.* v. *Justices of Gloucestershire* that the publican must serve the objector, and that the omission to do so is fatal. Therefore Boulter was a party to these proceedings, and he cannot get out of his liabilities as such by not appearing at quarter sessions. Section 31, sub-section 5, therefore applies, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hicks, Davis,* and *Hunt,* for *A. M. Bradley,* Dover.

Solicitors for the respondent, *Godden, Son & Holme,* for *Mowell & Mowell,* Dover.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 16, 1896.

RICHMOND HILL STEAMSHIP CO. *v.* CORPORATION OF TRINITY HOUSE. (*a.*)

Ship—Light dues—Measurement of tonnage—Deck cargo—"Goods"—Horses and cattle—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.

By section 23 *of the Merchant Shipping Act,* 1876, *if any ship carries as deck cargo timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods. The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines enclosing a rectangular space sufficient to include the goods.*

Held, that live animals carried on deck were "goods" within the meaning of the section; and that the space to be measured was not the actual sheds occupied by them, but a rectangular space no larger than was reasonably necessary to enclose the animals, allowing reasonable facilities for their movements.

Appeal from the judgment of Lord Russell of Killowen, C.J., at the trial of the action without a jury; reported [1896] 1 Q. B. 493, 44 W. R. Dig. 150.

The plaintiffs were the owners of the steamship *Richmond Hill,* and the defendants were the collectors of light dues payable by vessels entering the port of London. The plaintiffs carried on the *Richmond Hill* 17 horses and 350 cattle in covered pens on deck, and on arrival in the port of London a surveyor of Customs boarded the steamship for the purpose of ascertaining under section 23 of the Merchant Shipping Act, 1876, the tonnage of the ship upon which light dues were payable, and measured the deck cargo consisting of horses, cattle, and cattle pens. In accordance with instructions from the Board of Trade, the surveyor measured along the deck the greatest length and breadth of the pens, and also the greatest height reached by the pens, and he multiplied together the figures so obtained and divided by 100, which gave 328 as the tonnage of the space. The defendants demanded of the plaintiffs the sum of £3 16s. 6d. for light dues payable in respect of the said 328 tons, and the plaintiffs paid the amount under protest, and brought this action to recover it back. The agreed questions raised by this action were: (1) Whether the defendants were entitled to charge the plaintiffs with any light dues in respect of the said horses, cattle, or cattle pens? (2) if yes, whether the defendants had employed the right system of measurement in ascertaining the amount of such dues? Lord Russell of Killowen, C.J., held that live animals were "goods" within section 23 of the Merchant Shipping Act, 1876,* and that the tonnage of the space occupied by them should be added to the ship's registered tonnage for the purpose of calculating the light dues; but that the space to be measured was not the covered pens, but the space occupied by the animals themselves, making reasonable allowance for their free bodily movements. He accordingly gave judgment for the plaintiffs for £1. The defendants appealed, and the plaintiffs gave cross-notice of appeal.

Bucknill, Q.C., and *Butler Aspinall,* for the defendants.

J. Lawson Walton, Q.C., and *Holman,* for the plaintiffs.

Lord ESHER, M.R.—I am of opinion that the judgment of the Lord Chief Justice is right upon both points. The first question is whether the space occupied by cattle carried as deck cargo is space occupied by "goods" within the meaning of section 23 of the Merchant Shipping Act, 1876. It seems to me that where a shipowner is really using the deck, as if it were a part of the hold, for the carriage of cargo, taking into consideration what light dues are payable for—namely, for the safety of the ship and cargo, it would be strange to say that the shipowner was liable to pay light dues in respect of timber, stores, and goods of a similar nature—*i.e.,* wooden goods carried on deck, while if he carried bales of cotton or live animals on deck he would not be liable. That is the argument for the plaintiffs. To my mind it is impossible to say that the shipowner would not have to pay light dues in respect of bales of cotton carried on deck. The word "goods," on the principle laid down in *Anderson* v. *Anderson,* 43 W. R. 322, [1895] 1 Q. B. 749, must have its ordinary and natural meaning, having regard to the subject-matter dealt with—namely, cargo. If bales of cotton carried in the hold as part of the cargo under a contract of carriage, are—as undoubtedly they are—goods, they are not the less goods because they are carried on deck. So, too, as regards live animals. They are carried as goods under a contract of carriage. They come, therefore, within the word "goods" as being part of the cargo. Upon this point I think the Lord Chief Justice was right. The next point relates to the mode of measurement. The tonnage of the space occupied by the deck cargo is to be added to the ship's registered tonnage for the purpose of calculating the light dues payable by the ship. We must construe the words of the statute according to their ordinary meaning. What is the meaning of the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* "If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act, 1854, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable. The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines inclosing a rectangular space sufficient to include the goods." This statute has been repealed by the Merchant Shipping Act, 1894, but the provision has been re-enacted in section 85 of the latter Act.

"space occupied by such goods"? What is the space occupied by the horses and animals? The statute does not say the space allotted to or set aside for the carriage of the animals. The words must mean the space actually occupied by them. The subsequent words confirm this view: "The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines inclosing a rectangular space sufficient to include the goods." The space is not to be measured by the mere shape of the animal, but it is to be a rectangular space no larger than is reasonably necessary to inclose the animals. The surveyor has to measure a hypothetical shed no larger than is necessary for actual occupation by the animals, allowing reasonable facilities for their movements, and then to measure the inside of that shed. That I understand to be the principle laid down by the Lord Chief Justice. He came to the conclusion that the surveyor measured more than the inside of the hypothetical shed. The surveyor measured the actual shed. The principle laid down by the Lord Chief Justice is right, and we cannot say that he was wrong in coming to the conclusion that the measurement in this case was not in accordance with that principle. Both the appeal and the cross-appeal must be dismissed.

KAY, L.J.—I am of the same opinion. Formerly it would appear that light dues were payable on the registered tonnage of the ship. The object of section 23 of the Merchant Shipping Act, 1876, was to add the tonnage of the space occupied by goods carried as deck cargo to the registered tonnage of the ship for the purpose of calculating the amount payable for light dues. It is first said that live animals are not "goods" within section 23. It is urged that the words "other goods" following "timber stores," must be read, according to the misunderstood doctrine of *noscitur a sociis*, as goods made of wood. I differ from that contention. Why the word "stores" should be confined to things made of wood I cannot see. It is said that "stores" means ship's stores. I cannot see why. It cannot mean the stores of that particular ship, because in that case the stores would not be carried as cargo. In my opinion "stores" mean things other than timber which are stored for the purpose of carriage, and "goods" include all other kinds of goods. Horses and animals are goods in the ordinary sense of the word. It is said that at the time of the passing of the Act deck cargoes were chiefly timber. But even at that time timber was not the only article carried as deck cargo, and the Legislature must have known that many other articles would probably in future be carried on deck. In my opinion the section should be construed widely, because there is no reason why the shipowner should not pay light dues for all goods whether carried on deck or in the hold. The next point is as to the measurement of "the space occupied by such goods." The section does not leave the matter in doubt, because it goes on to state how the space so occupied is to be measured. It is to be a rectangular space sufficient to include the goods. What is the rectangular space sufficient to include horses or cattle? The surveyor must measure what space they require, allowing reasonable comfort for their carriage on deck. The section does not say that the shed is to be measured. The surveyor in the present case has measured a large shed divided into compartments called pens, and has measured the outside of that shed. It cannot be the right rule to measure the shed in every case. Supposing one sheep or one pig were put into each pen, would the pen be the space occupied by the sheep or the pig? That is not the meaning of the statute. The statute tells the surveyor to take an imaginary space bounded by rectangular lines sufficient for the animals during the voyage. Therefore upon this point I find it quite impossible to differ from the judgment of the Lord Chief Justice, and I do not think it can be better put than he puts it in his judgment, where he says: "He (the surveyor) is entitled, for the purposes of the computation of the horizontal area, to measure a rectangular space, the depth of which shall be something in excess of the longest animal contained in it, and he is entitled also to take a uniform height sufficient to allow fair headroom for the tallest of the animals." The surveyor is therefore not entitled to measure the outside of the shed. This case differs from the one suggested as analogous case—namely, goods packed in cases. There the cases would belong to the consignor, and would be treated as cargo, and the space occupied by the goods would be space occupied by the cargo. It is impossible to treat the space occupied by the sheds, in which the consignor has no interest, as being space occupied by the cargo.

A. L. SMITH, L.J.—I am of the same opinion. Upon the first point, in my opinion the words "other goods" mean other articles on deck carried as deck cargo, and therefore horses and cattle come within those words. The defendants, therefore, were entitled to measure in the space occupied by the horses and cattle. Then comes the question whether the defendants have measured correctly. They have measured round the outside of the sheds. Section 23, however, says that the space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods. Here the measurement was made irrespective of the area occupied by the goods because the surveyor has measured in space not occupied by the goods. The shed or pen is not part of the cargo. It is part of the fittings of the ship. I agree with the rule laid down by the Lord Chief Justice as to how the measurement is to be carried out.

Appeal dismissed.

Solicitors for the plaintiffs, *Downing, Holman, & Co.*
Solicitors for the defendants, *Sandilands & Co.*

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Rigby, L.JJ.) } July 3, 1896.

SALTER v. SALTER. (a)

Practice—Probate—Appointment of receiver pendente lite—*Jurisdiction—Pending suit*—Caveat—*Warning—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.

Notwithstanding sub-section 8 *of section* 25 *of Judicature Act*, 1873, *the court has no jurisdiction to appoint a receiver unless the application is made in a pending proceeding already duly commenced by writ or otherwise.*

In re Parker, Dearing *v.* Brooks, 54 *L. J. Ch.* 694, 35 *W. R. Dig.* 162, *explained.*

The entry of a caveat *in the goods of a deceased person, together with a warning to the* caveat *and an appearance by the* caveator *to the warning, does not constitute a* lis pendens *or enable the court to appoint a receiver* pendente lite.

Appeal from the President.

One Frederick Salter, died in May, 1896, having by his last will, dated the 9th of May, 1896, left all his

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

property to his brother. The testator's widow, who claimed the whole of the estate under an earlier will, resisted probate of the will of May, 1896. She entered a *caveat* in the matter of the estate, and when the *caveat* was warned she entered an appearance to the warning. At this stage she applied for the appointment of a receiver *pendente lite* of the goods of the deceased, contending that there was a *lis pendens* by reason of the proceedings already taken, and that in any case section 25, sub-section 8, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), gave the court jurisdiction to appoint a receiver. The President held that, a writ not having been issued, there was no *lis pendens*, and refused to appoint a receiver; but he granted an injunction to prevent the brother from parting with the property, which he had taken possession of. Against the refusal to appoint a receiver the widow appealed.

P. Rose-Innes, for the appellant.—A receiver may be appointed, even if there is no *lis pendens: In re Parker, Dearing* v. *Brooks*, 54 L. J. Ch. 694, 35 W. R. Dig. 162; Judicature Act, 1873, s. 25, sub-section 8. But here there is a *lis pendens*. [LINDLEY and LOPES, L.JJ., referred to *Moran* v. *Place*, 40 SOLICITORS' JOURNAL, 514; since reported, 44 W. R. 593.]

He also referred to 13 & 14 Vict. c. 35, s. 17: *In the Goods of Moore*, 36 W. R. 576, 13 P. D. 36; *In re Mallaliew, Ratcliffe* v. *Mallaliew*, 91 L. T. 398; and 20 & 21 Vict. c. 77.

Bargrave Deane, for the respondent, was not called upon.

LINDLEY, L.J.—It is impossible to accede to this application. I think the case of *In re Parker, Dearing* v. *Brooks*, has been misunderstood. *In re Parker* means this. It was a creditor's action in the Chancery Division—that is to say, there was a pending suit in the Chancery Division for the administration of the estate of a deceased person. There had been no probate of any will. The question arose whether a receiver could be appointed; and one question in the case was whether the application should not be made in the Probate Division rather than in the Chancery Division. Chitty, J., says the old rule was that there must be a *lis pendens* to justify the court in appointing a receiver, but that that was no longer necessary. But what does that mean? It means this. The old rule in Chancery used to be that there must be a *lis pendens* in the Probate Division before the Chancery Division could grant a receiver, and that rule has been altered. It is quite true that that is no longer necessary. For that purpose it is important and useful to invoke the Judicature Act. But that Act does not in any way support the idea that ever, in the Chancery Division or the Probate Division, or in any other court, you could apply for and obtain a receiver before there is any writ issued. I never heard, nor did anybody else in this court, that that could be done. The whole of this application seems to me to be based on a misconception of what Chitty, J., meant in that case. He simply meant that in a creditor's action in the Chancery Division you could now do what you could not do before, apply for the appointment of a receiver where there was no pending action in the Probate Division. I think the President was perfectly right.

LOPES, L.J.—I am of the same opinion. An application for a receiver cannot be made unless there is already a pending proceeding; and the same applies to an injunction, which cannot be obtained unles there is a *lis pendens*. It frequently happens that the application is made before the writ is served, but it has always been issued, and the application for the appointment of a receiver cannot be made unless there is a *lis pendens*. It is said that certain proceedings which have been taken amount to a *lis pendens*. I am clearly of opinion that they do not. When the nature of those proceedings is considered that is abundantly clear. A *caveat* is simply a notice to the registrar not to issue any grant of probate unless notice is first given to the solicitor of the property who has lodged the *caveat*. The *caveat* is issued, and it says, Let nothing be done in the matter. Then the *caveat* is warned, that is to say, notice is given to the *caveator* that he must appear within six days; and then an appearance is entered. What happens next? If any further proceedings are to be taken by the parties, the next step is the issue of a writ. When a writ is issued then a *lis* commences, and, in my opinion, not before then. Applying that to the present case, I think the learned judge was perfectly right, and had no jurisdiction to do what he was asked to do.

RIGBY, L.J.—I am of the same opinion. It is important for the purposes of this case to consider what the meaning of a receiver *pendente lite* is. The old rule was that before the Court of Chancery could appoint a receiver *pendente lite* there must be a pending litigation, not in the Court of Chancery, but in another court, and mainly at any rate—I am not sure if not exclusively—in the Court of Probate. The order was made on the ground that there was no proper person to take the management of the property. Then the court would step in and appoint a receiver. That was the meaning of a receiver *pendente lite*. Here there is no question of *lis pendens* in that sense; it is a mere question of how you are to approach the court in order to ask for a receiver. I will assume that, as we are told, the President thought there is behind all this a proper case for appointing a receiver. About that I know nothing. But how are you to appoint a receiver? You cannot simply walk into court and ask for the intervention of the court in that way. I do not know of any authority for doing that. These proceedings, commencing by a *caveat*, followed by a warning, and terminated by appearance, are no assistance to the present applicant in approaching the court, and she has not shown any other ground for asking the court to intervene. She might have issued a writ, but if she did not choose to do that I do not see anything which entitles her to make this application.

Appeal dismissed.

Solicitors, *H. Rose-Innes; J. G. Kempster.*

High Court of Justice.

Chan. Div. } July 9, 15, 1896.
Chitty, J. }

In re BREWER.
MORTON *v.* BLACKMORE. (*a.*)

Settlement—Determinable interest—"Become payable to or vested in other person"—Forfeiture.

B., by a marriage settlement, assigned property to trustees upon trust to pay the income to B. until he should die or . . . should assign, charge, or incumber the said income, or do or suffer anything whereby the same or some part thereof would, . . . if belonging absolutely to him, become payable to or vested in other persons. The surviving trustee in and subsequently to 1887 *made advances out of the* corpus *to B., which were*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

expended by B. for the maintenance of his family and other purposes.

Held, that the dissipation of the corpus *by B. did not, on the construction of the above clause, work a forfeiture of B.'s life interest, for, so long as the money was in B.'s hands and capable of being followed, the right to the income did not pass from B.; and after B. had spent the money, the persons to whom he paid it being purchasers for value without notice, the money in their hands ceased to have any existence as a trust fund.*

Semble, *the result would have been different if the words "or cease to be payable to himself" had been in the settlement.*

Summons.

R. H. Brewer, by a settlement made on his marriage in 1878, assigned certain reversionary property to trustees upon trust to pay the income thereof to himself, until he should die or become bankrupt, or should assign, charge, or incumber the said income, or do or suffer anything whereby the same or some part thereof would through his act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, become payable to or vested in some other person or persons; and after the failure or determination of the said trust upon trust to pay the income to his wife during her lifetime with ultimate trusts in favour of the children of the marriage.

In 1891 Brewer became bankrupt.

In and subsequently to 1887 (the property having fallen into possession and being worth about £1,000), and prior to the bankruptcy, Blackmore, the sole trustee of the settlement, advanced to the settlor out of the capital of the trust funds sums amounting to £685.

The only security taken was a covenant by the settlor and his wife (since deceased) to repay the principal of loans and to indemnify the trustee.

The money lent was applied by the settlor for his own purposes and for the maintenance of his wife and children.

After the bankruptcy an action was instituted by the infant children beneficially entitled under the settlement against Blackmore to compel him to replace the part of the trust fund which had been lost; and pursuant to a judgment in the action he has made good the trust fund, and new trustees have been appointed in his place.

Blackmore, having purchased from Brewer's trustee in bankruptcy all the interest of Brewer in the trust fund, claimed to be entitled to the income of the fund during Brewer's life.

This summons was taken out by the trustees of the settlement for the determination of the questions whether the life interest of Brewer in the settled funds had determined before the date of his bankruptcy, and whether the income should be paid to Blackmore or applied for the benefit of the children of the aforesaid marriage.

Farwell, Q.C., and *St. John Clerke*, for the trustees of the settlement.

Levett, Q.C., and *Ribton*, for Blackmore.—There was no alienation of Brewer's income, and therefore no forfeiture prior to the bankruptcy. A breach of trust may render income liable to be impounded under the Trustee Act, 1893, s. 45, but neither that liability nor the borrowing and spending the money would cause a forfeiture of Brewer's interest under the settlement.

They cited *In re Detmold, Detmold* v. *Detmold*, 37 W. R. 442, 40 Ch. D. 585; and *In re Sartoris, Sartoris* v. *Sartoris*, 40 W. R. 82, [1892] 1 Ch. 11.

Byrne, Q.C., and *St. John Clerke*, for Brewer's children.—The income of the capital which was handed over to Brewer and dissipated by him, was alienated, and Brewer's interest was consequently forfeited before his bankruptcy.

Levett replied.

CHITTY, J.—The limitation until bankruptcy being void as against Brewer's creditors in bankruptcy, his life interest was not determined by his bankruptcy, but, subject to the question presently mentioned, passed to the trustee in bankruptcy and is now vested in the defendant Blackmore as purchaser from the trustee in bankruptcy. The other events specified in the limitation of the life interest were (so far as material) until he (the settlor) should "assign, charge, or incumber the said income, or do or suffer anything whereby the same or some part thereof would, through his act or default, or by operation or process of law or otherwise, if belonging absolutely to him, become payable to or vested in some other person or persons." These limitations are valid; consequently if any of these events happened before the bankruptcy the life interest was determined. The facts on which the question arises are as follows. [His Lordship having stated the facts continued:—]

The effect of these transactions has now to be considered. On behalf of the infants it was contended that the life interest had ceased, or, to use the more common phrase, had been forfeited, and reliance was placed on the words "the income or some part thereof" would "become payable to or vested in some other person or persons." But to or in what other person would it have become payable or vested had it belonged to the tenant for life absolutely? And when would it, on the same hypothesis, have so become payable or vested? Certainly not on the occasion of the money being lent. For the purpose of the present question it appears to me to be immaterial whether the loans were breaches of trust or not. Undoubtedly they were breaches of trust. The tenant for life was liable to replace the fund, but without interest; the income still belonged to himself and to no one else. So long as the money was in his hands and capable of being followed, the money itself might have been recovered from him, but the right to the income did not pass from him. After he had spent it in the manner described, it could no longer be followed; the tradesmen and others to whom he paid it were, undoubtedly, purchasers for value without notice; the money in their hands ceased to have any existence as a trust fund. I think that it would be an extravagant refinement to say that every sovereign as he paid it away still remained part of the trust fund and was producing an income, and that such income was payable to or vested in the persons who had received the sovereign or other the money thus paid away. In my opinion after the money had in the first instance been lent, and subsequently after it had been spent, the income of the trust fund did not become payable to or vested in any person or persons other than the tenant for life.

The case, no doubt, is peculiar; I am not aware that there is anything like it in the books. In construing clauses of cesser or forfeiture such as that before me, the court is not at liberty to depart from the language of the document. The words "or cease to be payable to himself" are not in the settlement; and I find myself unable to say that, by any just method of construction applicable to such clauses, I ought to supply those words. Had they been there the case would have stood differently. A point was raised at the bar as the right to an order for impounding the income, and reference was made to the 45th section of the Trustee Act, 1893. But no such order was in fact made; nor could it have been made

effectually; any such order would have worked a cesser of the life interest.

The result is that I hold the life interest had not determined previously to the bankruptcy, and that the income of the trust fund is payable to the defendant Blackmore for the residue of the life of the settlor.

Solicitors, *A. M. Bradley; Woodbridge & Sons.*

Chan. Div. } March 20, 1896.
Kekewich, J. }

In re CULVERHOUSE.
COOK *v.* CULVERHOUSE. (*a.*)

Will—Leaseholds specifically bequeathed—Estate duty—Specific bequest—General personal estate—Vesting—Executor—Assent—Assignment—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-section* 1.

Leaseholds specifically bequeathed pass to the executor as such, and consequently estate duty upon them is primarily payable out of the general personal estate of the testator, as they do not come within the exception in section 9 *of the Finance Act,* 1894.

Leaseholds specifically bequeathed vest, upon the assent of the executor, absolutely in the specific legatees, and no deed of assignment by the executors is necessary.

John Culverhouse, who died on December 18th, 1894, by his will appointed executors and (*inter alia*) specifically bequeathed leasehold houses to certain legatees, and gave his residuary real and personal estate to his executors upon trust for sale to hold the same after payment of debts, testamentary expenses, and legacies upon the trusts therein mentioned.

This action was brought in 1895 for the administration of the estate and various inquiries were ordered to be made. The executors having admitted assets sufficient to meet all the specific bequests, took out this summons to decide the question whether it was necessary that they should assign the leaseholds by deed to the specific legatees (the legatees contending that a written assent by the executors accompanied by the handing over of the title deeds was all that was requisite), and also to decide the question whether the estate duty under the Finance Act of 1894 on the leaseholds was payable out of the leaseholds or out of the residuary estate.

Rowden, for the plaintiffs.

Upjohn, for the specific legatees of the leaseholds.—The assent of the executors is sufficient to pass to us the legal estate. The duty must be borne by the general estate. Section 9 of the Finance Act, 1894, says: "A rateable part of the estate duty on an estate, in proportion of the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable," but these leaseholds did pass directly to the executor as such, and therefore the payment of the duty is not thrown on them but on the general estate.

J. G. Wood, for pecuniary legatees.—A rateable part of the estate duty should be thrown on the specific legatees. The whole question is, do chattels real, specifically bequeathed, vest in the executor as such? I submit they do not, because, though if the estate is insolvent the executor could take them to satisfy debts, if the estate is not insolvent they pass direct to the legatees and the executor has nothing to do with them. They vest not from the time of assent by the executor to the bequest, but from the date of the testator's death. [KEKEWICH, J.—A term of years specifically devised vests in the first instance in the executor "by virtue of his office."—Williams on Executors, 9th ed. p. 600.] That means, if the executor has to resort to chattels for payment of debts he has first choice *virtute officii*. If the bequest vested first in the executor how is it divested? Not by the assent, which is merely an assent to the gift in the will taking effect as the will said it should do. In a gift of legal estate in remainder the particular estate vests by force of the will. The executor merely assents by saying: I don't wish to intercept that legacy.

Ribton, for infants in the same interest.

KEKEWICH, J.—I am quite sure that Mr. Woods' point must have something in it, but I am not prepared without some distinct authority to run away from elementary rules such as are laid down in Williams on Executors, where at p. 600 of the 9th edition leaseholds are said to vest in the executor by virtue of his office, and again at p. 802 where the learned author says with respect to bequests vesting upon the assent of the executor "the general rule certainly is that, at law, the title to any specific thing bequeathed, vests, upon the assent of the executor, absolutely in the legatee, so as to enable him to bring an action of ejectment for a chattel leasehold, or trover for the goods which are the subject of the legacy." It seems to me that Mr. Upjohn's position is the right one, and that these leaseholds vest, as he contends, in the "executor as such," and therefore do not come within section 9 of the Finance Act. Consequently the estate duty is payable out of the general personal estate and not by the specific legatees.

[The specific legatees consented to execute an indemnity to the executors against the rents and covenants in the leases, the costs of such indemnity being ordered to be paid out of the general personal estate.]

Solicitors, *Lovell, Son, & Pitfield; Rooke & Sons; A. G. Maskell; Bartlett & Co.*

Chan. Div. } May 14, 15, 22;
Vaughan Williams, J. } July 18, 1896.

In re ALKALINE REDUCTION SYNDICATE (LIMITED). (*a.*)

Company—Winding up—Contributory—Paid-up shares—Bonus shares—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

By a preliminary agreement made before the incorporation of a company, it was agreed that seventy-five shares fully paid up should be allotted to the vendors as the purchase price of the property to be sold to the company, leaving twenty-five shares in the company to be subscribed for in cash. This agreement was adopted by the company after incorporation, with the modifications that £5,000 in cash, omitted by mistake from the preliminary agreement, should be paid to the vendors in addition to the seventy-five shares, and that the vendors should distribute twenty-five out of the seventy-five shares rateably among the cash subscribers of the first-mentioned twenty-five cash shares. The company accordingly allotted twenty-five of the seventy-five vendors' shares to the cash subscribers, the certificates of title stating that

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

(*a*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

the shares were fully paid up. There was no question of section 25 of the Companies Act, 1867, not being complied with.

In the winding up of the company the liquidator applied to have the allottees of the twenty-five distributed shares placed on the list of contributories. There was no question of any fraud or impropriety having been committed.

Held, that the holders of the twenty-five distributed shares were liable to contribute the full nominal amount of such shares in cash.

This was a summons by the liquidator in the winding up of the above-named company, asking that certain persons (some of whom had been directors of the company at the time of the transactions hereafter mentioned) might be placed on the list of contributories in respect of twenty-five bonus shares allotted to them by the company, and be declared liable to contribute to the assets of the company the full nominal amount of those shares.

By an agreement duly filed with the registrar of joint-stock companies, made before the incorporation of the company, it was agreed that seventy-five out of the hundred shares of the company should be allotted as fully paid up to the vendors as the consideration of certain patents and property agreed to be sold to the company.

The company was incorporated in November, 1888. Some twenty-two or twenty-three friends of the vendors undertook to subscribe for the cash shares. Shortly before the first meeting of the board it was suggested that the price payable to the vendors was too large, and that the voting power of the vendors would give them undue influence in the company, and that they as providing the property, and the subscribers as providing the cash, ought to come into the company on an equality as regards shares. To carry this out the vendors agreed to give up twenty-five of the seventy-five shares, to be distributed *pro rata* among the cash subscribers, and resolutions to that effect were duly passed. The vendors also represented to the board that £5,000 in cash was intended to have formed part of the purchase consideration, in addition to the seventy-five shares, but by a slip was omitted from the preliminary contract.

An agreement was made on the 28th of December, 1888, between the company, the vendors, and the trustee under the preliminary agreement, by which, after reciting the preliminary agreement, and the slip as to the £5,000, and that it was "desirable to ratify such slip or mistake," the preliminary agreement (subject to the modifications in clause 2) was adopted by the company as if it had been in existence at the date of the preliminary contract, and had been a party thereto instead of the trustee. By clause 2 of the modified agreement the vendors were to have the £5,000 cash in addition to seventy-five fully-paid shares, and there was a clause to the following effect:—"Of the said seventy-five shares the vendors shall distribute twenty-five among the several persons who have taken up shares payable in cash—viz., those numbered fifty-one to seventy-five inclusive—in proportion to the number of such shares held by them respectively, but this shall not have effect unless and until such distribution has been approved by an extraordinary general meeting of the company." The extraordinary general meeting was held shortly afterwards, and a resolution passed sanctioning the agreement of the 28th of December, and approving "the distribution among members (including directors) of the twenty-five bonus shares in accordance with the modified agreement." The agreement was duly filed with the registrar of joint-stock companies, and the twenty-five bonus shares issued to the cash subscribers, including the respondents, in proportion to the shares for which they had subscribed in cash. The certificates of the bonus shares described them as fully paid.

A great deal of evidence was given, both *vivâ voce* and by affidavit, but the only question calling for a report was whether the twenty-five distributed or bonus shares were part of the original consideration paid to the vendors, or whether they were shares issued by the company without consideration.

Grosvenor Woods, Q.C., C. E. E. Jenkins, and *Munns*, for the liquidator, said they made no charge suggesting fraud or irregularity against any of the respondents, who had merely been unfortunate in their money transactions.

They cited *Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38; *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] App. Cas. 125; *Blund's case*, [1893] 2 Ch. 612; *Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9; *Chapman's case*, 43 W. R. 553, [1895] 1 Ch. 771.

Farwell, Q.C., Howard Wright, and *R. J. Parker*, for some of the respondents.—The vendors agreed to sell for seventy-five fully paid up shares, and those shares belong to them, and there is nothing to prevent them from dealing with those shares as they pleased. They are entitled to the seventy-five shares, and the liquidator has nothing to do with how they deal with their own property. The twenty-five shares formed part of the payment of the purchase price, and though they were allotted immediately to the respondents, yet the legal result is the same as if they had been allotted to the vendors in the first instance, and then transferred by them to the respondents: *Carling's case*, 24 W. R. 165, 1 Ch. D., at p. 124; *Postage Stamp Automatic Delivery Co.*, 41 W. R. 29, [1892] 3 Ch. 566. The liquidator is estopped by the statement in the certificates from saying that the shares are not fully paid up.

Byrne, Q.C., and *Methold Jelf, Q.C.*, and *Hart Eve, Q.C.*, and *Martelli*, and *Ingle Joyce*, for other respondents.

Grosvenor Woods replied.

VAUGHAN WILLIAMS, J.—The question is whether the respondents are liable to have their names settled on the list of contributories in respect of certain shares allotted to them by the company as fully paid up, and alleged to have been part of the share price payable by the company to the vendors. The shares in question were allotted direct by the company to the respondents, but it is argued on the authority of *Carling's case*, and I think rightly, that if the vendors were entitled to these shares, and pursuant to an agreement between them and the respondents the company at the vendors' request allotted the shares to the respondents, their position would be precisely the same as if the form had been gone through of allotting the shares to the vendors and then transferring them to the respondents.

In the present case the agreement for the distribution of these bonus shares was an agreement between the company and the vendors, and not, as in *Carling's case*, between the vendors and outsiders. The agreement was duly registered, and it follows that no question arises under section 25 of the Companies Act, 1867. The real question is whether the shares were in substance and in fact a part of the consideration which the vendors were entitled to receive from the company, and whether there was really an assignment by the vendors to the respondents, or whether the gift of shares to the respondents was

not a gift by the company. It is clear that from whomsoever the respondents received the shares, they gave no consideration for them—it is not pretended that they did. The consideration relied on is the consideration passing from the vendors to the company under the registered agreement. I find that the vendors never were entitled to receive these shares as part of the price of what they sold to the company. Even if they were entitled to receive them, they in substance and in fact gave nothing for them. It is true that under the so-called preliminary contract of the 29th of October, 1888, the price payable to the vendors was seventy-five shares out of a total capital of one hundred shares, leaving twenty-five shares for cash subscription; but it always seems to me that to call such a document an agreement is to use a misleading term. It is not really an agreement. The company, for the benefit of which it is supposed to be created, has at the time when the document is executed no existence at all, and the effect is that what is for convenience called an agreement is in truth only an offer. As no invitation to subscribe for shares was given to the public generally, this was in one sense a private company, but not entirely, because it was always contemplated that in some shape or other the public should be appealed to later on. Some twenty-two or twenty-three friends of the vendors undertook to subscribe for the cash shares. Shortly before the first meeting of the board it was suggested that the price payable to the vendors was too large.

It was also suggested that the voting power of the vendors would give them undue influence in the company, and that they as providing the patents, and the subscribers as providing the cash, ought to come into the company on an equality *qua* shares. To carry out this the vendors expressed their willingness to give up twenty-five out of the seventy-five shares. The effect of the resolutions was that the vendors gave up twenty-five shares, and that the twenty-five shares were to be distributed *pro rata* among the cash subscribers. Subject to these variations it was resolved that the preliminary contract should be adopted. [After referring to some other facts, his lordship continued:—] In my judgment the true share of consideration payable to the vendors was fifty, and not seventy-five, shares. Clause 4 of the agreement of the 28th of December makes it clear that the vendors had no right to call for the twenty-five shares except for distribution among the cash subscribers, and that the distribution was something insisted upon by the company. Even if I am bound to hold, as I am inclined to think, that as a mere matter of verbal construction the vendors on the wording of this contract would be entitled to the twenty-five bonus shares in case the cash subscribers refused to accept them, I still think that the cash subscribers have received shares which have not been paid for by any consideration being given. It is quite true that a contract has been registered under which, apparently, the vendors gave a real consideration for these shares—that is, the property which they transferred to the company; but it is impossible to arrive at the conclusion that the vendors were willing to part with their property for fifty shares, and that in respect of the twenty-five shares no consideration was given by the vendors beyond the property which they were content to sell—at all events, if the cash subscribers should accept the twenty-five shares for fifty shares. The moment you arrive at the conclusion that the vendors were willing to take the fifty shares it follows that for the other twenty-five shares there was no consideration, and there is nothing in section 25 of the Act of 1867 which is intended to legalize the issue of gratis shares by a company. The bonus shares were distributed among the shareholders, who one and all knew that the certificates they received in respect of such shares were certificates of bonus shares, for which they had paid nothing, and each of these shareholders seems to have given voting proxies in respect of these shares. The bonus shares were really a gift by the company to the cash subscribers. It is said that the company and its liquidator are estopped from saying that these shares are not paid up, but I do not think the respondents can rely on this estoppel. No doubt the company did by the certificates which they issued describe these shares as fully paid, and no doubt the shares were described as being distributed by the vendors; but I think the circumstances were such as to put the recipients of each one of these bonus shares upon inquiry, and I think, moreover, that the gift of these shares by the company, which is what I hold this transaction to have been in fact, was *ultra vires*, and that the company cannot be estopped by putting forward an untrue description of the transaction, and at all events cannot be estopped with regard to shares given to persons who were members of the company at the time when the distribution of bonus shares was approved of. I make an order as asked by the summons.

Solicitors, *Munns & Longden; F. C. Mathews, Browne, & Co.; Freshfields & Williams; Lindo & Co.; Budd, Johnson, & Jecks; Ingle, Cooper, & Holmes; G. E. Philbrick* for *Battishill & Houlditch*, Exeter.

Q. B. Div.
(Lord Russell of Killowen, C.J.) June 20.

WILMOT v. ALTON AND ANOTHER. (*a*.)

Bankruptcy—Assignment of future payments—Bankruptcy of assignor—Title of trustee in bankruptcy to payments accruing after bankruptcy — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44.

An assignment for value by a trader of future weekly payments accruing to the trader under a contract for the hiring of property belonging to the trader is, as regards those payments accruing due after the bankruptcy of the trader, inoperative as against the trustee in the bankruptcy, and such assignment does not pass to the assignee the right to future payments accruing after the date of the bankruptcy.

Such future weekly payments accruing under such a contract are not "debts."

Further consideration in an action tried by Lord Russell, C.J., without a jury.

His lordship took time to consider his judgment, and the facts as stated in the judgment were shortly these.

The question arose under an interpleader issue to determine who was entitled to a sum of £318 18s. brought into court by the Blackpool Winter Gardens and Pavilion Co., Limited.

The claimant (Wilmot) claimed under a charge, dated the 4th of July, 1895, given to him by one Mrs. Ruthven (trading as a costumier under the name of May) and the defendants, who were denying the claimant's right, were the trustees in the bankruptcy of Mrs. May.

On the 10th of June, 1895, the bankrupt (Mrs. May), entered into a contract with the Blackpool Winter Gardens and Pavilion Co., Limited, the terms of which appear in a letter of the 10th of June, 1895, addressed by the manager of the Blackpool Co. to

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Mrs. May or Ruthven: "I beg to acknowledge receipt of your contract to supply designs for the forthcoming ballet—namely, 'Eldorado,' 'The Land of Gold,' and 'Sons of the Sea,' according to sketch. The terms to be £40 per week for twelve weeks commencing the 8th of July, 1895, and wigs as may be required for the sum of £3 per week for the same period, you (that is Mrs. May) to find all materials and to keep in repair during the run."

Mrs. May having entered into this contract, gave a charge upon it to one Umpleby for the sum of £150, which charge is not now material; and being indebted to the present claimant in the sum of £330, she gave as collateral security to him a charge dated the 4th of July, 1895, in relation to which the question in this case arises.

That charge is under seal, and it purports to be made between the bankrupt of the one part and the claimant (Wilmot) of the other part. It recites the agreement with the Blackpool Co. of the 10th of June, 1895, and properly describes it as a contract by her to supply the company with certain theatrical dresses, and it recites the charge to Umpleby and the indebtedness by the bankrupt to the claimant, and then it provides: "And it is witnessed that the mortgagor" (who is the bankrupt) "for the consideration aforesaid, doth hereby charge to and in favour of the mortgagee all that her beneficial right, title, and interest in the said recited agreement dated the 10th of June, 1895, for securing to the mortgagee the said sum of £330 and interest at the rate of 5 per cent. per annum from the date hereof when and as the said acceptances" (bills given by Mrs. May) "fall due, and in default of the mortgagor meeting the same at maturity, subject nevertheless to the said recited charge of £150; and the mortgagor doth hereby constitute, nominate, and appoint the mortgagee as her lawful attorney, and for her and in her name to use and take such legal or other steps as may be necessary to enforce the rights of her, the mortgagor, under the said recited agreement as if she personally were doing the same, she hereby covenanting and agreeing to ratify and confirm such act or acts and to do such other deed, act, matter, or thing as may be necessary to more fully carry this charge into effect."

This charge having been given to the claimant on the 4th of July, 1895, Mrs. May, the mortgagor, on the 13th of July, 1895, presented a petition; and upon her own petition a receiving order was made, and on the 26th of July she was adjudicated bankrupt.

Subsequent to the 13th of July, when the act of bankruptcy was committed, there became due from the Blackpool Co. in respect of the supply of dresses under the contract of the 10th the sum of £318 18s.

On the 6th of August, 1895, notice was for the first time given by the claimant of the fact that the deed of charge of the 4th of July, 1895, had been executed in his favour. Later (in October, 1895)—the dresses having been before the date of the charge supplied to the Blackpool Co. in pursuance of the contract, and having been used by the Blackpool Co. under the contract—moneys admittedly became due by that company in respect of the contract of bailment for hire. The facts under which the payments were made by the company were not mentioned, nor are they material.

The Blackpool Co. admitted that they owed somebody (either the trustees in the bankruptcy, as representing the estate of the bankrupt, or the person who has this charge) the sum of £318 18s. in respect of the hire payable under the contract subsequent to the date to which the title of the trustees in the bankruptcy related—namely, subsequent to the 13th of July, 1895.

This sum was paid into court, and the question now was which of the two parties, the trustees in the bankruptcy or the claimant under the charge, was entitled to such sum.

Cooper Willis, Q.C., and *Hawtin*, for the plaintiff.

Bigham, Q.C., *H. Reed, Q.C.*, and *Scarlett*, for the defendants.

Cur. adv. vult.

June 20.—Lord RUSSELL, C.J. (after stating the above facts, his lordship proceeded:—) We have to consider what is the proper description to be given to the weekly payments under the contract of the 10th of June, and whether in respect of such payments, although payable at a future time, they can be said to be debts or to assume the form of debts, or whether they are weekly payments to be made from time to time, if the contract week by week is carried out. The charge now in question does not purport to assign the subject matter of the contract of bailment to the Blackpool Co., nor does it purport to assign the contract itself. It is merely a charge of the bankrupt's rights under that contract. Under these circumstances the question that now arises is which of these two claims is to prevail. It is clear that when this charge was made on the 4th of July the bankrupt, being then *sui juris*, could have parted with the whole of the property in the things bailed; this she has not done. She could have assigned the contract probably, but that she has not done. What she has done is to give a charge on the property to receive such sums as she herself would be entitled to receive under the hiring contract. Again, if the moneys to be paid to her under the hiring agreement were debts, it is clear that she had the property in such debts, and could assign them; but that is not the case made for the claimant, and rightly so, as I think it would be impossible to say that these are debts "due or growing due" within the meaning of the Act. The governing word in that section seems to me to be "debt"—not a claim which may become a debt, but one which is in fact a *debitum in presenti*, although it may be *solvendum in futuro*.

It is clear that the plaintiff could not recover the £40 a week unless Mrs. May performed her contract, and if she had failed to perform the contract in any particular (as in not keeping the dresses in repair) she would not have been entitled to the £40 a week as a fixed sum, but her claim in such a case would have been for damages for breach of contract, which might or might not have been represented by £40 per week. I therefore come to the conclusion that these are not "debts," and I come to that conclusion upon principle, and upon the authorities, which I think are clear on the subject—namely, *Jones* v. *Thompson*, 6 W. R. 443, E. B. & E. 63; *Ex parte Kemp*, 22 W. R. 462, L. R. 9 Ch. App. 383; *Hall* v. *Pritchett*, 26 W. R. 95, 3 Q. B. D. 215; *Webb* v. *Stenton*, 11 Q. B. D. 518, 31 W. R. Dig. 8. The claimant did not base his claim on that ground, because if these were debts he ought to have given notice of the charge, which he did not do until the 6th of August. It was said for the claimant that the 44th section of the Bankruptcy Act, 1883, particularly sub-head 3 of sub-section 2, helps the claimant; but I think that that does not in any way help the claimant. Can the claimant's title be supported on any other ground? After considerable hesitation I have come to the conclusion that the claimant does not make out a title, for this reason—that the bankrupt could have disposed of the property in this contract, or possibly have assigned the contract itself. She has not done either. What she has

done is to give the claimant the right to use her name to enforce payments which she would be entitled to receive under the contract; but her right to receive these sums only continued so long as she was *sui juris*, because the moment she became bankrupt the title of the trustee intervened, and it is a contract which is no longer hers, the property comprised in it is no longer hers, and she can have no authority to charge it in favour of anyone as against the trustees, or to charge to anybody else moneys which are not payable to her, and to which in the event which has happened she has no right whatever. The moneys in question represent the earnings arising from the hire of property which by relation back became the property of the trustees from the 13th of July, and those moneys are for the hire of the dresses at a period subsequent to the accrual of the title of the trustees.

She therefore had only authority to charge such payments as she has in fact the right to receive, a charge which would have been effective if she had continued *sui juris;* but the moment the bankruptcy occurred her right to interfere with the disposition or control of moneys payable under the contract altogether ceased, and at the time she effected this charge she had no property in these payments at all. All that she had was the expectation of receiving these sums for hiring the dresses, provided the contract were carried out on both sides; but the moment the bankruptcy intervened, at and from that moment, as her title to the subject matter of the contract ended, so the title to the moneys which arose from that property ceased to be hers, or under her control, or affected by any such charge as was here given. I have had some hesitation about this matter from the fact that, to my surprise, there is very scant authority on the question; but I feel no difficulty in the matter as a question of principle, as in principle I think it is governed by *Ex parte Nichols, In re Jones*, 31 W. R. 661, 22 Ch. D. 782. I do not lose sight of the differences between the circumstances of that case and of this; but I think the principle of that case governs the principle of this case. Here it is true that when the bankruptcy occurred—there being then a valid contract for payment between the bankrupt and the Blackpool Co.—there was no right in the trustees in bankruptcy to intervene and put an end to the contract; but assuming the contract had been one which, in order to ensure payment under it for the benefit of the estate, required some amount of work to be done or money expended, the trustees would have had the right the moment their title accrued to interfere and say that for the benefit of the estate they would take upon themselves the burden of carrying out the onerous part of this contract. Here there does not appear to be any onerous obligation of any moment to be discharged, and there is nothing in the case which (if, as I have pointed out, the trustees have in fact the right to the benefit of this contract) has disentitled them to come forward and assert that right.

It is therefore not a case, in my view, in which the trustees have done anything to prevent them from asserting that right. The circumstances of this case are somewhat different from those in *Ex parte Nicholls*, but in principle I think there is no substantial difference, and in fact no difference. I think the reason in *Ex parte Nichols* applies to this case, and I must give judgment for the defendant on the short ground that the bankrupt by the deed of charge charges future payments to arise under the contract in favour of the claimant, but that her right so to charge future payments ceases the moment the title of the trustees to the thing, the subject matter of the contract, arises. From that moment the property vests in the trustees, and equally there vests in the trustees the right to receive the money which from time to time accrues in respect of the property which has so passed and which forms a part of the estate. As I have said, I have hesitated in the conclusion I have come to, and I should be glad if there should be an appeal in this case.

Judgment for defendant.

Solicitor for the plaintiff, *Henry Reid.*

Solicitors for the defendants, *John C. Button & Co.*

Q. B. Div. (Pollock, B., and Bruce, J.) — May 14, 22, 1896.

CLIFFORD AND ANOTHER v. COMMISSIONERS OF INLAND REVENUE. (a.)

Revenue—Stamp duty—Agreement—Weekly payments—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *Schedule.*

An agreement entered into by the owner and manager of an hotel provided that the manager should have the entire control of the business of the hotel, and should make certain weekly payments to the owner. The agreement was not for a specified time, but contained provisions for its determination by either party. It was stipulated that the agreement should not operate as a demise of the hotel to the manager, and should not constitute a partnership between the parties.

Held, that the agreement was security for an indefinite period for a sum of money payable at stated periods—viz., weekly—within the schedule to the Stamp Act, 1891, *and that the sum chargeable with duty was the amount of the weekly payment, and not the total sum received yearly under the agreement.*

Special case stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

The instrument presented for the opinion of the commissioners was dated the 29th of April, 1895, and was an agreement under seal relating to an hotel in London. The parties to the agreement were Louisa Clifford, one of the appellants, therein called the owner, of the first part, Frank Hawkins, the other appellant, therein called the manager, of the second part, and two sureties for Hawkins of the third part. The material provisions of the agreement were as follows:—

Clauses 1 and 2 provided that the manager should, with the permission of the owner, carry on the business of an hotel proprietor at the hotel from the 29th of April, 1895, until the agreement should be determined under a provision thereinafter contained, and should have the use of certain furniture and effects therein, and provide certain other goods and furniture at his own expense.

Clause 4 provided that, subject to a power of inspection and a provision for the use of two rooms by the owner contained in clause 5, the manager should have the entire management, conduct, and control of the hotel and business without any interference by the owner, and should have the sole power of engaging and discharging all servants and other persons employed in the business.

Clause 5 provided that the owner and her nominee should have the exclusive use free of charge of a bedroom and sitting-room, and that when the owner should not require the rooms the manager should pay her £5 a week in addition to the weekly payment provided by the next clause.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

By clause 6 the manager was to be entitled to receive the whole of the receipts and profits of the business, and was to pay all necessary outgoings; he was to pay the owner £108 18s. per week and also, in the name of the owner, to pay the ground-rent and rent, insurance premiums, excise and other licenses, and all rates and taxes.

Under clause 25 the owner had power to re-enter on non-payment of any weekly payment within seven days, or on breach of covenants by the manager.

Clause 29 contained power for the owner if she should desire to sell the hotel to determine the agreement upon giving the manager one calendar month's notice.

Clause 30 contained power for the owner at any time, and for the manager after the expiration of three years to determine the agreement by three calendar months' written notice.

Clause 33 provided that the agreement should determine on the death of the manager.

Clause 35 provided that the agreement should not operate as a demise of the hotel and premises to the manager.

Clause 37 provided that nothing in the agreement contained should constitute a partnership between the owner and manager.

By clause 42 the sureties covenanted with the owner that the manager would perform the covenants in this agreement, and that they would indemnify the owner to the extent of £500.

The commissioners, having regard to clauses 35 and 37, considered that they were precluded from regarding the instrument as chargeable with the stamp duty, either as a lease or as a deed of partnership; they were of opinion that it was the only or principal or primary security for the sums of £5,662 16s. and £260 payable annually respectively for an indefinite period, by weekly payments of £108 18s. and £5 respectively; that such sums were neither interest for any principal sums secured by a duly stamped instrument nor rent reserved by a lease or tack; and that the instrument was chargeable with stamp duty under the heading, "Bond, covenant, or instrument of any kind whatsoever" in the first schedule to the Stamp Act, 1891, with the duties of £141 12s. 6d. and £6 10s. respectively, being the *ad valorem* duty of 2s. 6d. for every £5 and and fractional part of £5 of the respective annual sums of £5,662 16s. and £260, the sums periodically payable by the manager to the owner; and also under the head, "Deed of any kind whatsoever not described in the schedule" in the said first schedule with the duty of 10s.

The questions for the opinion of the court were whether the instrument was chargeable with the duties of £141 12s. 6d., £6 10s., and 10s., in accordance with the assessment of the commissioners, and if not, with what duty the instrument was chargeable.

By the schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the principal security for any annuity or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same *ad valorem* duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period, with a duty of 2s. 6d. for every £5, and also for any fractional part of £5 of the annuity or sum periodically payable.

A. T. Lawrence, for the appellants.—The stamp duty should be assessed upon the sum payable weekly; that is the "periodical payment" in this case. The agreement is not for the payment of an annuity, and there is no reason why the commissioners, in order to to ascertain the sum chargeable should have taken the weekly payment and multiplied it by fifty-two rather than by any other figure.

Sir R. B. Finlay, S.G. (with him *Danckwerts*), for the Commissioners.—The cases of *Jones* v. *Commissioners of Inland Revenue* and *Sweetmeat Automatic Delivery Co.* v. *Commissioners of Inland Revenue* 43 W. R. 318, [1895] 1 Q. B. 484, show that the decision of the commissioners is right. The appellant's contention involves the possibility of parties depriving the revenue of duty by fixing periodical payments at the shortest possible intervals.

Lawrence replied.

Cur. adv. vult.

POLLOCK, B.—This case comes before us upon a case stated upon appeal from a decision of the Commissioners of Inland Revenue. They held that the appellant was liable to pay stamp duty upon an instrument which comes within the words "bond, covenant, or instrument of any kind whatsoever" in Schedule 1 of the Stamp Act, 1891. Under the first sub-section of that title a duty is imposed upon instruments which are the only or principal or primary security for an annuity, or for any sum or sums at stated periods, not being interest or rent; the sub-section goes on to deal with two classes of cases—the first where the amount is payable for a definite and certain period, so that the total amount to be paid can be ascertained, in which case the duty payable is the same *ad valorem* duty as would be payable on a bond or covenant for the total amount; the second, where the payments are for the term of life or any other indefinite period, in which case the duty is 2s. 6d. for every £5, and for any fractional part of £5 of the annuity or sum periodically payable.

The instrument in the present case is an instrument of the 29th of April, 1895, being an agreement under seal making provision for the carrying on of an hotel, and it is made between Louisa Clifford, who is one of the appellants, of the first part, and Frank John Hawkins, who is another of the appellants, of the second part. The gist of the thing in this, that at the premises in question the manager, Hawkins, is, with the permission of the owner, to carry on the business of hotel proprietor. Then, subject to a power of inspection and a provision for the use of two rooms which are reserved for the owner, the manager is to have the sole control and management of the hotel, and then there is a provision with regard to the division of profits and so forth. Then there are two clauses, expressly providing that the agreement shall not operate as a demise to the manager of the hotel, and that nothing therein contained shall be considered or taken to constitute a partnership between the owner and the manager; therefore the commissioners were unable, and so state, to assess this as an agreement for either a demise or as a partnership, and having so stated, the commissioners state that they were of opinion that the instrument was the only or principal or primary security for the sum of £5,662 16s. and £260 payable annually respectively for an indefinite period by weekly payments of £108 18s. and £5 respectively, and that those sums were chargeable, or that the deed, rather, was chargeable, under the head, "bond, covenant, or instrument of any kind whatsoever," in the first schedule to the Stamp Act, 1891, with the duties of £141 12s. 6d. and £6 10s. respectively, being the *ad valorem* duty of 2s. 6d. for every £5 and fractional part of £5 of the respective annual sums of

£5,662 16s. and £260, the sums periodically payable by the manager to the owner, and also under the head "deed of any kind whatsoever not described in the schedule," with the duty of 10s. They assessed the duty thereon accordingly, and the instrument has been stamped in conformity with the assessment. The appellants, being dissatisfied, appealed. The ground of the decision of the commissioners is that this is an instrument which creates payment for an indefinite period. That is true, because although there are provisions in the deed with regard to the death of either of the parties, and with regard to a notice being given after a certain time for its determination, until that is done the manager, by clause 6, is to pay to the owner the sum of £108 18s. per week, such weekly payments to be made on the Monday in every week.

Now the mode in which the commissioners have dealt with this payment is as follows: They say the deed is one contemplating payment for an indefinite period, and that therefore they are entitled to treat it as if it were a yearly annuity or a yearly payment to be made by a bond or deed for an indefinite period, the actual payments being merely weekly. One of the reasons why they adopt that view is this, they say it is quite clear that this 2s. 6d. is based upon the supposition that it is a yearly payment, and if you read that in with the charging words you see that the object of the statute is to give a certain fixed *ad valorem* duty, which was fixed upon the supposition that it is an agreement for a yearly period. But that to my mind is rather a curious mode of dealing with an Act of Parliament of this nature. Referring to Maxwell on Statutes, it is stated on p. 259 of the first edition: "Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt." The author cites several decisions or dicta of different learned judges, and there is no doubt as to the correctness of the law so stated. Of course the author does not mean to say that where the plain language of the statute confers a tax any court is to construe it according to any other principle than they would construe another statute. Again, the statute must be so construed as to carry out the plain object of the Act. But if the statute is so indefinite and so uncertain that it can be treated in two ways, and that the true construction of it is open to two views, one more favourable to the Crown, and the other more favourable to the subject, then the latter construction should be adopted.

Now, I must say it does seem to me that a very far-fetched view has been taken by the commissioners in the construction of this statute in applying it to this particular deed. There is not a single word in the deed itself which contemplates any annual payments. The sum to be paid is that which is first named in clause 6, and that is this sum of £108 18s. weekly, and there is no provision that points to any other than a weekly payment. If you look at this schedule you find it is dealing in the first instance with an annuity, which means by the very word an annual payment, and then it deals also with any other instrument which is a security of the same kind which requires an annual payment. Then, secondly, it deals with an instrument which provides for a payment for a definite and certain period generally; and then, thirdly, "the term of life or any other indefinite period," still clearly meaning that an annual payment is involved by the instrument; and that I think is quite clear when you find these words: "For every £5 and also for any fractional part of £5 of the annuity or sum periodically payable." When is this periodically payable? Clearly by the week and not by the year. Therefore, apart from authority, it seems to me clear that this is not an instrument within this section which can be treated as an annual instrument to which this 2s. 6d. on the £5 can be applicable except upon one single payment, and then it is applicable as coming within the words "for every £5 and also for any fractional part of £5 of the annuity or sum periodically payable."

Some authorities were cited to the contrary, but the only ones I think that have any real bearing upon the case are two cases which were argued and reported together, one is *Jones* v. *The Commissioners of the Inland Revenue*, and the other is the *Sweatmeat Automatic Co.* v. *The Commissioners of the Inland Revenue*. The agreement in the first of these cases was an agreement between a theatrical ticket agent and a telephone company to supply telephonic communication between the agent's head office and other places, and the company undertook to erect and maintain in working order the telephonic lines and all other necessary apparatus, and the ticket agent covenanted to pay by quarterly instalments in advance to the company an annual sum per line. That clearly indicated that the sum payable was an annual sum although it was provided that it should be paid by quarterly instalments. In the other case the agreement was between a railway company and the Automatic Co., whereby the railway company agreed to permit the Automatic Co. to place on their platforms their machines, and the Auto-Machine Co. agreed to pay to the railway company a yearly rent by equal quarterly payments on the usual quarter days. In both those cases it was held that the agreement was a security for a sum of money for an indefinite period, and that the stated periods were annual periods. In both those cases it seems to me that the decisions were perfectly right, because the words are used in the first case that "an annual sum is to be paid," and in the second the words "yearly rent" occur.

In the present case, however, we find nothing in contemplation but a weekly payment, and it is always to be observed that by this Act and by the words "for every £5 and also for any fractional part of £5 of the annuity or sum periodically payable" the commissioners get a benefit which they otherwise might not get, that is to say there are a great many agreements of this kind which are for a shorter period than a year, which would not come within the the old provision for annuity deeds on which the commissioners now get the 2s. 6d. upon every £5 for whatever the sum may be, and the tax is paid where otherwise it would not be. It seems to me, therefore, that the amount which is payable every week is the sum that is properly chargeable and no other sum. Therefore the present assessment cannot stand, but it must be an assessment upon that weekly payment.

BRUCE, J.—I agree. The instrument in question in this case is a security for sums of money at stated periods, not being interest or rent. The sums of money payable under clause 6 of the instrument are not payable for a definite and certain period. There is no term fixed for the duration of the agreement and there are many contingencies on the happening of any one of which the agreement may be put an end to. The agreement is for an indefinite period, and in that case the duty is made payable upon the sums periodically payable. The sum periodically payable is £108 18s. and it is upon that sum that the duty should be charged. I see no reasonable ground

for the contention that the aggregate of the periodical payments for a whole year is to be taken as the amount upon which the duty is to be assessed. There is nothing in the words of the instrument to indicate a yearly payment. The provision of the schedule to the Act seems to me to be framed specially with the view to include cases where the periods of payment are less than a year. It was intended that where the sum is secured as payable for any indefinite period though for less than a year, the duty should still be payable in respect of the sum periodically payable. "The sum periodically payable" must mean the sum payable at the periods stated in the instruments, and in the present case the periods are weekly periods, and the duty must be assessed upon the amount of the weekly payment.

Solicitors for the appellants, *Burton, Yeates, & Hart.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — Aug. 5, 1896.

HOOD BARRS *v.* HERIOT. (*a*)

Practice—Security for costs of appeal—Appeal against order for attachment—Ord. 58, r. 15.

Where an appeal is brought against an order for a writ of attachment, the court will not, in its discretion, as a general rule, order security for the costs of the appeal to be given.

Application by the plaintiff that the defendant should be ordered to give security for the costs of an appeal.

A judge at chambers having made an order directing a writ of attachment to issue against the defendant, the defendant appealed. The plaintiff, thereupon applied, as above, on the ground that the defendant was a married woman who had no separate property except property which she was restrained from anticipating.

Oswald, Q.C. (*Bartley Denniss* with him), for the plaintiff.—*Whittaker* v. *Kershaw*, 38 W. R. 497, 44 Ch. D. 296, shows that security for costs will be ordered where the appeal is by a married woman who has no separate property except such as she is restrained from anticipating. The fact that the liberty of the subject is involved does not make any difference. He also referred to *In re Strong*, 34 W. R. 420; 31 Ch. D. 273.

Montague Shearman, for the defendant, was not called upon.

Lord ESHER, M.R.—By ord. 58, r. 15, the Court of Appeal can under special circumstances order security for the costs of an appeal. If there are no special circumstances the court cannot make any order. It has been held that poverty or inability to pay costs is a special circumstance; but even if special circumstances exist, the court must consider whether it will, in its discretion, exercise the power given to it. For instance, the court has said that if the application is made too late it will not make the order, though a case of poverty is made out. We have here an order to attach the defendant, from which order the defendant is now appealing. The order affects her liberty. Assuming that special circumstances are made out, no authority has been cited to the effect that the court is obliged to order security to be given. Where the liberty of the appellant is in question, or where the order under appeal will subject the appellant to highly penal consequences, the court will not as a general rule order security for the costs of an appeal to be given. The case of *In re Strong* is a high authority for that proposition. Lindley, L.J., there said that "such an order" (an order to strike a solicitor off the rolls) "is of a highly penal character, and it may well be that the court will allow him to appeal from it without giving security," and Fry, L.J., asked: "Has it not been said by the Court of Appeal that it will be slow to order security for costs where a solicitor appeals from an order striking him off the rolls?" The present case is an appeal from an order to attach the defendant, and we say that, in exercising our discretion, as the liberty of the subject is in question we shall not make an order for security to be given.

A. L. SMITH and RIGBY, L.JJ., concurred.

Application refused.

Solicitors for the plaintiff, *Hood Barrs & Co.*

Solicitors for the defendant, *Rye & Eyre.*

(*a*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. (A. L. Smith and Rigby, L.JJ.) — Aug. 3, 1896.

BENNETTS & CO. *v.* MACILWRAITH & CO. (*a*.)

Practice — Parties — Adding defendants — Alternative relief—R. S. C., 1883, ord. 16, rr. 7, 11.

The plaintiffs, who were shipowners, instructed the defendants, who were shipbrokers, to procure a charter. The defendants effected a charter in the name of B., P., & Co., as charterers. Default was made in loading the chartered cargo. B., P., & Co. having asserted that the defendants had acted without their authority, the plaintiffs commenced an action against the defendants for breach of warranty of authority. It subsequently appeared that the defendants probably had authority to make the charter on behalf of B., P., & Co.

Held, that the plaintiffs were entitled to an order adding B., P., & Co. as defendants to the action.

Appeal from an order of Collins, J., adding certain persons as defendants to the action.

The facts of the case and the argument sufficiently appear from the judgment of A. L. Smith, L.J.

Bigham, Q.C., and *Leck*, for the defendants.

Joseph Walton, Q.C., and *H. F. Boyd*, for the plaintiffs.

Cur. adv. vult.

August 3.—A. L. SMITH, L.J., read the following judgment.—This is an appeal against an order of my brother Collins, adding Burns, Philp, & Co., as defendants in the action. The facts are, shortly, these. The plaintiffs are shipowners, and they obtained, as they allege, a charter for their ship for a homeward voyage from Sydney to London. They say that their ship, pursuant to such charter, proceeded to Sydney to load the chartered cargo, which was not supplied, whereby they suffered damage, for which they bring this action. Now, the plaintiffs were in doubt from whom they were

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

entitled to obtain redress for the non-loading of this cargo, whether from Burns, Philp, & Co., the ostensible charterers, or from MacIlwraith & Co., the brokers who effected the charter, inasmuch as Burns, Philp, & Co., asserted that MacIlwraith & Co. had no authority from them to fix them with the charter. In these circumstances the plaintiffs issued a writ against MacIlwraith & Co. for representing that they had authority to enter into the charter for Burns, Philp, & Co., whereas they had not. The plaintiffs in their statement of claim set out two other alternative causes of action against MacIlwraith & Co., but upon the affidavits it is clear that the above is the only cause of action upon which they in reality rely against MacIlwraith & Co. It turns out upon discovery of documents that it is probable that Burns, Philp, & Co., did give authority to MacIlwraith & Co. to bind them with the charter, and in these circumstances the plaintiffs seek to add Burns, Philp, & Co., as defendants, and Collins, J., made the order under Ord. 16, r. 11. That rule I need not read; it deals among other things with joining and adding of parties. But I will read rule 7 of order 16, which is as follows: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties."

It is said that the learned judge had no jurisdiction to make the order. If he had jurisdiction I cannot doubt that he has rightly exercised his discretion in making the order. The redress, it will be seen, is sought against two persons, but the right to it arises out of one common transaction. Now this very point was expressly decided in the year 1877 in this court by Cockburn, C.J., and Mellish, Baggallay, and Bramwell, L.JJ., in the case of *Honduras Railway Co.* v. *Tucker*, 25 W. R. 310, 2 Ex. D. 301, under ord. 16, r. 6, which was the equivalent of the present ord. 16, r. 7. There can be no doubt as to this. Again in the year 1888, in *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330, this court held that, where, as in the present case, an action was brought against agents in this country for breach of warranty of authority, the foreign principals were proper parties to be joined as co-defendants. It is clear that these two cases are conclusive authorities, if they have not been overruled, to show that my brother Collins in the circumstances of this case had jurisdiction to make the order he did; but it is said that these cases are no longer law, and that the House of Lords in the case of *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, has overruled them. It is said, and with truth, that the House of Lords decided in *Smurthwaite* v. *Hannay* that ord. 16, rr. 1 and 4, do not apply to joinder of separate causes of action, but only to joinder of parties, and if the question in the above-mentioned cases had arisen under rule 1 or rule 4 of order 16, or if this case had arisen under those rules, I must and should have held that the two cases had been overruled, and that this order could not have been made. But it will be seen that the House of Lords never dealt with nor even alluded to rule 7 of order 16, which is a very different rule from rules 1 and 4 of that order, nor was a case similar to the present then before it, and the House consequently never referred to rule 7, nor to the two cases above mentioned. In these circumstances I have come to the conclusion that the two above-mentioned cases have not been overruled and that rule 7 of order 16 stands unimpeached. These cases still stand. I am bound by them, and I think them rightly decided. I think this appeal must be dismissed with costs.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *W. A. Crump & Son.*

Solicitors for the defendants, *Lowless & Co.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 23, 1896.

In re POLLARD'S SETTLEMENT. (*a.*)

Married woman—Restraint on anticipation—Power of court to remove restraint, when exercised—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), s. 39.

Though the words "where it appears to the court to be for her [the married woman's] benefit," in section 39 *of the Conveyancing Act*, 1881 (*which enables the court to bind the interest of a married woman in any property, notwithstanding that she is restrained from anticipation*), *are not to be construed as applying only to pecuniary benefit, yet the court will not exercise its power under that section unless, when all the circumstances of the case are considered, a good case is made out for so doing.*

Decision of Chitty, J., 44 *W. R.* 474, *affirmed.*

Appeal from a decision of Chitty, J., (reported 44 W. R. 474, where the facts will be found stated). After the date of that decision the prosecution against the married woman was withdrawn, and Chitty, J., thereupon refused to make any order to enable her to provide for the costs of the prosecution.

Farwell, Q.C., and *Johnston Edwards*, for the appellant, referred to *Lowther* v. *Bentinck*, 23 W. R. 156, L. R. 19 Eq. 166; *In re Kershaw's Trusts*, 16 W. R. 963, L. R. 6 Eq. 322; and section 39 of the Conveyancing Act, 1881. [LOPES, L.J., referred to *Hodges* v. *Hodges*, 30 W. R. 483, 20 Ch. D. 749.]

Bartley Dennis, for the trustees of the settlement.

LINDLEY, L.J.—I do not think we ought to accede to the application in this case. I do not think the learned judge below ever said that the words "for her benefit" in section 39 of the Conveyancing Act must in all cases be confined to pecuniary benefit; nor do we say that. I do not see why we should tie ourselves. But I cannot help feeling that what Chitty, J., has held is quite right, and that we cannot add anything to the force of what he said. His remarks are as follows: "Recently attempts are being made by married women who have got into debt through extravagance to endeavour to obtain in chambers orders for the removal of the restraint. If judges in chambers yield to applications like the present, the result can easily be forecasted by solicitors. The married woman has only to involve herself in difficulties and make piteous affidavits. Directly such a system as that got into vogue the married woman would be able to force the hands of the court, and in effect destroy the restraint on anticipation."

I think if we were to accede to this application it would be a very bad precedent, and I am quite against doing such a thing.

LOPES, L.J.—I am entirely of the same opinion. I do not say that "benefit" means only pecuniary benefit, but I am perfectly clear that if we were to accede to this application, we should be doing very

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

serious mischief, and that it would lead to those consequences which are anticipated by Chitty, J., I entirely agree with every word said by the learned judge.

RIGBY, L.J.—The legislature has said that such an order as is here asked for may be made where it appears to be for the "benefit" of married woman. We have certainly no power to alter the Act so as instead of "benefit" to read "pecuniary benefit"; but in this particular case I think that on the facts here stated it would be entirely wrong to grant such an application.

Appeal dismissed.

Solicitors, *Hood Barrs & Co.*

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) March 18, 19, 1896.

LYONS & SONS *v.* WILKINS. (*a.*)

Trade union—Strike—Picketing—Conspiring to induce persons not to enter into contracts—"Watching or besetting"—Interlocutory injunction—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 2—*Conspiracy and Protection of Property Act,* 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7.

Watching or besetting the works or place of business of an employer for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information, is illegal within the meaning of section 7 *of the Conspiracy and Protection of Property Act,* 1875, *and will be restrained by interlocutory injunction.*

The plaintiffs were a firm of leather bag and portmanteau manufacturers. The defendants were the secretary and one of the committee of a trade union called the Amalgamated Trade Society of Fancy Leather Workers.

Communications passed between the plaintiffs and the defendants with reference to the terms of the plaintiffs' employment of their workpeople; subsequently, a strike was ordered by the trade union, partly to obtain an increase of the workmen's wages and partly with the object of putting an end to the system of paying some persons according to piece-work and some according to time.

The trade union had picketed the plaintiffs' works in the usual way. They had also called out on strike the workmen of one Shoenthal, another manufacturer, with whom they had no quarrel, solely because he did work for the plaintiffs; they had also picketed his shop, and had threatened to pursue the same course against another manufacturer if he did work for the plaintiffs. One of the pickets had told Shoenthal that they were determined to ruin the plaintiffs if they did not give in.

The pickets were provided by the defendants with a card, and they were instructed to accost the workpeople, and to show them and give them copies of the card. It was as follows:

"Dear Sir,—You are hereby requested to abstain from taking work from Messrs. Lyons & Sons, . . . pending a dispute. Members are also requested to use their influence to keep non-society men, stitchers, machinists, &c., from applying for work until the dispute is settled."

The plaintiffs applied by motion for an interlocutory injunction to restrain the defendants from unlawfully and maliciously procuring any persons who had entered into contracts with the plaintiffs to break their contracts, and from unlawfully and maliciously inducing or conspiring to induce persons not to enter into contracts with the plaintiffs; and also to restrain libel, and for damages.

On the hearing of the motion, North, J., made an order restraining the defendants from maliciously inducing or conspiring to induce, persons not to enter into contracts with the plaintiffs.

His lordship was of opinion that as only one case of breach of contract had been put in evidence, no case for an interlocutory injunction had been made out under that head, nor had any libel been proved such as would justify the granting of an injunction.

The defendants appealed.

C. E. E. Jenkins, for the appellants.—I am entitled to persuade a person not to enter into a contract with a third person, as the law now stands, and if I do not act maliciously I am entitled to conspire and combine to do that. I rely upon *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 40 W. R. 337, [1892] A. C. 25, where it was held that the acts of the defendants were not unlawful, and that an action for conspiracy would not lie. The decision in that case shews that, though the net result of the acts complained of may be damage to the plaintiffs, the court will not interfere provided that there has been no malicious intention to injure the plaintiffs. To go out on strike is perfectly legal; it is the only way that workmen have of protecting themselves. And picketing *per se*, without intimidation, is also legal. In *Trollope* v. *London Building Trades Federation*, 72 L. T. N. S. 342, 43 W. R. Dig. 95, the ground for restraining the publication of the black list was because of the intimidation. [A. L. Smith, L.J.—Why, are you not within section 7, sub-section 4, of the Conspiracy and Protection of Property Act, 1875, which makes "watching or besetting" the residence or place of business of another person an illegal act?] There is a saving clause to that section, and, moreover, that raises a question of criminal law. These pickets may have rendered themselves amenable to the criminal law by committing a misdemeanour; but that is not the point at issue here. The Act of 1875 has nothing to do with the case. If the plaintiffs have a remedy under the statute, then they should have proceeded thereunder. I rely on the observations of the Court as to intimidation in *Connor* v. *Kent*, [1891] 2 Q. B. 545, 40 W. R. Dig. 146. The defendants can justify what they have done, both under the Act and independently of it. Their object is to protect themselves. A combination in restraint of trade is not unlawful at common law if it is for the benefit of the traders, *Jenkinson* v. *Nield*, 8 T. L. R. 540. That case was decided on the authority of the *Mogul case*. As regards Shoenthal, it is true that the defendants are putting pressure on him. They are inducing him. But it is not forcibly in any legal sense, and he is not complaining. This sort of case ought not to be decided on a mere interlocutory application. North, J., based his judgment on *Flood* v. *Jackson*, 43 W. R. 453, [1895] 2 Q. B. 21. But if malice is relied on, it is a question of fact for the determination by a jury, as was said by Lord Esher in that case—see also on this point *Bonnard* v. *Perryman*, 39 W. R. 435, [1891] 2 Ch. 269. It is not right that this sort of dispute should be decided on affidavit evidence. This is not the tribunal that should be invoked. This court ought not to be made the tribunal to decide trade disputes when the legislature has pointed out the tribunal to which resort should be had. Picketing is legal, and by implication is legalised by statute,

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

except so far as it is rendered illegal by section 7 of the Act of 1875. If the court is prepared to hold that all picketing is illegal, then my case is gone; if it holds that only picketing under section 7 is illegal, it is not its function on an interlocutory motion to say that this picketing comes within section 7.

Section 3 of the Conspiracy and Protection of Property Act, 1875, enacts: "An agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. . . ." By section 7: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—1. Uses violence to or intimidates such other person, or his wife or children, or injures his property; or 2. Persistently follows such other person about from place to place; or 3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or 4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or 5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road, shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

Levett, Q.C., and *Ward Coldridge*, for the respondents, were not called upon.

LINDLEY, L.J.—The question in this case is undoubtedly an extremely important one. One cannot help seeing what the real fight is, and I think that we have got the facts in such a shape that they are not really in controversy. What appears to me to be doing is this. The plaintiffs, Messrs. Lyons, make leather goods and employ workmen to make them up for them at certain wages. They also have a person of the name of Shoenthal making things up at home and employing other people to do that, and then bringing them to the plaintiffs' place. Shoenthal is what they call an "outworker." He is not an ordinary workman in the employ of the plaintiffs, except in that sense. Now, disputes have arisen between Messrs. Lyons and their workmen, and the work-people have gone to their trade union, and the trade union have taken up the cause of the work-people, and up to a certain point it appears to me that they have done nothing which is wrong. But ultimately they have done some things which appear to me to be wrong. They have in the first place withdrawn the work-people of Shoenthal in order to prevent him from working for Messrs. Lyons, or, in other words, they have been trying to hit Messrs. Lyons through Shoenthal in that way, and they have picketed Messrs. Lyons' place of business by besetting and watching that place of business for a purpose and with an object which is not admissible under the Act of Parliament to which I will refer presently. That is the short outline, and I think that the undisputed facts prove it.

I do not think that it is necessary to go at length into the affidavits or to refer to Messrs. Kenway, Dawson, & Scott's evidence, but I take the report of the trade union themselves, and what I have alluded to is really not in dispute at all. The report which they have issued contains this: "Previous to the receipt of a certain reply Mr. Lyons thought fit to summarily discharge Mr. Thompson" (that is one of his complaining workmen). "By the previous instructions of the committee the shop was struck, the piece-workers finishing up, and the time-workers giving notice, altogether seventeen leaving the firm. The shop has been picketed" (that is Lyons' shop), "and members are requested to do all in their power to bring the matter to a successful conclusion. It has also been found necessary to withdraw the members from Shoenthals', Finsbury-market, as this man is an outworker of Lyons & Sons, three hands leaving him." Then they say, "Of the twenty hands thus drawn out twelve have obtained work elsewhere," and so on. With regard to the picketing, what they have been doing is not in dispute. What they have been doing is that they have been placing a few men about the plaintiffs' works and telling them to show this card and accost work-people. It is headed: "Amalgamated Trade Society of Fancy Leather Workers, Affiliated to London Trades Council, 'White Swan,' Temple-street, E.C. Dear Sir,—You are hereby requested to abstain from taking work from Messrs. J. Lyons & Sons, Redcross-street, E.C., pending a dispute. Members are also requested to use their influence to keep non-society men, stitchers and machinists, &c., from applying for work until the dispute is settled." The consequence of these proceedings is that the trade union are, in effect, preventing Messrs. Lyons from carrying on their business upon such terms as they and their work-people may mutually agree upon. Of course one sees the difficulty in which all these trade unions are. Trade unions, which were considered illegal, have now been legalized, at all events so far as the doctrines as to restraint of trade are concerned, and a strike can be conducted up to a certain point with perfect legality. That is to say, persons can not only decline individually to work for a master except upon terms which the workmen desire to obtain, but they can combine to do that. They can combine to leave him; they can strike unless he will raise the wages up to what they desire; and trade unions which assist them in withdrawing their own labour, and declining to work, and which assist them in supporting themselves during the strike, can legally do so. Then comes this difficulty, and this is a difficulty which is as well known to those who conduct trade unions as it is to the masters and to all persons who have experience in these disputes: "If that is all that we can do we may be defeated by the masters making arrangements with other people who may be willing to work for them, either by taking the work away or working for less wages than we think is right, and unless we can stop that our strike may be ineffective." There comes the struggle. Now Parliament has not yet conferred upon trade unions the power to coerce people, and to prevent people from working for whomsoever they like, upon any terms that they like; and yet in the absence of such a power it is obvious that a strike may not be effective, and may not answer its purpose. Of course it depends on circumstances. Some strikes are perfectly effective by virtue of the mere strike, and other strikes are not effective unless the next step can be taken, and unless other people can be prevented from taking the place of the strikers. That is the pinch of the case in trade

disputes, and until Parliament confers on trade unions the power of saying to other people, "You shall not work upon terms which you shall agree with those who are desirous of employing you," trade unions are exceeding their power when they take steps and endeavour to compel people not to work on such terms as they choose to make. I need hardly say that up to the present moment any such power as that does not exist. By the law of this country as it has been established immemorially, no one has that power; no set of people have that power. If Parliament chooses to confer it on trade unions it will do so as and when it thinks proper, and subject to such limitations as it thinks proper; but it is idle to pretend not to see that there is this struggle. Trade unions up to a certain point have now been recognized as organs for good. They are the only means by which workmen can protect themselves from the tyranny of those who employ them, but the moment that trade unions become tyrants in their turn they are engines for evil, and they have no right to prevent people from working on any terms that they choose.

The Act of Parliament which is important in this case is "The Conspiracy and Protection of Property Act, 1875." Section 3 is very important. In the first place it repeals previous Acts relating to the same subject, and has become a code on this subject. There are other Acts of Parliament relating to trade unions the provisions of which may possibly have to be consulted. But for the present purpose the Act of 1875 is all that we want. The 1st clause of section 3 is an enabling clause: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." Then come sections 4 and 5 containing certain provisoes to that enabling clause which are provisoes relating to gas and water and breaches of contract involving injury to property. Then section 7 is extremely important. I will read the whole of it: "Every person who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority"—does certain things which are enumerated in five sub-sections, the first of which is this: "Uses violence to or intimidates such other person or his wife or children or injures his property." Now, that sub-section has been made the subject of judicial decision in the case to which Mr. Jenkins referred—namely, *Gibson*, v. *Lawson*, 9 W. R. 271, [1891] 2 Q. B. 545, 40 W. R. Dig. 146, and for reasons which are there given the court held that intimidation was a threat of violence for which a person could be bound over to keep the peace. Whether that was rather a narrow view to take of the word, or not, I do not pause to inquire, but that is the construction that has been put upon it. [His lordship then read the other sub-sections of section 7, and proceeded:—] Then comes this clause which is a proviso: "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information shall not be deemed a watching or besetting within the meaning of this section." It is obvious, I think, to anybody who reads this with a view simply of understanding it, and without any prepossession one way or the other, that the legislature, in adding those words did not intend to unsay what it had said above. The obvious intention is to prevent the general words which are found in clause 4 from being stretched to apply to that which might possibly fall within a narrow construction, and yet not be within the mischief of it. It is a proviso on watching or besetting, and I understand it to read thus: "That every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do, or abstain from doing, wrongfully and without legal authority watches or besets the house or other place where such other person" and so on "shall on conviction be liable to a penalty"; but in construing that and giving effect to it, we are not to treat as "watching or besetting" within the meaning of that prohibition any "attending at or near the house in order merely to obtain or communicate information." That is to be allowed, and picketing (if you call it so) for that limited purpose and conducted in that way for that simple object is not made a criminal offence, and therefore must be taken to be a lawful act; therefore one cannot say as an abstract proposition that all picketing is unlawful, because if all that is done is attending at or near a house in order merely to obtain or communicate information, that is lawful. But it is easy to see how, under cover of that, a great deal may be done which is absolutely illegal. It would be wrong to place people about a place of business or a house under pretence of merely obtaining or communicating information, if the object and effect were to compel the person so picketed to do that which he has a perfect right to do, and it is because there is practical danger of using this proviso for an illegal purpose that such disputes as these very often arise.

In this particular case we have heard plainly what has been done. This is not a case in which there have been a large number of persons picketed about Messrs. Lyons' house. As I understand it, there have been few. The affidavits do not say so, but Mr. Jenkins told us, no doubt perfectly accurately, that there are four, two at a time, relays of two each. Now, they are not there merely to obtain or communicate information; that is not their function. They are there to put pressure upon Messrs. Lyons by persuading people not to enter into their employment, and that is watching or besetting within clause 4, and is not attending in order merely to obtain or communicate information. Under these circumstances I think that they have gone too far, and have gone beyond what the Act of Parliament authorizes, and I do not hesitate to say that it is a case in which, from the necessity of the thing, a quick remedy is actually and absolutely required.

That leads me to the second point, which was that we ought to leave these people to the summary jurisdiction of a magistrate. I do not think so. This is obviously a case in which a man's property, his trade, his livelihood, and the goodwill of his business will be absolutely ruined if what is complained of is not peremptorily stopped, and it appears to me that, according to the well-known principles upon which the Court of Chancery has been guided, it is a case in which a person's property and trade are so interfered with that he may come to the court for the protection which an injunction affords him. I think that North, J., was quite right. But the actual terms of the injunction are open to the objection that they are not sufficiently definite, and that when motions to commit are made upon the footing of that injunction there will not be a sufficiently definite enunciation of what can be lawfully done, or what can not be lawfully done. I do not understand the evidence to prove that the defendants are doing anything wrong, except that which one might put one's finger upon and stop by an injunction. The words of the injunction should be varied. I do not think that in varying them we are disagreeing with North, J., at all; on the contrary, we are carrying out his idea, but putting it

into a better shape. One word more. Shoenthal's case is a case in which it appears to me that the defendants have clearly gone too far, and it is idle to say that their object in doing what they did to Shoenthal was not to compel Messrs. Lyons to do that which the trade union wanted. Shoenthal was the outworker. I do not say that they continue to do it now, but what they did was they told people not to work for Shoenthal in order to prevent his working for Messrs. Lyons, and in order to hit Messrs. Lyons through him. That appears to me to be an obvious stretching of the Act which the defendants cannot possibly justify. I think therefore that the appeal must be dismissed, but the terms of the injunction will be altered, and considering that the terms are altered, possibly in Mr. Jenkins' favour, I think that the costs should be costs in the action. Personally I feel under great obligations to Mr. Jenkins for the very able manner in which he has conducted this case. Although I think that the construction which he asks us to put on the Act of Parliament is the wrong one, that does not detract from the ability which he has displayed.

KAY, L.J.—I entirely echo the last words of Lindley, L.J. I also feel very much indebted indeed to Mr. Jenkins for the manner in which he has conducted his case. It is a case which involves a question of the highest possible importance, because the long struggle which has been going on between trade unions and employers and workmen is brought exactly to a point by this case. I will begin by saying that since the Judicature Act, at any rate, there can be no doubt whatever of the jurisdiction of the court to grant an interlocutory injunction like this which has been granted by North, J. It seems to me quite plain (indeed, in the case of *Bonnard* v. *Perryman*, 39 W. R. 435, [1891] 2 Ch. 269, it was admitted) that there is jurisdiction to grant an injunction in cases even of libel. Of course, in a case like the present it is not a question of libel. This is an appeal from an interlocutory injunction, and in all these cases of interlocutory injunctions, where a man's trade is affected, one sees the enormous importance that there may be in interfering at once before the action can be brought on for trial, because during the interval, which may be long or short according to the state of business in the courts, a man's trade might be absolutely destroyed or ruined by a course of proceeding which, when the action comes to be tried, may be determined to be utterly illegal; and yet nothing can compensate the man for the utter loss of his business by what has been done in that interval. Such a case as that may happen, and I am not at all sure that this is not a case of that very kind. I can well understand that immense damage may be done, and damage which really would be almost irreparable to Messrs. Lyons by what may take place, if what is now being done is allowed to continue without interruption or interference until the action comes on to be tried. The case is one of very great importance indeed. If the parties are doing more than they have a right to do in their interference with Messrs. Lyons' business I have no doubt that it is a proper case for the court to stay that kind of proceeding until, at any rate, the trial of the action, the injunction being granted on the usual terms, that the plaintiff gives an undertaking as to damages if the defendants suffer any damage. Now, the defendants in this case are the officers of a trade union, and it seems to me to be very unlikely indeed that any possible damage can result to them from this injunction being granted; whereas on the other hand if it is not granted I think that very grave damage indeed may result to Messrs. Lyons. Therefore I feel that upon the balance of convenience and inconvenience there is a *primâ facie* case of illegality made out, and that it is clearly a case in which an *interim* injunction ought to be granted. To come to the point I quite agree that it is a case in which possibly at the hearing the evidence may show a different state of things, but that seems to me to be in the last degree unlikely, because the facts on which I am going to base my decision are facts which are practically not contradicted at all. What has been done is this: Messrs. Lyons were giving wages which the trade union thought were in some instances too small. Thereupon the Leather Trade Union (the union of this particular trade) give Messrs. Lyons notice that they object to the wages and that they shall call out the workmen and induce a strike if those wages are not altered. Messrs. Lyons, abiding by their particular course of business, refuse to raise the wages, and a strike is resolved upon, and this trade union does all in its power to encourage and carry out and make effective the struggle. Before the Act of 1875 the strike itself would have been illegal. The combination of a number of persons to induce and encourage and bring about a strike would also have been an illegal act. But section 3 of the Act, which Lindley, L.J., has read, rendered legal an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, and provided that it should not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. There you get the fact that strikes are legalized by Act of Parliament, and that one person would not be indictable for a crime by endeavouring to encourage or bring about that which in itself is not illegal—namely, a strike. Therefore a combination of two or more persons to do this would come exactly within the words of the 3rd section of the Act, and would not since this Act of Parliament be an offence against the law. But then it does not go further than that. At present the legislature has simply legalized strikes, and a strike is an agreement between persons who are working for a particular employer not to continue working for him. That is legalized. Also I take it that under the terms of the section which I have read it is not illegal for a trade union to promote that strike. But further than that the law has not gone.

Now what have these people been doing in this particular case? In the first place they have been planting two or three persons at the approaches to the works of Messrs. Lyons with direct instructions to persuade the workmen coming from or going to those works not to work for Messrs. Lyons. That that is so is put beyond question by the card in the form of a letter which has been read by Lindley, L.J., which was put into the hands of these pickets for the purpose of showing to the workmen who were coming from or going to the works of Messrs. Lyons. On the face of it the card contains a direct request to such persons not to work for Messrs. Lyons. We have to see whether that is an illegal act, because that is one of the things complained of. The other thing complained of is this. Shoenthal was a person who carried on work at his own place of business, and he did a certain amount of work for the plaintiffs. He employed workmen under him separately; and this trade union intimated to him that if he went on working for the plaintiffs they would call out his workmen, that being with the express and direct object of preventing—not because there was any quarrel between him and his workmen, not because his workmen objected to the wages that he was giving them, not to make a strike of the workmen for the sake of those workmen as between them and their own employer, but for the

very purpose of preventing Shoenthal from working for Messrs. Lyons, and for the purpose of putting additional pressure upon Messrs. Lyons by preventing Shoenthal from working for them, so as to induce them to come to the terms which they wished to establish between Messrs. Lyons and their workmen. Now, are those acts legal? It seems to me that one has only to look at the Act of Parliament to see that it is quite impossible to maintain the legality of either of those acts. I hold distinctly that it is illegal to picket the works or place of business of a man, by persons who are distributed and placed there for the purpose of trying by persuasion to induce the workmen of that man not to work for him any longer, or to induce people who want to work for him to abstain from entering into an agreement with him to do so. That seems to me to be illegal; and still more clearly is it illegal to induce a man, or to prevent a man in the position of Shoenthal from working for the plaintiff by calling out the workmen of that man and inducing them not to work for him, that being done for the purpose of putting pressure both upon Shoenthal and upon Messrs. Lyons, by preventing Shoenthal from working for Messrs. Lyons. I cannot read section 7 without seeing that those things are distinctly things which are not permissible by this Act of Parliament, and no Act of Parliament can be referred to which makes them lawful. Section 7 says: [His lordship read the section and the first four sub-sections, and continued:—] Now, Mr. Jenkins argued very ingeniously that that means, "compel only the workmen." I entirely disagree with him. I think that it means to compel either the employer or the workmen. To compel the employer by inducing the men not to work for him seems to me to be precisely within the language of this section. It is watching or besetting a house for the purpose of compelling an employer not to do an act which he has a lawful right to do—namely, to make such terms with his workmen as he and they may mutually agree upon. If that is done through the medium of the persuasion of the workmen, no compulsion being put on the workmen themselves, but compulsion being put by that means on the employer, that seems to me to be distinctly within this section of the Act of Parliament, and I think that that is shown the more clearly by the proviso which is put at the end of this section.

The thing which is made illegal is watching or besetting the house or the approach to the house with a view to compel any person to abstain from doing or to do any act which such person otherwise might lawfully do. Therefore watching or besetting Messrs. Lyons' place of business with a view to compel Messrs. Lyons to do or abstain from doing an act which they might legally do is an offence against this particular clause of the Act of Parliament, and the proviso at the end shows exactly how far the parties may go in watching or besetting the house. It says, "Attending at or near the house or place where a person resides or works or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." Sub-section 4 is as wide as can be. It does not speak of the purpose in that sub-section at all. It is "watching or besetting the house or place of business." The only words controlling the generality of sub-section 4 are to be found in the beginning of the section, "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing." That is the only thing. Therefore I repeat that watching the works of Messrs. Lyons for the purpose of persuading persons who were working or intending to work there not to do so with a view to compel Messrs. Lyons to come to the terms which the trade union wish to impose upon them, is a direct violation of that which this section prohibits. I think that here the trade union has gone widely beyond that which this Act authorizes them to do, and that they are distinctly committing an illegal act which may have the effect of ruining Messrs. Lyons' business if it is not interfered with by an *interim* injunction. I repeat again that I think that this fact cannot be altered. It is a fact which the trade union in this case admits. They admit that they did put this card into the hands of their pickets for the purpose of its being shown to the people who were either working or intending to work for Messrs. Lyons, and that they placed those pickets at the entrance to Messrs. Lyons' works for the very purpose of persuading the workmen not to work for Messrs. Lyons in order to compel Messrs. Lyons to come to their terms. As to this, I think that it is impossible to suppose that any evidence given at the trial of the action can alter it at all. The facts that I am dealing with are admitted facts.

Now let me take Shoenthal's case. In Shoenthal's case they are not merely persuading Shoenthal not to work, but they are trying to prevent his working. They have no right to prevent anybody working, they have no right to prevent one of his workmen working for him. If they use means to prevent his working, that is not encouraging a strike but it is doing something far more. If by any means they prevent Shoenthal working for Messrs. Lyons, that is an illegal act. They have conspired together, and combined to take means to prevent somebody from working for Shoenthal who otherwise would do so. No Act of Parliament justifies that. It would have been illegal before this Act. There is nothing in this Act which justifies it, and it is illegal still. Therefore I think that the trade union have gone beyond any right which as yet Parliament gives them—any right which is to be considered as existing either directly by the legalization of strikes or as incidental to strikes being made legal; and to that extent, both of these things being calculated and intended to injure the plaintiff in his business, it is a case in which an *interim* injunction should be granted.

The form of the injunction granted by the learned judge in the court below may possibly give rise to question. Therefore we have considered whether it would not be better to make it more specific. I think that we all agree that the injunction should be: "An injunction to restrain the defendants, their servants and agents"—in the usual way—"from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them or for any purpose except merely to obtain or communicate information"—that is following the very words of the Act—"and also from preventing Shoenthal or other persons from working for the plaintiffs by withdrawing his or their workmen from their employment respectively." With that alteration the appeal substantially fails; but still, as it is necessary to make some alteration, perhaps the best course of dealing with the costs will be to say that the costs of this appeal shall abide the result of the action.

A. L. SMITH, L.J.—I also wish to thank Mr. Jenkins for the extremely able way in which he argued this case. His argument has been of great assistance to me. Now, this is a case in which an injunction has been obtained by Messrs. Lyons against the secretary of the Amalgamated Society of Leather Workers, a trade union, to restrain the trade union from doing certain acts which they have been doing

heretofore. I really should not have said much in this case excepting for its great importance. I wish simply to state shortly how the case strikes me. In the year 1871 it could not have been said in a court of law that a strike was legal, or that any class of picketing was legal, because there is ample authority to the contrary. If authorities were wanted I would refer to the cases of *Hilton* v. *Eckersley*, 6 E. & B. 47, 3 W. R. Dig. 176, and *Walsby* v. *Anley*, 9 W. R. 271, 30 L. J. M. C. 121, which are found referred to by Lord Coleridge in *Gibson* v. *Lawson*. I say that prior to that date I do not think there can be a doubt that it was a common idea (and indeed the authorities have so shown) that a strike or picket would have been illegal. How does this case come before this court? The complaint was made by Messrs. Lyons that what the defendants were doing was illegal at common law. To that the defendants set up this: "That is all very fine—you are saying that it is illegal at common law, and you would have been right before the year 1871, but in the years 1871 and 1875, we, the trade union, had two Acts of Parliament passed which legalize what we are doing upon this occasion." Those two Acts are really the charters and foundation of the legality of trade unions. There is no doubt that a trade union now, as long as it carries on its affairs up to a certain point, is as legal as any other community in the kingdom. Of that there cannot be a doubt; but Mr. Levett answers, "Yes, you may have those charters—namely, the Act of 1871 and the Act of 1875, yet what you are doing is outside what has been granted to you by the legislature"; and the real question is whether or not it has been shown that what the defendants have been doing is outside of the power granted to them by Act of Parliament. Now, the defendants induced Messrs. Lyons' men to strike—that was perfectly lawful; and they induced Messrs. Lyons' men to strike for the purpose of their getting better wages—which also is perfectly lawful. There cannot be a doubt about that; and it seems to me that, as regards what they did in inducing Messrs. Lyons' men to go out on strike, the Acts of Parliament which have been passed in favour of trade unions undoubtedly allow them to do that. And if that was all that they had done, there would be no groundwork for an application for an injunction in this case. But they have done more. I think myself that the procedure which they have adopted as regards Mr. Shoenthal is not authorized by the statute. The particular portion of the statute which authorizes these strikes being promoted or encouraged by trade unions is the 3rd section of the Act of 1875. [His lordship read the section, and continued:—] Now, was there any trade dispute between Mr. Shoenthal's workmen and himself? None at all. If there had been a trade dispute between Mr. Shoenthal's workmen and Mr. Shoenthal I apprehend that the trade union might have done as regards Mr. Shoenthal exactly that which they did as regards Messrs. Lyons, and they might have called his men out on strike; but that is not the state of things. There was no dispute between Mr. Shoenthal and his men. What they did was to call out Mr. Shoenthal's men so as to prevent Mr. Shoenthal from working for Messrs. Lyons. That was to compel Mr. Shoenthal who was willing to work for Messrs. Lyons not to work for them—not to have the men wherewith to work for Messrs. Lyons, and therefore to injure Messrs. Lyons in their trade. In my judgment that is inadmissible under the Acts of Parliament which I have mentioned. I think that inasmuch as it was clearly intended to hurt and injure Messrs. Lyons in their trade, it is an act which this court has jurisdiction to stop when it finds that it has been perpetrated and may continue to be perpetrated. That act of the trade union against Shoenthal was, as I have pointed out, a way of compelling Shoenthal not to work for Messrs. Lyons.

Is there anything else? I think that this picketing is not admissible. As I have said already, before 1871 and before the Acts were passed it was illegal, but a certain amount of picketing (if that is the proper word) was rendered lawful by the proviso to section 7. The section is strong against what one ordinarily understands by the word "picketing," which really means placing men outside a man's shop where a strike has taken place and where the men have been called out to compel men not to go into that shop to work for that man as long as the strike lasts. That is the meaning of picketing pure and simple. What does the statute say about it? I want just to read the first few lines and to put my construction upon it: "Every person who, with a view to compel any other person to abstain from doing, or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority" does any of the five acts mentioned shall be liable to punishment. What is the meaning of the words "every person who, with a view to compel any other person"? I think that section can only be read in this way—that every person who, with a view to compel any other person (that is, whether a master or man—that is the only way in which this section can be properly read in my judgment)—"Every person who, with a view to compel any other person, whether master or man, to abstain" and so on, "does any one of these acts without lawful excuse acts unlawfully." What is one of the things which he is not to do? It says "every person" (that in this case is the defendant, the secretary of the trade union) "who watches or besets the house or other place where such other person resides or works or carries on business." Now, what is the evidence about watching or besetting? Why, there is ample evidence that they have watched and beset the house of Messrs. Lyons, and you have only to refer to their own circular which points out exactly what they have been doing. They have been picketing Messrs. Lyons' house, and that is clearly within sub-section 4 of section 7. How can Mr. Jenkins say that what his clients have been doing is lawful, because what they did was in order merely to obtain or communicate information which in such a case would not be deemed watching or besetting? But the evidence does not prove that; because they have done a great deal more. Therefore it appears to me that on this ground also an illegal act has been done by the trade union. For these reasons I think that this interlocutory injunction should go, and that it should be moulded in the form which has been read by Kay, L.J., because I can see that in the general form in which it has been brought into this court everlasting difficulties would arise as to the carrying of it out; and what is more, it seems to me that it might be said that it would restrain this trade union from doing that which the law allows it to do. By the form in which the injunction goes now it only restrains them from doing what the law does not allow them to do. I also think that as we have somewhat altered the injunction the costs of the appeal should be costs in the cause, so that the party who is in the right when the action is tried will get the costs of this appeal.

Appeal dismissed.

Solicitors, *Shaen, Roscoe, Massey, & Co.; Warburton & De Paula.*

High Court of Justice.

Chan. Div.
Chitty, J. } July 15, 23, 1896.

In re EARL OF DEVON'S SETTLED ESTATES.
WHITE *v.* EARL OF DEVON.
In re STEER.
STEER *v.* DOBELL. (*a.*)

Limitations, Statutes of—Settlement—Power of appointment—Real Property Limitation Act, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *ss.* 1-3, 20—"*Person through whom another person is said to claim*"—"*Appointee*"—"*Other estate, interest, right, or possibility*"—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *ss.* 1, 2, 9.

A tenant from year to year, under a verbal agreement, of settled land remained in possession for more than twelve years from 1876 *without paying rent or giving any acknowledgment. Under the settlement the land was limited to A. for life, remainder to B. for life, remainder to such uses as A. should by deed or will appoint. This power of appointment was exercised by A.'s will. A. was barred shortly before his death. B., who succeeded A., died without having recovered the land in* 1891. *On an application to determine whether the estate of A.'s appointees, which thereupon came into possession, was barred,*

Held, that the limitation to the appointees must be read into the settlement which created the power; and, applying the principle laid down by Tindal, C.J., *in* James *v.* Salter, 3 *Bing. N. C.* 544 (*p.* 553), *that the case fell within the latter part of section* 2 *of the Real Property Limitation Act,* 1874, *and that B. being the person last entitled to a particular estate, and not being in possession or receipt of the profits of the land when his interest determined by his death in* 1891, *the appointees had a further period of six years from that time to bring their action; and therefore that their estate was not barred.*

The words "other estate, interest, right, or possibility" in section 20 *of the Real Property Limitation Act,* 1833, *and the word "appointee" in section* 1 *of the same Act, discussed and considered.*

Special case.

John Wotton Steer was until Lady-day, 1876, tenant under a verbal agreement of a plot of land forming part of the Devon Settled Estates on a yearly tenancy at a small annual rent. This land remained in his possession until his death in July, 1889, and thenceforth in the possession of the trustees of his will; but after Lady-day, 1876, no rent was ever claimed by the owners of the Devon Estates, and none was ever paid nor any acknowledgment given in respect thereof.

Steer v. *Dobell* was an action for the administration of the estate of John Wotton Steer, and an order for administration had been made therein.

White v. *Earl of Devon* was a mortgagee's action, and had reference to the Devon Estates, the title to which, so far as is material, was as follows:—

By a settlement dated the 22nd of July, 1857, and made between Lord Courtenay (afterwards 11th Earl of Devon) and Edwin Baldwin Courtenay of the one part and trustees of the other part, and a deed poll dated the 10th of June, 1862, under the hands and seals of the 11th Earl of Devon and Edwin Baldwin Courtenay, then Lord Courtenay, the Devon Settled Estates were limited to the use of the 11th Earl of Devon for life, with remainder to the use of Lord Courtenay for life, with remainder to uses which failed, with remainder to such uses upon such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, agreements, and declarations as the 11th Earl should at any time by deed or will direct, limit, or appoint with divers remainders over in default of appointment.

By his will dated the 17th of September, 1885, the 11th Earl devised, bequeathed, and appointed all his estate, including any over which he had or might acquire any power of appointment, to Lord Halifax and others therein named trustees, and died the 18th of November, 1888; and upon his death Lord Courtenay became 12th Earl of Devon. He died the 15th of January, 1891.

By an indenture dated the 1st of May, 1891, the Devon Settled Estates were conveyed by the trustees of the will of the 11th Earl to the 13th Earl, subject to the incumbrances affecting the same and otherwise, and shortly after the same estates were settled by him to uses in strict settlement.

The question whether the persons interested in the Devon Settled Estates could recover possession of, and whether the persons entitled to the estate of John Wotton Steer had any, and if any what title to or interest in the land was by consent submitted in the form of a special case to Chitty, J., as the judge in whose division the above actions were pending.

Byrne, Q.C., and *Beaumont* for the persons interested in the Devon Estates.—The appointees are in the same position as if they were named in the instrument conferring the power of appointment, they come therefore within section 2 of the Act of 1874, and the statute only began to run against them on the death of the 12th Earl in 1891. Until then they had only a future interest, and he was the person last entitled to the particular estate on which their estate was expectant. On his death their estate became vested in possession, and they had the further period of six years from his death within which they could bring their action. Section 20 of the Act, 1833, does not apply to a case like this. It applies where a man has one interest, and after an intervening estate, then another interest in himself, so that having been once barred in respect of one, he is deprived of any right or action in respect of the other. They also referred to sections 1, 2, and 3, of the Act of 1833, to sections 1 and 9 of the Act of 1874, and to Farwell on Powers, 2nd ed., p. 288, section 3, Fearne's Contingent Remainders, vol. 1, p. 73, and Sugden on Powers, 8th ed., p. 470, *et seq.*

G. Cave, for the persons entitled to the real estate of J. W. Steer.—The claimants are barred by section 1 of the Act of 1874. By section 1 of the Act of 1833, which under section 9 of the Act of 1874 is to be read into the latter Act, persons claiming as appointees under another person are to be considered as "claiming through" him. The present claimants therefore claim through the 11th Earl, whose right of action was barred at the end of twelve years from Lady-day, 1876, and are accordingly barred under section 1 of the Act of 1874. Section 3 of the Act of 1833, and section 2 of the Act of 1874, cannot be used to cut down section 1 of the latter Act, *James* v. *Salter,* 3 Bing. N. C. 544, 553; *Magdalen Hospital* v. *Knotts,* 26 W. R. 640, 8 Ch. D. 709, 727. The argument founded on these sections is inapplicable unless the words "in respect of the estate or interest claimed" are inserted in section 1 after the word "accrued." A general power of appointment is equivalent to absolute ownership, Farwell on Powers, 2nd, 286; *Rous* v. *Jackson,* 33 W. R. 773, 29 Ch. D. 521, 526. The power was also barred before the death of the 11th Earl, as being "another estate, interest, right, or possibility" within the meaning of section 20 of the

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Act of 1833, or was extinguished as a "right or title" under section 34 of the same Act. *Doe* v. *Mouledale*, 16 M. & W. 689.

Byrne, Q.C., replied.

CHITTY, J.—Regard being had to the 8th section of the Statute of Limitations of 1833 and to the Statute of 1874, and to the non-payment of rent by the yearly tenant, it is admitted that the right of the 11th Earl to recover the land was barred a few months before his death, which occurred in November, 1888. [His lordship, after stating the facts, continued:] The question is, whether the remainder appointed to Lord Halifax and others is barred by the Statute of Limitations. That estate was a future estate when the Statute had run against the life estate of the 11th Earl.

The case of future estates appears now to depend upon the 2nd section of the Act of 1874, construed with the fourth branch of the 3rd section of the Act of 1833 and on the 20th section of the same Act. The statement to this effect in Shelford's Real Property Statutes (9th ed., by Carson, p. 195) appears to me to be correct.

A point of general law was raised in reference to the execution of the power by the 11th Earl. According to the established doctrine the limitation to Lord Halifax and others must be read into the settlement which created the power, the estate limited taking effect from the time when the power was executed—in this case from the death of the 11th Earl (see Sugden on Powers, 8th ed., p. 470 *et seq*). The doctrine that the appointee takes under the original deed is followed in all its consequences except that where the power is a general power the rule against perpetuities is applied only from the time of executing the power (see *Rous* v. *Jackson*). That exception has no bearing on the present case. The doctrine of equity that the estate created under a general power is assets for payment of the appointor's debts is not a true exception to the general doctrine. The appointee of real estate is treated as a trustee for the creditor of the appointor (see *Fleming* v. *Buchanan*, 3 De G. M. & G. 976).

For Steer's representatives it was argued that the case fell within the 20th section of the Act of 1833. The general effect of that section is that when the right to an estate in possession is barred, the right of the same person to future estates is also barred. The argument for Steer's representatives was that inasmuch as the estate of the 11th Earl as tenant for life was barred, the estate limited by him in virtue of his power to Lord Halifax and others was also barred.

It was said that a general power of appointment fell within the words "other estate, interest, right, or possibility," and particularly that such a power was included within the word "right." This argument is unsound. The Act deals with our highly technical system of real property law, and the language employed is necessarily technical. It has to be borne in mind that real actions were in existence when the Act was passed, and were abolished by the Act itself (see section 36). No real property lawyer in 1833 would have spoken of a power of appointing uses as an "estate, interest, right, or possibility." The terms "right" and "possibility" are used in their technical sense. "Right," for instance, applies to the case of an estate turned to a right which could be enforced only in a real action. I hold that a power is not within the section.

For Steer's representatives it was also argued that the case falls within the 1st section of the Act of 1874, read in connection with the 1st or interpreting section of the Act of 1833. On the other hand it was contended for the Devon Estates that the case was governed by the 2nd section of the Act of 1874. The relation of these two sections is explained by the decision of the Court of Common Pleas on the relation of the analagous sections, the 2nd and 3rd, of the Act of 1833 in *James* v. *Salter*, approved in the *Irish Land Commission* v. *Grant*, 33 W. R. 357, 10 App. Cas. 14, 27. Tindal, C.J., in giving judgment, said "that the case must have been governed by the 2nd section, if that section had stood alone, cannot be doubted; and upon a more close examination of the 3rd section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the 2nd clause, as to 'time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the 2nd section, but is not included among the instances given by the third, to be governed by the operation of the second." In *Magdalen Hospital* v. *Knotts*, the Court of Appeal, citing *James* v. *Salter*, used somewhat different language, but did not intend in any way to modify the clear expressions found in the judgment of Tindal, C.J.

I proceed to consider the 1st and 2nd sections of the Act of 1874; in stating the relevant portions of the sections I shall, for the sake of clearness, omit words not bearing on the present question. The 1st section enacts that no person shall bring an action to recover land but within twelve years next after the time at which the right to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to some person through whom he claims, then within twelve years next after the time at which the right to bring such action shall have first accrued to the person bringing the same. For Steer's representatives it was argued that the right to bring an action first accrued to the 11th Earl, and that Lord Halifax and others as appointees claim through him, and are therefore barred by the section. Reference was made to the 1st section of the Act of 1833, which interprets the meaning of the expression "claiming through another person." The enactment is that the words and expressions thereinafter mentioned, which in their ordinary signification have a more confined or different meaning, shall in the Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: "The person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by courtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise." The term "appointee" was fastened upon, and it was urged that Lord Halifax and others, being appointees of the 11th Earl, claimed through him within the interpretation clause, which by virtue of the 9th section of the Act of 1874 is read with the Act of 1874. No doubt there is a difficulty in ascertaining the meaning of the term "appointee." Limitations to dower uses were in vogue when the Act of 1833 was passed, and it seems to me that, regard being had to the context in the interpretation clause itself, an appointee under the general power of appointment contained in such limitations would be within the meaning. But I think that appointees under a special power would not. Suppose, for instance, under a settlement lands were limited to the use of one for life with remainder to such uses in favour of one or more of his children as he should appoint, and in default to the use

of his children in fee; it would, I think, be absurd to say that the right of the children to recover depended on the exercise or non-exercise of the power; that, if the power were exercised, they were barred if the estate of the appointor were barred, but they were not barred if the power were not exercised. In fact the children would not claim by, through, or under, or by the act of the appointor. They would claim under the settlor and by the combined operation of the act of the settlor and the appointor. Obviously some restriction as to the meaning of the term "appointee" is imposed by the interpretation clause itself. But for the reasons presently stated it is not necessary for me to decide whether the term "appointee" includes the case where the power of appointment is not in substance created by the appointor himself—a question which I leave open.

In my opinion, consistently with the judgment in *James* v. *Salter*, the case falls within the 2nd section of the Act of 1874. That section deals specially with cases in which a doubt or difficulty might occur as to the time when the right to bring an action accrues. The section enacts that a right to bring an action to recover land "shall be deemed" to have first accrued in respect of an estate in remainder or other future estate at the time at which the same shall have become an estate in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which have determined, have been in possession or receipt of the profits of such land; but if the person last entitled to any particular estate on which any future estate was expectant shall not have been in the possession or receipt of the profits of such land at the time when his interest was determined, no such action shall be brought by any person becoming entitled in possession to a future estate but within twelve years next after the time when the right to bring such action shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have vested in possession, whichever of these periods shall be the longer. The case falls within that part of the section which begins with the word "but." The person last entitled to a particular estate was the 12th Earl; he was not in possession or receipt of the profits when his interest determined, and Lord Halifax and others have the further period of six years* (which has not yet elapsed) after his death to bring their action; and therefore I hold that their estate was not barred.

Solicitors, *Lake & Lake*; *Ford, Lloyd, Bartlett, & Michelmore*, for *Hacker & Michelmore*, Newton Abbot.

* *N.B.*—It would appear that the appointees really had the longer period of twelve years from the succession of the 12th Earl in 1888, but under the circumstances the difference in length between the two periods becomes immaterial.

Chan. Div.
Chitty, J. } April 16; July 8, 1896.

In re LART.

WILKINSON *v.* BLADES. (*a*.)

Practice—Representation order under Ord. 16, *r.* 32—*Will—Construction*—Res judicata—*Acquiescence.*

An order appointing a person to represent a class for the purpose of obtaining the judgment of the court does not affect a member of the class who has a distinct and independent right in the subject-matter of the litigation, and does not make the judgment binding on him.

Where the court has construed a will for the purpose of determining the title to a fund passing under the will, and the same question of construction is raised afterwards in regard to another fund passing under the same will, the court is bound by the precedent created by its former decision.

Summons.

The above-named testator, who died in 1853, by his will, dated in 1852, bequeathed to his daughters the respective annual sums therein mentioned, and in case of the marriage of any of his daughters directed the investment of a sufficient sum to answer the same by the interest thereof. And in case any of them died leaving children, the principal was to be divided between those children in equal shares. And the will proceeded as follows: "If my daughters die not having been married, then in every case the principal shall be divided equally among my surviving children," not providing expressly for the case of a married daughter dying without leaving children.

On the death of a married daughter without ever having had issue, the construction of the will came before the court in 1883, and Chitty, J., held that it was a necessary implication from other parts of the will that the above clause covered the case, and that her share was divisible equally among the children of the testator who survived the daughter, and such division was accordingly made. A representation order was made in the action appointing a representative of the next of kin of the testator for the purpose of obtaining the judgment of the court.

This was an application by J. Wilkinson, as legal personal representative of his deceased wife, E. Wilkinson, who was another daughter of the testator and who also died without issue, raising the same question of construction as was decided in 1883, but in reference to E. Wilkinson's share. Neither the applicant nor E. Wilkinson were parties on the former occasion, but they were both aware of the action and its nature and also of the order when it was made, and took the benefit of the order.

Ingle Joyce, for the applicant.

Munns, for the trustees.

Byrne, Q.C., and *W. A. Peck*, for other defendants.

The cases cited were *Duchess of Kingston's case*, 2 Sm. L. C., 10th ed., 713; *May* v. *Newton*, 35 W. R. 363, 34 Ch. D. 347; *Young* v. *Holloway*, 43 W. R. 429; 1895, P. 87; *Wytcherley* v. *Andrews*, 19 W. R. 1015, L. R. 2 P. & D. 327, p. 329; *Jacques* v. *Harrison*, 32 W. R. 470, 12 Q. B. D. 165; *Watson* v. *Cave*, 29 W. R. 433, 17 Ch. D. 19; and *Commissioners of Sewers* v. *Gellatly*, 24 W. R. 1059, 3 Ch. D. 610.

CHITTY, J.—On this summons the applicant did not offer even to restore what he received under the former decision. I say what he received. It was paid on the joint receipt of husband and wife; but,

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

there being no separate use, that was a reduction into possession by the husband. At the bar, however, his counsel has offered to refund, but so far as I am concerned that offer becomes immaterial, because it is admitted that I should have to follow, according to the usual practice of the court, my former decision.

Now, the applicant and his wife, not having been parties to that action, were not bound as a person who is a party is bound, by the result of the action. It was suggested, both before and on the present occasion, that the wife was one of the next of kin, and bound through the representation order as to the next of kin; but in my opinion an order appointing a person to represent a class such as the next of kin does not affect one of the next of kin who has a distinct and independent right as the wife had as survivor.

What, then, could the applicant and his wife have done in the circumstances? They could have declined to take the money under the order. They could, if dissatisfied with the judgment, have brought their own action the next day after, and asked the court to put a different construction on the will; and if that decision had been followed as a precedent, have brought what would practically be an appeal against the first decision. That is one course the applicant could have adopted. Another would have been to apply to this court pending the proceedings, under ord. 16, r. 11, which was then in force, to be added as defendant, and had he done so he would have been made a defendant. So that there were two courses which he could have adopted for the purpose of bringing the case before the Court of Appeal within a reasonable time after my decision. In the Probate Division a party, when a will is in question, has a right to intervene, and if he does not intervene he is *primâ facie* bound by the result of the litigation, *Young* v. *Holloway*, and the reasoning upon which that practice has been established appears from the judgment of Lord Penzance in *Wytcherley* v. *Andrews*. At common law, parties to a judgment are bound, of course, but persons claiming under them are also bound on the principle *qui sentit commodum sentire debet et onus*. These analogies afford some ground for saying that the applicant in the circumstances is bound. But I have not said he was bound by the judgment. I think he was not. But by his conduct, and by taking the money, he has acquiesced, if ever a man could acquiesce.

It was said that even supposing the applicant had been a party he would not have been bound, because the decision was not on the same fund as that now in question. But this court is bound by the precedent. If it were shown that there was some palpable blunder in the former decision there might have been a ground for reconsidering it. I may mention that Sir G. Jessel, M.R., when orders had been made in chambers involving in his opinion a certain construction of a will, would not when the case came on hear argument in court on the question of construction, considering himself bound by what had been done in chambers.

Although not technically bound, I think it is contrary to good faith and equity that the applicant should raise this question now. I therefore dismiss his application, not merely on the ground of the former decision, but on the ground that he is a person not entitled to come forward to maintain it.

Summons dismissed.

Solicitors, *G. F. Hudson Matthews & Co.; Dawes & Sons*, for *Young, Son, & Coles*, Hastings; *Munns & Longden*.

Chan. Div.
Kekewich, J. } June 26, 1896.

In re DYSON & FOWKE'S CONTRACT. (*a.*)

Vendor and purchaser—Will—Trustees—Power of sale—Charge of legacies on residue—Insufficiency of personal estate to pay debts and specific legacies—Legal estate—Title—Concurrence of beneficiaries.

A testator, after directing payment of his debts, funeral and testamentary expenses, and certain specific legacies, gave his residuary real and personal estate to trustees upon trust as to part thereof as therein mentioned, and he then gave the rest and residue of his real and personal estate to certain persons absolutely in equal shares.

Subsequently, by a codicil he revoked the gift to those persons and substituted other persons in their stead, and in all other respects confirmed his will. The testator's personal estate was insufficient to pay his debts, &c., and the specific legacies; and, in consequence of this, the trustees put up for auction residuary real estate of the testator. A purchaser of a portion of such estate objected that the trustees had no power to make a valid assurance, and required the concurrence of the residuary devisees.

Held, that the vendors, the trustees, had made a good title.

Motion.

T. B. Dyson, who died on the 16th of December, 1895, by his will, dated the 13th of October 1892, after providing for payment of his debts, funeral and testamentary expenses, and making various specific and pecuniary bequests, devised and bequeathed all the rest and residue of his real and personal estate to the plaintiffs (the trustees of his will), as to certain parts thereof upon trusts as therein mentioned, and then devised and bequeathed absolutely all the rest and residue of his real and personal estate and effects to the two children of his late son Edwin Dyson and to all the children of his (the testator's) son Cornelius Dyson equally, share and share alike; and the testator declared that the trustees or trustee of his will should have power "to sell the whole or any part of my real estate," and should "hold the proceeds upon the trusts of the will."

By a codicil, dated the 13th of December, 1892, the testator revoked the gift of residue in favour of the children of Edwin and Cornelius Dyson, and devised and bequeathed all the rest and residue of his real and personal estate and effects to his wife Mary Dyson, his two sons Cornelius and John Dyson, and his daughter Isabella Phillips equally, share and share alike, and in all other respects confirmed his will.

The testator's personal estate was not sufficient to pay his debts, funeral and testamentary expenses, and the specific legacies, and the trustees, in consequence of this, put up for sale by auction, in lots, residuary real estate of the testator.

E. C. Fowke, a purchaser of one of these lots, took the objection that the trustees had no power to sell, and required the concurrence of the residuary devisees.

An order was obtained in chambers to the effect that the trustees had no power to sell and make a valid assurance of the property without the concurrence of the beneficiaries. This order the trustees now moved to discharge.

E. P. Hewitt, for the trustees.—The question is, Can trustees with power of sale sell without the concurrence of the beneficiaries? The trustees require this power to sell in order to pay the debts and funeral and testamentary expenses and legacies,

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

and at any rate it is applicable to the gift of residue. The trustees may therefore use it without the consent of the beneficiaries: *Peters* v. *Lewes and East Grinstead Railway Co.*, 29 W. R. 874, 18 Ch. D. 429, at p. 434; *In re Cotton's Trustees and School Board for London*, 30 W. R. 610, 19 Ch. D. 624; *In re Lord Sudeley and Baines & Co.*, 42 W. R. 231, [1894] 1 Ch. 334.

L. Morton Brown, for the purchaser.—The power of sale is cut down by the subsequent devise, and consequently we are entitled to require the concurrence of the beneficiaries. He referred to *In re Lord Sudeley and Baines & Co.*, [1894] 1 Ch., at p. 339. The devisees here take absolutely, and therefore the legal estate does not vest in the trustees: *Davis to Jones and Evans*, 32 W. R. 460, 24 Ch. D. 190.

KEKEWICH, J.—Having had the advantage of a fuller consideration of this case than any which is possible on a summons in chambers, I have come to the conclusion that the order which was made in chambers must be discharged, and that the vendors' title must be upheld.

The question here is whether the trustees can make a title under the power of sale contained in the will—a power expressed in the widest terms both as regards time and otherwise. The power runs as follows [His lordship then read the power of sale and continued:—] Mr. Hewitt has convinced me that the power is at any rate applicable to this particular gift of residue, whether or not it may have been intended to be applicable to more than that. The residue is given in the simplest possible manner by the will to the two children of the testator's late son Edwin Dyson and to all the children of his son Cornelius Dyson equally. The beneficiaries are altered by the codicil, but the mode of gift is not altered. Nothing is given by way of settlement, there is no life estate and no restriction; it is simply a gift in fee. Is such a power of sale as this a good power in respect of real estate which is given in that way? I think there is no doubt that it is good so long as there is some purpose for which the power can be exercised.

Chitty, J., in *In re Lord Sudeley and Baines & Co.*, at p. 339 of [1894] 1 Ch., with respect to that, says: "These unlimited powers can be exercised only while the purposes of the settlement remain unexhausted," and he proceeds to expound that farther on in a passage which I do not pause to consider. This is in agreement with Lord St. Leonards' opinion in his book upon Powers which is cited by Fry, L.J., in *In re Cotton's Trustees and the School Board for London*, at p. 627 of 19 Ch. D.: "Perhaps the better opinion is that the powers cannot be exercised after the union of the estates, on the ground, not that the powers are merged, but that, according to the true construction of the settlement, they were not to be exercised after the determination of the limitations which they were intended to overreach."

The question for me is whether there were any trusts of the will existing at the date of the testator's death, or within a reasonable time thereafter, which would require to be enforced by means of the exercise of this power of sale. The testator has limited the exercise of the power in that way, for he says that the proceeds of sale are to be held upon the trusts of the will. Mr. Hewitt argued that I ought to infer that the power of sale was intended by the testator to be used for the purpose of division, and he says that if I do I can uphold the power on that ground, if it is required, in order to divide the property among the beneficiaries, and he cites the case of *Peters* v. *Lewes and East Grinstead Railway Co.*, where the power was expressly given for the purpose of division, and also the cases of *In re Lord Sudeley and Baines & Co.* and *In re Cotton's Trustees and the School Board for London*, in which it was pointed out that the will contained provisions from which it might be inferred that a division was intended. But in those cases there were a number of legatees and there was property of a peculiar character, which instances I do not find in this case, and that argument is, I think, narrowed, because in order to infer the existence of the power I must first find that there is such a purpose of division. In this case there is only a direct gift to a small number of persons, and that not by way of division. The legal estate is in the trustees and the equitable fee in the beneficiaries, and there is no reason why, if no obstacle intervenes, the beneficiaries should not call for the legal estate from the trustees. If that were all I should decide against the vendor's title; but that is not all. My attention has been called to other points. The testator has not only ordered his debts and funeral and testamentary expenses to be paid, but has also given many legacies amounting to a considerable sum, and he has charged them upon his real estate by the operation of a rule of law which is now well settled, and is laid down in the case of *Greville* v. *Browne*, 7 W. R. 673, 7 H. L. Cas. 689, and which is that where a man gives legacies and then the residue, that residue is chargeable with the legacies. Now, the payment of the legacies is distinctly one of the trusts of the will, and it seems to me, apart from anything else, that the trustees have a duty to perform in the discharge of these legacies, and that if this duty is to be performed it is for them to say whether they require to sell the residuary real estate for such purpose. I am only considering the question as between the vendors and the purchaser, who is not bound to inquire, and if he did would probably not be told, why the property is put up for sale. It is sufficient for him that the vendors have a power of sale which is exercisable for the purposes of the will. If the beneficiaries were here suing the trustees and attempting to prevent the sale, then, of course, the trustees would be obliged to say that they retained the property for the specific purposes of the will. But the question here is simply one between the vendors and the purchaser, and assuming the vendors to be acting honestly, they have a power of sale which they may exercise.

I therefore discharge the order made in chambers and overrule the purchaser's objections. I declare that the vendors have made a good title. The purchaser must pay the costs both here and in chambers.

Solicitors, *Preston, Stow, & Preston*, for *Rowlands & Son*, Birmingham; *Emmet & Co.*, for *J. C. Fowke & Son*, Birmingham.

Chan. Div. Kekewich, J. } June 24, 25, 1896.

In re SMITH.

DAVIDSON *v.* MYRTLE. (*a.*)

Trustee—Investment—Company incorporated by Act of Parliament.

Where a testator had empowered the trustees of his will to invest "in or upon the bonds, debentures, or debenture stock of any company incorporated by Act of Parliament,"

Held, that the trustees were not empowered to invest on the bonds or debenture securities of a company incorporated by registration under the Companies Act of 1862.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Summons.

John Smith, by his will made in April, 1895, after appointing the plaintiffs, Robert Davidson and Arthur Humbert executors and trustees of his will, and making various dispositions of his property as therein mentioned, declared that they should stand possessed of his residuary estate upon trust to invest the same "in or upon any of the public stock funds or securities of the United Kingdom, or any real or leasehold securities, or in or upon the bonds, debentures, or debenture stock of any company incorporated by Act of Parliament and paying a dividend upon its ordinary stock or shares," with a discretionary power to vary and transpose the investments for others of a similar nature.

The testator died on the 5th of December, 1895, and his will was proved on 31st of December, 1895, by the plaintiffs. This was an originating summons taken out by the trustees to determine (*inter alia*) the question whether the investment clause in the will authorized them to invest in or upon the bonds, debentures, or debenture-stock of any company incorporated by registration under the Companies Act of 1862. The defendants were nieces and nephews, the residuary legatees of the testator.

Renshaw, Q.C., and *Jason Smith*, for the trustees.—A company registered under the Companies Act, 1862, is a company incorporated by Act of Parliament: *Edwards* v. *Edmunds*, 34 L. T. N. S. 522, 24 W. R. Dig. 300; *Elve* v. *Boyton*, [1891] 1 Ch. 501, 39 W. R. Dig. 244; Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1 & 3.

Warmington, Q.C., *Warrington, Q.C.*, and *P. B. Lambert*, for Mrs. Myrtle, a residuary legatee.—"Companies incorporated by Act of Parliament" is not equivalent to "Companies registered under the Companies Act, 1862 (25 & 26 Vict. c. 89)." (They referred to parts 7 and 8 of the Act of 1862.) The expression "company" in the Forged Transfers Act, 1891 (54 & 55 Vict. c. 43), is by section 2 defined as meaning "any company incorporated by or in pursuance of any Act of Parliament or by Royal Charter."

Haldane, Q.C., and *Methold*, for Mrs. Humbert and Mrs. Smith.

Bramwell Davis, Q.C., and *Owen Thompson*, for three nephews.

A. à B. Terrell, for the remaining nephew, all in the same interest.

KEKEWICH, J.—The real question as it presents itself to my mind is whether I am free to express an opinion at all. If the point has been decided by Hall, V.C., or still more if it has been decided by the Court of Appeal, I have nothing to do but to perform the agreeable duty of obedience, and follow those who have decided the point. I cannot say that the point was decided by Hall, V.C., in *Edwards* v. *Edmunds*. No doubt he did not decide against the view that a company registered is not a company incorporated by Act of Parliament; but that was not the real question which was present to his mind. There was in that case a power to retain the shares, and therefore he found that the trustees had done their duty and had not committed any breach of trust in not selling, not because they were empowered to invest in that way, but because they had a power to retain. As regards the new shares he certainly held that Edmunds was not wrong in accepting them. He said, "I do not say that Edmunds was wrong in accepting the shares, though he would have been perfectly justified in refusing to take them"—that is to say, he appears to think he had a discretion. That does, no doubt, imply that he was at liberty to accept them, yet it is not a neat decision on the point.

Then came the case of *Elve* v. *Boyton*, and that is a decision very much nearer the point. There the company was not incorporated by Act of Parliament devoted to the incorporation of the company, but was incorporated by Royal Charter made in pursuance of the Act of Parliament—that is to say, there was the authority or (as lawyers in some connections call it) the "power" given to the Crown to incorporate it. Lindley, L.J., uses the very words at p. 507 of (1891) 1 Ch.: "It empowers the Crown to grant charters of incorporation to persons who shall be liable to calls, amongst other things which the Crown could not do." Then there are certain precautions. Then he says at p. 508: "The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the Charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the Charter." It is in strict analogy to my mind to a power in a deed exercised, say, by a will, in which the ultimate donee takes both under a deed creating the power, and the will exercising the power. Lindley, L.J., says, at p. 508: "It appears to us that, upon any reasonable construction of this clause, this first corporation was a corporation incorporated by Act of Parliament within the true meaning of that clause." That seems to be a question differing rather from that which I have to decide. The power given in that case was a power given to the Crown—given as it might very well be—in pursuance of the existing practice of the Legislature to empower some of the departments of the executive to create corporations; the practice is to do this by means of provisional orders, which are afterwards confirmed by an Act of Parliament which groups several together, and gives them legislative force. That does not seem to be precisely the same case as this. I have no desire to cut down the reasoning of the Lords Justices in *Elve* v. *Boyton*. If I were at liberty to do so I would much rather boldly follow them, but I do not think I have got sufficient guide, and I am bound to act on my own opinion. It seems to me there is all the distinction in the world between a corporation created by the Crown or by any body of persons in pursuance of powers delegated by the Legislature, and the creation of an incorporated company by seven persons complying with certain rules (or not complying with them sometimes) and thereby creating a corporation which, after all, may be very little more than a sham. I believe that the general acceptation of the expression "incorporated by Act of Parliament" among conveyancers has been for many years "incorporated by an Act of Parliament devoted to that particular end." No doubt you have the words "by special Act of Parliament" inserted in many of the conveyancing forms, but I do not think it is always so; and as to the expression "and by Royal Charter" my own recollection is that it is by no means always put in as an alternative to the old form; and I think if you asked a good conveyancer what "incorporated by Act of Parliament" meant, he would say "A corporation which owes its origin—its corporate existence—to a clause in a particular Act of Parliament," and that anything less than that, is not incorporation by Act of Parliament.

Mr. Warmington alluded generally to the Companies Act of 1862. This very Act of 1862 in clause 199, which comes under part 8, makes use of the expression "incorporated by Act of Parliament"; it says: "Subject as hereinafter mentioned any partnership, association, or company except railway companies incorporated by Act of Parliament." That is only an illustration of the reasoning why I think the phrase "incorporated by Act of Parliament"

has been generally used, or, if not generally used, generally understood by experts in the sense in which I have used it; and as I am not bound by authority I must follow the bent of my own inclination, and hold that "incorporated by Act of Parliament" is not equivalent to "incorporated by registration under the Companies Act, 1862."

Solicitors, *R. S. Taylor, Son, & Humbert; William Stubbs*, for *Hirst & Capes*, Harrogate; *Theodore Allingham.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.)

May 15; June 18, 1896.

MAYOR, &c., OF EASTBOURNE *v.* BRADFORD. (*a*)

Local government—Drainage—Single drain connecting different houses with public sewer—Liability to repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

In an urban district in which Part III. of the Public Health Acts Amendment Act, 1890, *had been adopted several houses belonging to different owners were connected with the public sewer by a single drain, constructed previously to the adoption of that Act.*

Held, that the drain was a "single private drain" within the meaning of section 19 *of the Public Health Acts Amendment Act*, 1890, *and that the local sanitary authority were entitled to recover from the owner of one of the houses his proportion of the cost incurred by them in re-laying the drain.*

Self *v.* The Hove Commissioners, 43 *W. R.* 300, [1895] 1 *Q. B.* 685, *followed.*

Hill *v.* Hair, 43 *W. R.* 651, [1895] 1 *Q. B.* 906, *disapproved.*

Appeal by the defendant from the decision of the judge of the Eastbourne County Court.

The facts and the arguments sufficiently appear from the judgments.

May 15.—*Macmorran, Q.C.*, for the defendant.

Bozall, for the plaintiffs.

Cur. adv. vult.

June 18.—The following judgments were read:—

Lord RUSSELL OF KILLOWEN, C.J.—This is an appeal from the decision of the county court judge of Eastbourne in an action brought by the Corporation of Eastbourne against one Bradford to recover the sum of £2 7s. 2d., which is a proportion of certain expenses incurred in relaying a drain connecting a house belonging to the defendant and other houses belonging to different owners with a public sewer. The drain in question drains houses Nos. 13, 11, 9, and 7 in the Pevensey-road, and Nos. 13 and 14 in Little North-street, and, passing through private property, it joins the main public sewer in Susan's-road. The facts were agreed upon by the parties, and the only question for the decision of the county court judge was whether the conduit in question is a public sewer within the meaning of the Public Health Acts, 1875 and 1890, or a single private drain within the meaning of section 19 of the Act of 1890.

The learned county court judge considered himself bound by the decision of the Divisional Court in the case of *Self* v. *The Hove Commissioners*, and held that the conduit was a single private drain, and judgment was given for the plaintiff corporation with leave to appeal. On the argument before us the cases of *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233; *Self* v. *The Hove Commissioners*, 43 W. R. 300, [1895] 1 Q. B. 685; and *Hill* v. *Hair*, 43 W. R. 651, [1895] 1 Q. B. 906, were cited.

In *Travis* v. *Uttley* the drain passed through private grounds, and received the drainage of three houses before it joined the main sewer; but the three houses so drained belonged to one person, consequently section 19 of the Act of 1890 did not apply. It was there held that the conduit was, so far as it was in question in that case, a sewer repairable by the public authority. I think the judgments in that case were right. I say nothing about some expressions appearing in those judgments which were incidental and were not necessary for the purpose of the decision arrived at.

In the case of *Self* v. *The Hove Commissioners* two houses belonging to different owners were connected with a public sewer by a single private drain. This was therefore held to be a drain within the meaning of section 19 of the Public Health Act, 1890, and as the local authority had adopted Part III. of the Act of 1890, section 19 applied.

In the case of *Hill* v. *Hair* the drain was similar to that in *Self* v. *The Hove Commissioners*, a drain carrying the drainage of the respondent's house, and of other houses belonging to different owners, into a public sewer. Here, also, the local authority had adopted the Act of 1890, but the court held that section 19 of that Act did not apply.

In these two cases different and conflicting decisions were therefore given.

There is no substantial difference between the drain in the case before us and that in *Self* v. *The Hove Commissioners* and that in *Hill* v. *Hair*. In the present case it drains houses belonging to different owners and enters the public sewer, and the local authority has adopted the Act of 1890.

In consequence of the impossibility of reconciling the decisions in *Self* v. *The Hove Commissioners* and *Hill* v. *Hair*, I have reconsidered the whole question independently of these cases. The real question is—What is the proper application of section 19 of the Public Health Amendment Act, 1890? The section says that, where two or more houses belonging to different owners are connected with the public sewer by a single private drain, the local authority may deal with that drain in the same way, both as to the execution of works and recovery of expenses, as it may deal with drains, ashpits, and cesspools, under section 41 of the Public Health Act, 1875. The first point of difficulty is, What is a single private drain? Sub-section 3 says that a drain includes a drain used for the drainage of more than one building. This very much widens the definition of drain given in section 4 of the principal Act of 1875. In that section a drain means any drain of and used for the drainage of one building only or of premises within the same curtilage. What, then, is the meaning, in section 19, of the words, "single private drain"? What is a private drain and can there be a private drain connecting two or more houses (belonging to different owners) with a public sewer? Prior to the passing of the Act of 1890, by the operation of the Act of 1875 (and, indeed, by the operation of the prior Act of 1848) there could not be a private drain which connected two or more houses (belonging to different owners) with a public sewer, because any such drain was a sewer, and was a sewer vested in the local authority. Therefore it might be said that the drain in this case is not a private drain because it was vested in the local authority. Therefore it might be said that the drain in this case is not a private drain because it was vested in the local authority, if the word "private is

(*a*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

to be taken as used in the sense of belonging to an individual; and it was not a drain at all, because it came under the definition of "sewer" in section 4 of the Act of 1848. But the Act of 1890, for the purposes of section 19, and for those purposes only, widens the definition of "drain" contained in section 4 of the Act of 1875, and therefore there seems to be no difficulty in interpreting section 19 with regard to the word "drain." In the case before us it seems to me to be clear that the drain was a drain within the meaning of the definition given in sub-section 3 of section 19.

The next question is—What is the meaning of the word "private" in "single private drain," and what meaning can be given to it which shall harmonize with the application of section 13 of the Public Health Act, 1875? It has been suggested that the expression "private drain" might be said to apply only to drains of the character set out in section 19 of the Act of 1890, which were constructed after the passing of the Act of 1890—in other words, that the Act has no retrospective force. That would be a very simple way of getting out of the difficulties of the section. But the words of the section are not "shall be," but "are," and therefore, when it says that where two or more houses belonging to different owners are connected with the public sewer, it points, I think, to a state of things in existence at the time of the passing of the Act which is to be altered. If then the provision is retrospective, what effect is to be given to section 13 of the Act of 1875 in this connection? Now that section (13) says that all existing and future sewers shall vest in and be under the control of the local authority. The word "sewer" here will no longer include the drain in question in this case, which is a drain under and for the purposes only of section 19 of the Act of 1890. But inasmuch as prior to the passing of the Act of 1890 that drain was a sewer vesting in the local authority, does the vesting control the natural application of the new definition? If, indeed, the absolute property in the sewer were given by section 13 of the Act of 1875 to the local authority, one might feel some difficulty in making this section applicable to drains constructed prior to 1890, notwithstanding the use of the word "are." But what is the meaning of the word "vest" in section 13 of the Act of 1875? It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but gives such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter—*Hinde* v. *Chorlton*, 15 W. R. 226, L. R. 2. C. P. at p. 116; *Coverdale* v. *Charlton*, 26 W. R. 687, 4 Q. B. D. 104; *Rolls* v. *The Vestry of St. George the Martyr, Southwark*, 28 W. R. 867, 14 Ch. D. 785; *Attorney-General* v. *Guardians of Dorking*, 30 W. R. 579, 20 Ch. D. 595; *The Mayor, &c., of Birkenhead* v. *London and North-Western Railway Co.*, 15 Q. B. D. 572, 34 W. R. Dig. 100. But if the duty is partly or entirely shifted from the local authority to individuals, that right which the word "vest" gives to the local authority disappears to the same extent. Therefore it does not appear that there is any difficulty arising from the word "vest" in section 13 of the Act of 1875. The vesting was only for the purpose of performing a duty, and the duty having *ex hypothesi* been shifted on to the owner, there is no difficulty in arriving at the proper interpretation of section 19 of the Act of 1890 by reason of the use of the word "vest" in section 13 of the Act of 1875.

I am unable to see any special use in the word "private" in this section, but it is intelligible, and, I think, means a drain originally constructed for the drainage of one or more houses as distinguished from a drain or sewer which any member of the public may have a right to use by connecting to it the drain from his own house. We must put some reasonable interpretation on the section, and on this construction of it there is no difficulty in applying it to the present case. If it does not govern the class of drain in this case, which is for all purposes identical with that in *Self* v. *The Hove Commissioners* and in *Hill* v. *Hair*, what application can the section have? A drain now, by the combined operation of section 4 of the Public Health Act, 1875, and section 19 of the Act of 1890, for the purposes of this latter section and for those purposes only, includes (1) a drain used for the drainage of one building only; (2) a drain used for the drainage of premises within the same curtilage; and (3) a drain used for the drainage of more than one building.

The section therefore applies to two or more houses belonging to different owners connected with a public sewer by a single private drain, whether within the same curtilage or not. If it was only intended to apply to drains which did not vest in the local authority prior to 1890, it is difficult to understand the object of making a new definition of the word drain for the purposes of applying section 41 of the Act of 1875. The local authorities could already deal with drains draining one building and drains draining premises within the same curtilage: see section 4 of the Act of 1875 and section 41 of the same Act. Moreover, the object of section 19 of the Act of 1890 is to give increased power to the local authorities enumerated in the Act, and therefore the second exception under the definition of sewer in section 4 of the Act of 1875 does not help us, especially as the class of drains there mentioned are not sewers. Further, since it is intended to throw upon owners of houses certain expenses, it is difficult to suppose that the section can have been intended to operate on the first exception to section 13 of the Act of 1875—viz., sewers made for profit.

It is difficult to suppose that the legislature intended that the owners of houses are to be called upon to pay the cost of repairing a sewage system such as that in *Minehead Local Board* v. *Luttrell*, 42 W. R. 667, [1894] 2 Ch. 178. The second exception of section 13 of the Act of 1875 affords no assistance, as it deals with land drainage; neither does the third exception, because the local authority can have no power over these sewers, except as provided by section 327 (1). Nor does the proviso of section 13 help us, as it points to public sewers constructed by a public body for public use. It appears to me to follow that the section could practically have no operation at all if it were not intended to apply to such cases as that before us.

I am therefore of opinion that in this case the drain was a single private drain connecting two or more houses belonging to different owners with the public sewer, and that therefore under section 19 of the Act of 1890 the local authority was entitled to proceed under section 41 of the Act of 1875. I agree in the decision of *Self* v. *The Hove Commissioners*, and I think the county court judge was right in following it. It follows that I do not agree with the judgment in *Hill* v. *Hair*.

I may add that I think it is to be regretted that the legislature did not pass some such provision as clause 134 of the Carlisle Corporation Act, cited in *Hill* v. *Hair*, instead of a section limited as section 19 of the Act of 1890 is. Had they done so, drains like that in *Travis* v. *Uttley* would have stood on the same footing as the drain in this case. I cannot avoid pointing out the highly unsatisfactory state of the existing legislation relating to questions of public health and to

cognate questions of local authority under the Acts dealing with that subject. It is entirely unsystematic and most confused, and in the public interest steps ought to be speedily taken to reduce the existing chaos into system and order.

WILLS, J.—The plaintiffs in this case are the local sanitary authority of the borough of Eastbourne, and they have, under the provisions of section 3 of 53 & 54 Vict. c. 49 (Public Health Act, 1890), adopted, amongst other provisions of that Act, section 19, which is therefore in force in that borough.

The defendant is the owner of a house which is connected with the public sewer by a pipe or conduit, which passing through private property receives the drainage both of the defendant's house and of several other houses belonging to different owners. This pipe had become a nuisance and injurious to health, and the plaintiffs took the necessary steps, and all things happened to entitle them to execute the works necessary to abate the nuisance. The proportion of the total cost to be charged to the plaintiffs has been ascertained as provided by section 19 of the Act of 1890, and this action is brought in the county court by virtue of section 261 of the Act of 1875.

If the Act of 1875 alone were applicable, the pipe in question, from the point at all events where it receives the drainage of the second house, would be a "sewer" within the interpretation clause (section 4).

Section 19, however, of the Act of 1890 is the enactment applicable to this case. By that section it is provided that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred upon them by that section from the owners of the houses," in shares or proportions to be assigned, as therein provided, to each owner respectively.

As in the Public Health Act, 1890, "drain" and "sewer" are, where the context does not require otherwise, to have the same meaning as in the Act of 1875, this enactment, read with the interpretation clause of the Act of 1875, would involve a contradiction in terms, for the single private conduit carrying the drainage of two houses would be excluded from the definition of drain and fall within that of a sewer. It is therefore a case where the context does require that the word "drain" in section 19 should not receive the statutory definition. But the Legislature has not left this matter to inference, and has provided by sub-section 3 of the same section that "for the purposes of this section the expression "drain" includes a drain "used for the drainage of more than one building."

The section, therefore, seems to me to say in terms that the definition of "drain" in the Public Health Act of 1875 is not to prevent the words of the section from receiving their natural interpretation, and that for the purposes of that section, and of that section only, the definition of "drain" in the Act of 1875 shall be qualified in the manner and to the extent pointed out in sub-section 3.

I do not apprehend, therefore, that the use of the expression "private" drain connecting two or more houses with the public sewer effects any change in the ownership of the conduit which serves two houses or prevents it from being for any other purposes than those covered by section 19 a sewer and not a drain. But for the purposes of this section I cannot see why there is any difficulty in giving to the language used its natural meaning, and saying that in such a case as the present the section is directly applicable, and does so far as proceedings under section 41 of the Act of 1875 are concerned, and to that extent and in that case only, alter the incidence of the cost of executing the necessary works contemplated by that section and throw them upon the owner.

In the remarks of the Lord Chief Justice as to the meaning and application of the expression "vest" I entirely agree.

It may be asked what is the meaning of a "private drain" serving two houses, when the moment it serves two houses it becomes, so far as ownership is concerned, public property? It seems to me that the section itself shows clearly enough what is meant. The "private drain" is contrasted with the "public sewer." The public sewer is obviously meant here to indicate a sewer which serves the public generally, and has or may have an indefinite number of houses connected with it, either directly or because branch sewers came into it; whereas the "private drain," serving two or more houses, is that of which the natural use is confined to those houses, and with which other houses belonging to other owners could not be connected without the consent of the persons through whose land it runs. The provision so understood does not seem unreasonable. A drain of this character is, generally, an economical substitute for separate drains from each of the houses served by it to the public sewer. As a general rule no public use can be made of such a drain, and there does not seem any reason in the nature of things why the owners of houses so drained should, by reason of the mere fact that two or more of them use the same "private drain," escape the burden which would fall upon them if each house ran its drain direct into the public sewer.

I do not mean to say that the scheme is complete or logical. If two or more houses situated as those in the present case belonged to one owner, this section would not apply, and yet there is no reason of justice or policy which can be urged in support of such distinctive treatment. The truth is that the whole of our sanitary legislature is in a state which I hardly like to characterize in the language which naturally suggests itself, and the attempt to extract from the various details of the legislation a set of harmonious principles always underlying the specific provisions is, I am afraid, futile.

It has been suggested that section 19 might have been intended to apply to buildings and drains not existing at the time the Act was passed; but I do not think there is anything in the language to point to such an interpretation. The words are, "where two or more houses belonging to different owners are"—not "shall be"—"connected with a single private drain," and I think it was intended to the limited extent to which section 19 is confined to alter the law which existed at the date of the passing of the Act of 1890 with respect to houses and drains then existing as well as with respect to such as should thereafter be constructed.

The present case is entirely within the decision in *Self* v. *The Commissioners of Hove*. Under ordinary circumstances no more need have been said in this court. That case is an authority which we ought to follow unless and until overruled by the Court of Appeal. But I have discussed the question *de novo* out of respect to the judgment of my brothers Cave and Lawrance, JJ., in *Hill* v. *Hair*. The facts of the case make it substantially undistinguishable from the present case. It is true that it is not stated that the proceedings were those authorized by section 19 of the Act of 1890, and the notice mentioned in the report as having been given by the local

authority looks rather more like one under section 91 than one under section 41 of the Public Health Act of 1875, but no such distinction was made in the argument or the judgment, and my brother Cave expressed in very unmistakable language his opinion that the decision in *Self* v. *The Commissioners of Hove*, and especially my judgment, were wrong, not to say very wrong indeed. This expression of his opinion has led me to review the whole question with the result I have already stated.

My brother Cave thinks that it was not intended to alter the law with respect to drains, which by virtue of the general provisions of the Public Health Act, 1875, were sewers, and that not only did they remain vested in and under the control of the local authority, and generally repairable at their expense, but that the removal of nuisances arising in them could not be dealt with under section 19 of the Act of 1890, and that as a consequence the cost of such works as the present case deals with cannot be thrown upon the owner. He recognizes that section 19 of the Act of 1890 requires some subject-matter to operate upon, but thinks that such subject-matter is confined to sewers made for private profit (which under section 13 of the Act of 1875 do not vest in the local authority), and to drains or sewers used for draining premises within the same curtilage—which under section 4 fall within the description of drains. But as section 19 is confined to the case of a private drain serving two or more houses belonging to different owners—a part of the phraseology of section 19 which appears to have escaped the notice of my brother Cave—it can hardly be applicable to a drain serving premises within the same curtilage, and the class of sewers made by any person for his own profit, seems, according to the authorities, to be of a kind totally different from any that are the least likely to come within the operation of section 19 of the Act of 1890. See *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580, [1893] 2 Q. B. 135; *Minehead Local Board* v. *Luttrell*; *Acton Local Board* v. *Batten*, 28 Ch. D. 283, 33 W. R. Dig. 128; *Pinnock* v. *Waterworth*, 51 J. P. 248. If it be possible to conceive a case in which a sewer constructed by anyone for his own profit could fall within the scope of section 19, the operation of the section would be reduced to limits of the very narrowest possible kind, and I find it difficult to concur with my brother Cave in thinking that the possible existence of such a case can be an adequate reason for the legislation effected by section 19. It is to be observed that sub-section 3 of section 19, if one may judge from the reports of *Hill* v. *Hair* as given in the *Law Reports* and in the *Law Journal*, does not seem to have been successfully pressed upon my learned brother's attention.

A good deal has been said in the course of the argument about *Travis* v. *Uttley*. But it appears to me to be a case having no bearing upon the present question. I have referred to the special case filed in the court, and I find that the facts of that case were that three houses numbered respectively 109, 107, and 105 were served by one common pipe or conduit which received the drainage first of No. 109, then of No. 107, and then of No. 105. This common conduit ran into the public sewer. It was defective below 109, so that the sewage leaked into the cellars of Nos. 107 and 105. Proceedings were taken by the inspector of nuisances against the respondent, who was the owner of all the three houses under sections 91-94 of the Act of 1875, on the ground that upon his premises was this "drain"—as it was alleged to be—which was in such a state to be injurious to health. The magistrates dismissed the information on the ground that the nuisance arose not from a defective drain but from a defective sewer, and that the respondent therefore was not liable. The Divisional Court, consisting of my brother Wright and myself, upheld their decision and dismissed the appeal.

The judgment was clearly right. The place where the nuisance existed was below the junction of the drain from the second house. The plans which formed part of the case seem to me to make this perfectly clear. There is an expression in my judgment which my brother Cave and myself have very recently decided to be erroneous. I have said that "it is impossible to say that the part which is used for the drainage of one building is a drain and the rest a sewer. The drain is a sewer from end to end." In *Kershaw* v. *Taylor*, 44 W. R. 28, [1895] 2 Q. B. 471, however, the Court of Appeal decided that under such circumstances the same conduit was a drain so long as it received the drainage of one house only, but a sewer from the point where the drainage of the second house came into the conduit. The passage therefore which I have cited from my judgment in *Travis* v. *Uttley* must be considered as erroneous. It was not necessary for the judgment, and the correction does not affect the decision. The error, however, in the *obiter dictum* and the decision itself are alike foreign to the present inquiry; *Travis* v. *Uttley* had nothing to do with section 19 of the Act of 1890, and it has no bearing at all upon the present case.

Self v. *The Commissioners of Hove*, unless it is to be discarded, is a decision precisely in point with respect to the present case. For the reasons I have given I think that it was rightly decided, and as the learned Lord Chief Justice has come to the same conclusion, there is no reason for departing from the usual course of treating it as an authority to be followed.

This appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitor for appellant, *F. D. W. Hutton*, for *F. Lawson Lewis*, Eastbourne.

Solicitors for respondents, *Sharpe, Parker, Pritchards, & Barham*, for *H. W. Fovargue*, Town Clerk, Eastbourne.

House of Lords.

From C. A. (England). — May 5, 1896.

SAVOY OVERSEERS v. ART UNION OF LONDON. (a.)

Poor law—Rating—Exemption—Society instituted for the purposes of science, literature, or the fine arts—Supported by voluntary contributions—Art Union—6 & 7 Vict. c. 36, s. 1.

The Art Union of London is a society instituted for the purposes of the fine arts exclusively, but it is not a society supported by voluntary contributions within section 1 of the 6 & 7 Vict. c. 36, as the subscribers get an equivalent for their subscriptions, and consequently the society is not exempt from liability to be rated to the poor and other local rates in respect of the premises occupied by it.

Decision of the Court of Appeal (42 *W. R.* 690, [1894] 2 *Q. B.* 609) *reversed.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and Kay, L.J.; A. L. Smith, L.J., dissenting), reported 42 W. R. 690, [1894]

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

2 Q. B. 609, reversing the judgment of the Divisional Court (Wright and Collins, JJ.) on a special case stated under 12 & 13 Vict. c. 45.

The facts are given in the report in the court below, and sufficiently appear in Lord Herschell's judgment.

Sir E. Clarke, Q.C., and *Haldenstein*, for the appellants.

Sir R. Reid, Q.C., and *Bristowe*, for the respondents.

Lord HALSBURY, L.C.—The appellants in this case are the overseers of the poor and chapelwarden of the Royal Precinct of the Savoy, within which precinct the Art Union of London have premises which are rateable, unless they are exempted from such rating by virtue of 6 & 7 Vict. c. 36, s. 1, which is as follows:—"That from and after the 1st day of October, 1843, no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county borough, parochial, or other local rates or cesses in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or Lord Advocate, as hereinafter mentioned."

The question in this case depends upon a very simple alternative exposition of the sense in which the Legislature used the word "voluntary." The society is partly supported by annual contributions and the word "voluntary" must be construed in order to decide whether it is partly supported by voluntary contributions. Two conditions have been insisted on for the exemption claimed by the Art Union. One is—the exclusive devotion of its property to the purposes of art, upon which, as it appears to me, no question arises. But the other condition is that it must be wholly or in part supported by voluntary contributions.

There is no doubt that the word "voluntary" is constantly used in two different senses. It is constantly used as the antithesis of something done under compulsion; but it is also used commonly among lawyers, and not uncommonly among other people, as denoting the obtaining or giving of something without anything being obtained in return. A lawyer speaks of a voluntary conveyance as opposed to one which involves valuable consideration. It is common to hear of some institution supported by voluntary contributions. There is no doubt of the frequent use of the word "voluntary" in both these senses, and the problem to be solved is in what sense, or in which of these two senses, the Legislature has used the word in the section under consideration. It is manifest that if used in the former sense every purchase is voluntary since no one can be compelled to buy; but if in the latter sense, there are a great many institutions which the Legislature may well have intended to encourage, because, if people gave their money without receiving anything in return, towards the encouragement of objects which the Legislature approved, there would be a reason why the Legislature should exempt such institutions from rating, since they would *pro tanto* relieve the national funds from burdens which, but for such voluntary contributions, the Legislature itself might be called upon to bear, if such institutions were to exist at all. This consideration would seem to show that it is in the latter sense that the word is used, and, if so, it is fatal to the claim of the Art Union to be relieved from the burden in question. It hardly admits of debate that the Art Union gives to every subscriber full value for his money; the document published by the Art Union itself appears to establish very clearly that the subscriber obtains as an equivalent for his contribution money's worth at least equal to, if not beyond, the amount he has subscribed. I cannot, therefore, regard this as a voluntary contribution; it is a prudent and well-rewarded investment. The result is that the exemption cannot be insisted on, and I move your Lordships that the judgment of the Court of Appeal be reversed and the appeal allowed with costs.

Lord HERSCHELL.—The question raised by this appeal is, whether the respondents are exempt from liability to be rated in respect of a building occupied by them, on the ground that it belongs to a society instituted for purposes of the Fine Arts exclusively, and is occupied by it for carrying into effect its purposes, and that the society is supported wholly or in part by annual voluntary contributions.

The Divisional Court of the Queen's Bench held that the respondents were not so exempt, but this judgment was reversed by the Court of Appeal, A. L. Smith, L.J., dissenting.

It is stated by the charter that the respondent society was formed "for the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally." Whatever view may be taken of the means employed to accomplish this end, I see no reason to doubt that the society was instituted for the purposes of the fine arts exclusively within the meaning of the statute, and that these purposes have not been departed from. Upon this point the Court of Appeal was unanimous. The question which gave rise to a difference of opinion is one of greater difficulty. Is the society supported wholly or in part "by annual voluntary contributions"? These words have been the subject of much discussion, and there are many judicial *dicta* bearing upon their meaning. I proceed at once to an examination of the authorities, for if these had been uniform and consistent your lordships would have been unwilling, though not bound by them, to disturb a long settled construction of the statute. But it will be seen that this is very far from being the case.

The earliest of the authorities is the *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868. Lord Denman, C.J., in delivering the judgment of the court, said: "It is perhaps not easy to determine what the Legislature intended by the word 'voluntary' in this combination. . . . Upon consideration we think that annual contributions will satisfy the condition required if they commence of the party's own choice, are so continued, and may be withdrawn at pleasure. . . . If the contributor was free to commence his contribution and incurs no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor, unless we add something to the idea of voluntariness, which in ordinary language it does not import. And that is what, in fact, is done by those who contend that it must also be gratuitous and bring no return of any kind to the contributor." This judgment appears to me to lose sight of the fact that what has to be construed is the combination "voluntary contributions," and not merely the word "voluntary" alone, or in

some other combination. It may be that this word is ordinarily used as the antithesis to "compulsory," though in legal parlance it is quite commonly employed to describe that which is gratuitous and without consideration. But putting aside this legal acceptation of the words, I cannot think that "voluntary contributions" in the statute means the same thing as "voluntary payments," or that an institution can properly be said to be supported by voluntary contributions where these are the price paid for a purchase, whether of goods or advantages, merely because the person making the payment was under no obligation to do so.

The *Birmingham case* was followed in *R.* v. *Overseers of Manchester*, 16 Q. B. 449, the Royal Manchester Institution being held exempt from rating. In *R.* v. *Brandt*, 16 Q. B. 462, however, where it was sought to extend the exemption to a concert hall, to the concerts in which subscribers and their friends alone were admitted, Lord Campbell, C.J., said: "We look upon this institution as totally different from the Birmingham Library or the Manchester Institution, where the members, not with a view to their own gratification but to the good of others, by cultivating in them a taste for literature, science, and the fine arts, subscribe money and continue their personal trouble, and may therefore be fairly supposed to be the objects of the special favour of the Legislature at the cost of their fellow parishioners." Again, in the case of *R.* v. *Gaskell*, 16 Q. B. 472, a house belonging to the "Portico Society," containing a library and reading-room, the use of which was confined to members of the society, was on the same grounds held not exempt.

The question next arose in the case of the Russell Institution: *Russell Institution* v. *Vestry of St. Giles*, 2 W. R. 169, 3 E. & B. 416. It was held not to be a society instituted for purposes of literature exclusively, but Lord Campbell made some observations on the part of the enactment now under consideration. "It is unnecessary," he said, "to decide whether this be a society supported in part by annual voluntary contributions within the meaning of the Act. There may be ground for contending that 'contribution' here does not mean a voluntary annual subscription or payment of money for value received, or expected to be received, by the party paying, but means a gift from disinterested motives for the benefit of others." In *St. Anne's* v. *The Linnæan Society*, 2 W. R. 516, 3 E. & B. 793, a building belonging to that society was held to be within the exemption. Lord Campbell said: "The case in no way resembles the Russell Institution, where newspapers were supplied and accommodations given to the subscribers, preventing the payments from being mere voluntary contributions for the promotion of literature." It is to be noted, too, that the mere fact that the payments of the Fellows were voluntary in the sense that they might be discontinued at any time was apparently treated as unimportant, for the Chief Justice, after pointing out that though the Fellows were under an obligation to pay while they continued Fellows, the payment was still voluntary, seeing that the obligation was incurred by a voluntary engagement from which the Fellows were at liberty to withdraw, added, "though I do not say that, even if they had no longer the power to withdraw, the payment would be the less voluntary."

Whilst the building belonging to the Linnæan Society accordingly obtained the benefit of the exemption, it was held inapplicable to the buildings of the Zoological Society: *Marylebone Vestry* v. *Zoological Society*, 2 W. R. 491, 3 E. & B. 807. The decision turned mainly upon the earlier provisions of the enactment, but Lord Campbell, C.J., observed that if it had been necessary to decide the point, he should have said that the contributions were not voluntary contributions within the meaning of the Act, inasmuch as subscribers looked to the amusement which they and their families and friends would derive from their access to the gardens. And on the same point Erle, J., said: "As to the question whether the contributions are voluntary, we have expressed an opinion that contributions are not so where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects."

In the case of the Bradford Library (1 E. & E. 96), which was open only to members, the Queen's Bench followed the Birmingham case. Erle, J., said: "Although personal benefit is derived by each subscriber, that is not a personal benefit or convenience such as has been mentioned in some of the cases, which means something in the nature of that derived from an investment of money, though not absolutely a return of so much per cent.; if you, by investment, get something for which you would otherwise have to pay, for instance, the advantage of non-payment on admission to public gardens, then "the subscription is not voluntary." This does not seem to me quite consistent with the *dictum* of the same learned judge, which I have just quoted. Each member of the library did purchase a private convenience. He obtained the opportunity of reading books which he must otherwise have purchased or hired. This seems to me to be a return for the investment he made in contributing to the funds of the library. I confess I am unable to appreciate the distinction which the learned judge suggests.

Somewhat similar words came before the courts for construction in the case of the Customs and Inland Revenue Act, 1885, which exempted from the taxation thereby imposed "property acquired by or with funds voluntarily contributed." The view taken of the meaning of the words "voluntarily contributed" in the case of *In re New University Club*, 35 W. R. 774, 18 Q. B. D. 720, and by my noble friends Lords Watson and Macnaghten, in the case of the *Commissioners of Inland Revenue* v. *Forrest*, 39 W. R. 33, 15 App. Cas. 334, was in complete accordance with that more than once expressed by Lord Campbell in discussing the meaning of the expression "voluntary contributions."

The matter now comes for the first time before your lordships' house for decision. I do not think it was intended to exempt from rating, buildings belonging to a society merely because the payments by which it was wholly or in part supported were made voluntarily and not compulsorily, when they were not made gratuitously, but were the price of advantages obtained in return for them. The expression "supported by voluntary contributions" has long been well known in connection with hospitals and other institutions; I think the essential idea conveyed by them is that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by the contributor. It was pointed out by Kay, L.J., that in the case of some hospitals the contributors receive a certain number of letters of admission measured by the amount of their subscriptions. But though this may give them a voice as to the persons who are to be the objects of the charity, I think it would be unreasonable to regard the contribution as being on that account not a gratuitous charitable gift, but the purchase of a personal advantage. If, indeed, a hospital were established on co-operative principles, each contributor being entitled to claim medical treatment there, and the inmates being confined to contributors, I should say that it was not supported by "volun-

tary contributions," even though there was nothing to compel any person to become a contributor, and he might cease to be so at any time he pleased.

Applying the construction I have put upon the statute to the facts of the present case, I have come to the conclusion that the payments made by the members of the Art Union are not "voluntary contributions." Every member receives each year, in return for his subscription of a guinea, a copy of an engraving, and in addition, one chance in the annual distribution of prizes. He may purchase extra chances at half-a-guinea each. The council also present a consolation prize to members who have paid ten consecutive subscriptions without gaining any prize. This arrangement, they say, "has given great satisfaction and has avoided any disappointment on account of want of success in the annual distribution." And they point out that the engraving given to everyone is a work of the market value at least of his subscription, and that looking to the probable extinction of line engraving, members have the opportunity of acquiring invaluable artists' proofs, the value of which in a few years must rise to many times their present cost. In addition to this, attention is called by the council to the fact that the highest prize of one year, £300, with £200 added by the prizeholder, was expended on the purchase of a picture which had since been sold for upwards of £,1000.

When statements such as these are put forward by the council as an inducement to persons to join the society, I cannot but hold that the contributions of members are not "voluntary contributions" within the meaning of the Act.

I think, therefore, that the judgment appealed from should be reversed.

Lord MACNAGHTEN.—It cannot, I think, be denied that the Art Union of London is a society instituted for the purposes of the fine arts exclusively. That seems to me to be clear on consideration of its charter and byelaws and the provisions of the Art Unions Act, 1846. But it seems to me to be equally clear that the Art Union of London cannot properly be described as a society "supported wholly or in part by annual voluntary contributions." This description, which is an essential condition of immunity under the Act, has given rise to a good deal of controversy and some difference of opinion. Apart from authority, the meaning of the provision would seem to be tolerably obvious. The first observation that must, I think, occur to anyone who may be called upon to construe it is that the phrase which the Legislature has adopted is an old and familiar acquaintance. In the public streets it meets the eye not unfrequently on the walls of hospitals; it is to be found in the forefront of many charitable appeals. So used, it carries with it a meaning which nobody can mistake. It means that the institution on whose behalf the statement is put forward depends for its support on freewill offerings—on the generosity of persons acting from disinterested motives and not looking for any return in the shape of direct personal advantage. Except in the Act of 1843 the expression is not, I think, found in any other connection. Nor is it, so far as I am aware, ever used in any other sense outside the Act. It is only natural to suppose that the enactment points to contributions partaking of a similar character and made in a similar spirit. It appears to me to be almost absurd to say that a society is supported by voluntary contributions when it prides itself, as the Art Union of London openly does, on returning to every contributor the equivalent of his contributions in market value and money's worth.

Very little assistance is, I think, to be derived from the reported cases on the subject. The authorities are, I think, neither clear nor uniform. The error, if I may call it so, began with the case of *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868, in 1849. There Denman, C.J., who delivered the opinion of the Court of Queen's Bench, observes that "it is not, perhaps, easy to determine what the Legislature intended by the word 'voluntary' in this combination." Then his lordship proceeds to take the word out of its setting, and to deal with it as if it stood alone. On this the difficulty vanishes, and the conclusion is that if the contributor was free to commence his contribution and incurs no legal obligation to continue it he must be considered a voluntary contributor "unless," as his lordship says, "we add something to the idea of voluntariness, which in ordinary language it does not import." Lord Denman's view was carried still further in a later case, *Bradford Library Society* v. *Churchwardens of Bradford*, 1 E. & E. 96, where it was laid down that "a contribution paid under an obligation voluntarily incurred is a voluntary contribution." So that it seems it would not be inappropriate to describe a co-operative store, where membership is constituted by the purchase of an annual ticket, or even the ground landlord of a fashionable quarter in London, as supported in part by annual voluntary contributions. On the other hand, in order to escape from the consequence of this view, which would render the condition under consideration almost, if not altogether, unmeaning, it has been held in several cases that where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose "exclusively." This mode of construction may be admissible when the society is not incorporated, and its purpose, consequently, is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of individual members in joining it. In some cases it has been said that contributions which go to purchase some private benefit in the shape of amusement, or convenience, are not to be deemed voluntary according to the true intention of the Act. I think that is so; but then I think that this intention is only to be discovered by taking the words as they occur—in the combination in which they are placed—not by breaking up a compound expression and weighing the words separately.

I agree with the view that A. L. Smith, L.J., has expressed, and I think that the appeal must be allowed.

Lord SHAND.—In the decision of this case I think a distinction must be clearly drawn between the purpose for which the society was instituted, and the objects of those who join it and who annually subscribe to its funds. The society was, I think, instituted for the promotion of the fine arts exclusively. The question whether it has been supported wholly or in part by voluntary contributions invokes a consideration of the object and purpose which the persons who give the annual contributions have in view in becoming contributors.

Now, it seems to be quite clear that the inducement held out to contributors to join the society, and which therefore may be taken to show the objects for which the contributors become members, is that they will receive a return not in money, but in money's worth, which appears to me to be the same thing, for every contribution made. The members become, in truth, purchasers of personal property in the form of engravings, with the addition of the chance of prizes in the shape of paintings—advantages which

form an adequate return for the money subscribed. I agree with your lordships in thinking that money subscribed in this way cannot properly be regarded as "voluntary contributions." That term seems to me to imply not merely that the subscriber chooses of his own free will to make his contribution, but that he does so for the benefit of others—as in the support of a hospital or other charitable institution, or in the promotion of science, literature, or the fine arts. It is not, I think, properly applicable to what is in substance a business transaction or investment, in which the stipulation or at least the agreement is that a personal advantage, substantially of the value of the sum subscribed, is to be received in return by the contributor. I therefore concur in thinking that the judgment of the Court of Appeal should be reversed.

Order appealed from reversed, with costs here and below.

Solicitors for the appellants, *B. H. & E. Van Tromp.*

Solicitors for the respondents, *Hopgood & Dawson.*

Court of Appeal.

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — July 16, 1896.

"THE RUTLAND." (*a.*)

Ship—Pilot—Compulsory pilotage—Exemption—Ship trading from port in Great Britain to port in Europe north and east of Brest—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 625 (3).

A ship engaged on a voyage from the River Plate to Rotterdam with a general cargo had liberty to carry some cattle to London. Having landed the cattle in London, she was proceeding on her way to Rotterdam in charge of a pilot, when she came into collision with another ship within the London district. In proceedings against her for damage, the plea of compulsory pilotage was set up.

Held, that the ship was, at the time of the collision, a ship trading from a port in Great Britain within the London district to a port in Europe north and east of Brest within the meaning of section 625 (3) *of the Merchant Shipping Act,* 1894, *and that she was therefore exempt from compulsory pilotage.*

Courtney *v.* Cole, 36 *W. R.* 8, 19 *Q. B. D.* 447, *followed.*

Appeal from a judgment of Sir Francis Jeune.

The action was brought by the owners of the steamship *Edenbridge* against the owners of the steamship *Rutland* for damage by collision. The plaintiffs alleged that at the time of the collision *The Edenbridge* was, whilst on a voyage from Rosario and La Plata to Rotterdam *viâ* London laden with a general cargo, proceeding from the Thames through the East Swin Channel in charge of a duly licensed Trinity House pilot, and that the collision was caused solely by the negligent navigation of *The Rutland* by the defendants or their servants, and they claimed damages against the defendants.

The defendants denied that the collision was caused or contributed to by the negligent navigation of *The Rutland*, and alleged that it was caused solely by the negligent navigation of *The Edenbridge*, and further, by way of counter-claim, they alleged that they had suffered damage by the collision, and they claimed damages against the plaintiffs.

The plaintiffs in their reply said that, if the collision was caused or contributed to by the negligence of any person on board *The Edenbridge* (which was denied), *The Edenbridge* at the time in question was in a district where pilotage was compulsory, and was in charge of a duly licensed pilot by compulsion of law, and the negligence, if any, was that of the said pilot, and not of the plaintiffs or their servants.

The question was whether *The Edenbridge* at the time of the collision was subject to compulsory pilotage, or whether she was exempt by virtue of section 625 of the Merchant Shipping Act, 1894. By that section: "The following ships, when not carrying passengers, shall . . . be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; (that is to say) . . . (3) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man."

It appeared that *The Edenbridge* had loaded a cargo of coals at Cardiff and proceeded therewith to the River Plate, and having discharged the coals had taken on board a general cargo at Rosario for Rotterdam, with leave to carry some cattle and sheep to London. She put into the Thames for the sole purpose of landing the cattle and sheep, and having done so she proceeded on her way to Rotterdam with the same crew which she had brought from Rosario. She did not discharge any of her general cargo in London, neither did she take in anything except some bunker coals. She did not carry any passengers. The collision occurred while she was on her way out in the East Swin Channel.

Sir Francis Jeune held, on the authority of *Courtney* v. *Cole*, 36 W. R. 8, 19 Q. B. D. 447, that *The Edenbridge* was exempted from compulsory pilotage, and he found that both vessels were to blame.

The plaintiffs appealed.

Sir Walter Phillimore and *F. Laing*, for the plaintiffs.—This case is not within the exemption contained in sub-section 3 of section 625 of the Merchant Shipping Act. *The Edenbridge* was not trading from any port in Great Britain, she was trading from the River Plate. In construing this section, which speaks of ships trading between certain ports, it is necessary not only to have regard to the particular ship which is being dealt with, but also to consider whether there is a trade being carried on between the ports in question. The River Plate trade is a well-defined trade, with which business men in the City of London are quite familiar. It was on this trade that *The Edenbridge* was engaged. She was, therefore, subject to compulsory pilotage under section 622, and the defence to the counter-claim is established. The case of *Courtney* v. *Cole* is not binding on this court, and further, admitting that that case was rightly decided, the words of the Merchant Shipping Act of 1894 are different from those of the Act of 1854.

They cited *The Sutherland*, 36 W. R. 13, 12 P. D. 154; and *The Winestead*, [1895] P. 170, 43 W. R. Dig. 172.

Pyke, Q.C. (*H. S. Q. Henriques* with him), for the defendants.—This case is covered by *Courtney* v. *Cole*, which shows that *The Edenbridge* was within the exemption. According to the true construction of

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

sub-section 3 of section 625, a ship trading from one port to another means a ship going in the course of trade from the one port to the other. It is immaterial where the cargo was taken on board.

Lord ESHER, M.R.—We cannot go into the reasons which prompted this legislation, for we do not know what those reasons were. We must construe the Act as it stands. It exempts from compulsory pilotage "ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France or any port in Europe north and east of Brest." What does the word "trading" mean in this enactment? It is an epithet applied to a ship. Now, what is the trade of a ship? The trade of a ship is the carrying of goods for freight. Therefore a ship carrying goods for freight from any port in Great Britain within the London district to a port in the north of Europe is exempt from compulsory pilotage. *The Edenbridge* during this voyage was carrying on her trade—viz., the carriage of goods for freight, and it was part of her trading adventure to come into the port of London and to sail from it. I am therefore of opinion that she is within the words of the exemption, and that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The word "trading" in sub-section 3 of section 625 is descriptive of the ships which are being dealt with. I think that a trading ship is a ship carrying cargo as distinguished from a yacht, or a man-of-war, or any other ship not carrying cargo. It cannot be said that *The Edenbridge* was not a trading ship between London and Rotterdam. In *Courtney* v. *Cole* it was held that a ship "trading to a place north of Boulogne" meant a ship when so trading, and that it was not necessary that it should be constantly so trading. It seems to me that that case is not distinguishable from the present. Therefore, both on authority and also on my own view of the proper construction of the section, I think that the learned President was right.

A. L. SMITH, L.J.—I am of the same opinion. I think that the word "ships" in sub-sections 1 and 2 of section 625 means "all ships sailing," and that the words "ships trading" in sub-sections 3 and 4 mean "trading ships sailing."

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *Lowless & Co.*

From Chan. Div.
Lindley, Lopes, and Rigby, L.JJ. — June 3, 9, 1896.

PATERSON *v.* GAS LIGHT AND COKE CO. (*a.*)

Gas company—Receivers and managers—Arrears during company's occupation—"Occupier"—Incoming tenant—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 39—*Gas Light and Coke Co.'s Act*, 1872 (35 *Vict. c. cxxiii.*), *s.* 18.

By section 16 *of the Gasworks Clauses Act*, 1847, *a gas company is empowered to stop the supply of gas to a consumer who shall neglect to pay the rent due for the same.*

A mill company who had been supplied with gas by a gas company owed money for gas supplied. P. and S., having been appointed by the court receivers and managers of the mill company on behalf of the debenture-holders, applied to the gas company for a supply of gas as renters of the gas company, and undertook to pay for all gas consumed by them since the date of their appointment, but asked that the arrears might stand over to be dealt with by the liquidator of the company.

By virtue of section 18 *of the gas company's private Act of* 1872, *in case a consumer should leave the premises where gas had been supplied without payment of the sum due from him, the company should not require from the next tenant payment of the arrears, unless the incoming tenant had agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant should continue the trade or business of the outgoing tenant, and should have paid a consideration for so doing.*

Held (*reversing* Kekewich, J.), *that the rights of P. and S. as receivers and managers were merely those of custodians of the mill company's property; they were caretakers for the mill company, the owners, and stood in the same position to the gas company as the mill company; and therefore the gas company were within their rights in refusing a supply of gas until the arrears had been paid.*

In re Smith, Ex parte Mason, 41 *W. R.* 159, [1893] 1 *Q. B.* 323, *applied.*

Appeal by the defendant company from Kekewich, J.

The plaintiffs Paterson and Stephens were joint receivers and managers on behalf of mortgage debenture-holders of Marriage, Neave, & Co. (Limited), who carried on business as corn millers and flour dealers at the Albert Bridge Mills, Battersea. The first-named plaintiff was appointed by the trustees for the second debenture-holders under the powers contained in their trust deed, and entered into possession of the company's premises on the 7th of February, 1896, and carried on the business until the 17th of February, on which date he and the second-named plaintiff were, by an order of the court in an action by the first debenture-holders, appointed joint receivers and managers of the property and business of the company. Since the latter date they had been in possession, and carried on the business.

The Gas Light and Coke Co. supplied gas to the mills, and threatened to cut off the supply under the following circumstances. Marriage, Neave, & Co. were indebted to the gas company to the amount of £90 14s. 5d. for gas supplied for the quarter ending December, 1895. This amount was not paid, and on the 25th of February a final notice was left at the company's office at Battersea requiring payment, and stating that if default were made the supply would be cut off. By an oversight the receivers and managers had omitted to give notice as incoming tenants to the gas company that they required a supply of gas. But on the 26th of February the plaintiff Paterson wrote to the gas company, on behalf of himself and his co-receiver, stating that he had been in possession, on behalf of the second debenture-holders, since the 7th of February, and, as co-receiver with Stephens, the co-plaintiff, under an order of the court, since the 17th of February on behalf of the first debenture-holders, on whose behalf he and Stephens were now carrying on the business; that they desired to be supplied with gas, and to become renters of the gas company from the 7th of February, and offered to pay for all gas consumed after that date, but regretted that it was not in their power to pay the debt due from Marriage, Neave, & Co. (Limited), and asked for the matter to stand over to be dealt with by the liquidator.

On the 27th of February the defendant company wrote to the plaintiff Paterson that the supply of gas

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

would be discontinued unless they received payment of the £90 14s. 5d., or a guarantee for the payment of the account and for all gas from December, 1895. By arrangement the defendants, on payment by the plaintiffs, agreed not to cut off the gas, and to abide by any order the court might make with regard thereto.

The plaintiffs on the 5th of March issued a writ, and gave notice of motion for an injunction to restrain the gas company from cutting off the supply of gas, and on the motion being heard it was agreed that the motion should be treated as the trial of the action.

By section 16 of the Gasworks Clauses Act, 1847, "If any person supplied with gas by virtue of this or the special Act neglect to pay the rent due for the same to the undertakers, the undertakers may stop the gas from entering the premises of such person by cutting off the service pipe, or by such means as the undertakers shall think fit."

Section 11 of the Gasworks Clauses Act, 1871, provides that "the undertakers shall, upon being required so to do by the owner or occupier of any premises, . . . give, and continue to give, a supply of gas to such premises, . . . subject to the conditions following. . . . Every owner or occupier of premises requiring a supply of gas shall—serve a notice upon the undertakers at their office, specifying the premises in respect of which such supply is required, and the day (not being an earlier day than a reasonable time after the date of the service of such notice) upon which such supply is required to commence; enter into a written contract with the undertakers (if required by them so to do) to continue to receive and pay for a supply of gas for a period of at least two years, &c. . . . Provided always that the undertakers may, after they have given a supply of gas for any premises, by notice in writing, require the owner or occupier of such premises, within seven days after the date of the service of such notice, to give to them security for the payment of all moneys which may from time to time become due to them in respect of such supply, . . . and if any such owner or occupier fails to comply with the terms of such notice, the undertakers may, if they please, discontinue to supply such gas for such premises so long as such failure continues."

Section 18 of the Gas Light and Coke Co.'s Act, 1872, is as follows: "In case any consumer leave the premises where gas was supplied to him without paying to the company the rate or meter rent due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant shall continue the trade or business of the outgoing tenant, and shall have paid to the owner, lessee, or mortgagee in possession, or to the outgoing tenant of such premises, a consideration for so doing; but the company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this Act, on being required by him so to do."

Kekewich, J., held that the receivers and managers were new occupiers, and as such entitled to a supply of gas. Further, they were not liable, under the exception in section 18 of the company's private Act of 1872, as incoming tenants continuing the business of the outgoing tenants, and as having paid consideration to them for so doing.

The gas company appealed.

Warrington, Q.C., and *Danckwerts*, for the appellants.—The occupation of the company continued, notwithstanding the appointment of a receiver. An action of trespass must be brought in the name of the company, and not in the name of the receiver. Nothing has happened in this case to prevent our resorting to the express provisions of the Gasworks Clauses Act, 1847, and stopping the supply. Receivers are in no sense incoming tenants; consequently there is no new occupation: *In re Smith, Ex parte Mason*, 41 W. R. 159, [1893] 1 Q. B. 323. Their position is analogous to that of the official receiver in bankruptcy; he is simply an officer appointed by the court to receive the debtor's assets. The appointment of a receiver does not divest the property though it may change the possession: see *Rhodes* v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548; *Corporation of Bacup* v. *Smith*, 38 W. R. 697, 44 Ch. D. 395; *Gaskell* v. *Gosling*, [1896] 1 Q. B. 669, 44 W. R. Dig. 132.

Renshaw, Q.C., and *Kirby*, for the respondents.—A receiver appointed by the court may be an agent or a trustee, but he is not an incoming tenant; he is either an owner or an occupier: *Owen* v. *Cronk*, 43 W. R. Dig. 147, [1895] 1 Q. B. 265; *Burt* v. *Bull*, 43 W. R. 180, [1895] 1 Q. B. 276. In *Corporation of Bacup* v. *Smith* Chitty, J., considered whether a receiver was an "owner" within the meaning of the Public Health Act, 1875.

Warrington, Q.C., in reply, referred to *Chinnery* v. *Evans*, 11 H. L. Cas. 115.

Cur. adv. vult.

June 9.—LINDLEY, L.J., after stating the facts, said:—It is important to observe that the £90 14s. 5d. became due from the mill company whilst the debenture-holders' security was a floating security. It is also important to bear in mind that the gas never was in fact cut off. No new or fresh supply was wanted, no pipes had to be laid down, no meter had to be provided. What the plaintiffs wanted was simply that the defendants should allow gas to come as usual, and not prevent it from so doing. The defendants were quite willing to do this if the plaintiffs would pay or undertake to pay the £90 14s. 5d. The plaintiffs would not do this. But there was no other dispute between the parties.

The question between them turns on the true construction of a number of sections contained in three public and three private Acts of Parliament. It is quite sufficient to say they begin in 1847 and end in 1872, and they were discussed with great care in court during the argument. The examination of these by counsel in court and a perusal of them since shows that there are two series of sections which require attention. The first series is that which entitles owners or occupiers generally to require a supply of gas. This series, however, although it has to be considered, is not that which really governs the decision in this case. This series consists of sections 14 and 15 of the public Act of 1860, sections 12 to 14 of the private Act of 1870, and section 11 of the public Act of 1871. The other series is that which entitles the gas company to refuse to continue to supply gas to places to which gas has been supplied but not paid for. This series begins with section 16 of the public Act of 1847, and ends with section 18 of the company's private Act of 1872. The intermediate sections are section 15 of the company's private Act of 1870 and section 39 of the public Act of 1871; but these may be disregarded, for they are repeated with some additions in section 18 of the company's private Act of 1872, and they add nothing to what is thereby enacted.

The only sections which really govern the question which has to be decided are section 16 of the public Act of 1847 and section 18 of the company's private Act of 1872. It is plain from the language of these

two sections (1) that the gas company is entitled to refuse to supply gas to the mill company unless and until the £90 14s. 5d. due from it is paid; (2) that until that sum is paid the gas company is entitled to refuse to supply gas to the mill at the request of any one unless he is in some better position than the mill company—in other words, unless he is entitled under section 18 of the special Act, to have gas supplied to the mill without complying with the condition which the gas company is entitled to impose on the mill company.

Are, then, the receivers appointed by the court at the instance of the debenture-holders in a better position in this respect than the mill company? I am of opinion that they are not. The right of the gas company to refuse to supply gas to the mill company unless they paid the £90 14s. 5d. had accrued before any receiver was appointed, although the notice that such right would be enforced was not given until afterwards. The receiver appointed by the trustees on the 6th of February was clearly in no better position in this respect than the mill company. The receivers appointed by the court on the 17th of February are not technically appointed under the terms of the debenture trust deed, and are not in all respects in the same position as receivers appointed by the trustees themselves. At the same time the receivers appointed by the court are appointed for the benefit of the debenture-holders, and, having regard to the nature of their security and to the obligation imposed by statute on the gas company to continue to supply gas to the mill, it would, in my opinion, be very unjust if the debenture-holders could enforce this obligation against the gas company without complying with the condition of paying for the gas supplied to the mill company whilst the debenture-holders permitted the mill company to carry on its business. The plaintiffs, being receivers and managers appointed by the court, were lawfully in possession of the mill and were entitled (with the leave of the court) to use the name of the mill company for any purpose which might be necessary to enable them to discharge their duties. The plaintiffs clearly could, by using the name of the mill company, require gas to be supplied to the mill after their appointment, upon payment of the sum due to the gas company for gas supplied to the mill previously to their appointment.

It was strenuously contended that the plaintiffs could simply as occupiers of the mill have required gas to be supplied to it without requiring such supply in the name of the mill company, and this view was adopted by Kekewich, J. But the term "occupier" is ambiguous. In one sense a caretaker is an occupier, but in another sense his occupation is that of some other person. But further, the sections relied upon as entitling the plaintiffs to require a supply simply as occupiers, contain nothing which negatives the right of the gas company to withhold such supply until payment of the sum due for gas previously supplied to the mill company. The two sets of sections must be read together. The general right of an owner or occupier to require a supply is limited by the right of the gas company to refuse a supply in certain specified cases.

We are thus brought back to section 18 of the private Act of 1872. This section, although badly worded, has, in my opinion, no application to such a case as that before us. It does not apply to persons simply put in possession of the premises of a defaulting consumer to manage his business for the benefit of his creditors and of himself. The statute contemplates and provides for a change of possession of a very different nature; and its language is quite inappropriate to cover such a case as this. The plaintiffs' rights as receivers and managers were merely those of custodians of the mill company's property. The relation of the mill company to the plaintiffs was not the relation of outgoing and incoming tenant, nor of vendor and purchaser, but that of owner and caretaker; and the relation of the plaintiffs to the gas company was the same. The position of the plaintiffs towards the gas company is precisely similar to that of the official receiver in *In re Smith, Ex parte Mason*. It is true that *Smith's case* turned on the public gas Acts only, but section 18 of the private Act, 1872, is not more favourable to the plaintiffs than section 39 of the public Act of 1871, which was the governing enactment in *Smith's case*. There the official receiver took possession of the debtor's business premises, but the learned judge held that he was not entitled to a future supply without paying the amount due from the debtor for gas supplied before the receiver was appointed. This decision appears to me to have been correct, for the official receiver was only an "occupier" in the sense of a caretaker. This view of the case renders it unnecessary to consider some subordinate points which would only arise if the plaintiffs were right in their main contention. The appeal must be allowed, and judgment must be entered for the defendants, with costs here and below.

LOPES, L.J.—The decision of this question appears to me to depend upon section 16 of the public Act of 1847 and section 18 of the company's private Act of 1872. There can be no doubt that the defendant company are entitled to refuse to supply gas to any consumer until any arrears are paid. Under section 16 of the Act of 1847 the defendant company therefore were justified in refusing to supply gas to the mill company after Christmas, 1895, until the arrears up to Christmas were paid, unless the plaintiffs can bring their case within the provisions of section 18 of the private Act.

It is said that the plaintiffs were new occupiers, and bring themselves within section 18 of the private Act. I think not. In my judgment there has been no change of possession. The plaintiffs are mere custodians placed on the premises by the order of the court. They are mere caretakers of the property of the company. *Smith's case* is in point, and in principle is undistinguishable from this case. I am of opinion, therefore, that the appeal should be allowed.

RIGBY, L.J.—I am of the same opinion. In my judgment the whole question has to be determined upon two sections that have been referred to—section 16 of the public Act of 1847, and section 18 of the company's private Act of 1872; and that being the case I do not feel myself bound to express any opinion as to what would be the position of a receiver appointed by the court if he were not within these two sections—or rather, I ought to say, within section 16, and not in any way saved from the operation of section 16 by section 18 of the Act of 1872. I should have considerable difficulty in holding that a receiver appointed by the court had not, independently of those sections, a right as occupier to demand a supply of gas; and, so far as my opinion goes, if the case should ever arise independently of these sections, I wish it to be understood that I express no opinion whatever.

Now, coming to those sections one thing is plain—namely, that there has been no change of ownership in this case as distinguished from a change of possession or occupation. Therefore I come to the conclusion that the case is within the letter and within the meaning of section 16 of the public Act, which is incorporated with the company's private Acts. Marriage, Neave, & Co. were supplied with gas. They neglected to pay the rent due, and section 16 of the Act of 1847 provides that under such circum-

stances the undertakers may stop the gas from entering the premises of such person, and there is no provision that that person shall remain in possession. These are the premises of a limited company, and so in terms the Act applies. Looking at section 18 of the Act of 1872 I think there may be derived that which will aid us in coming to the conclusion at which we arrive. It is a very curious section. On the face of it it is difficult to treat it as altogether exhaustive of the subject, and I understand it was not intended to exhaust the subject in cases where the consumer leaves the premises where the gas was supplied to him, without paying to the company the rate or meter rent due from him. I will assume now that the mill company had within the meaning of that section left the premises, which is not absolutely clear. I will assume that, for the purposes of this particular case, "the company shall not require from the next tenant of the premises payment of the arrears so left unpaid." That is the main provision, with certain exceptions. I gather from that, that they are to have a right to require payment from the incoming tenant in the cases that are provided for by the words of that section; and as correlative to that right they are to have the duty of supplying the incoming tenant as required by this Act on being requested by him to do so. That is not the position of things here, because it would appear that they do not fall within the excepted cases. What are the excepted cases? The first is, "Unless the incoming tenant shall have agreed with the defaulting consumer to pay the arrears." An agreement of that sort would be one that would not give independently of statute a right to the gas company to require from the incoming tenant the payment, although he had agreed with the outgoing tenant to make it. But I read the section as giving them that right. If there has been an agreement with the incoming tenant to pay the outgoing tenant's arrears, the statute (as I read it) gives the gas company a right directly against the incoming tenant without having recourse to the outgoing tenant at all. The next exception in point, is a new one, which, so far as I know, has never been dealt with in any way before by the court. It is "or unless the incoming tenant shall continue the trade or business of the outgoing tenant." Now, if it had stopped there it is plain that the receivers appointed by the court are continuing the business of the outgoing tenant; and I think I see plainly that the intention of the Legislature, so far as it provided for the case at all, was this, that the supply of gas for the trade or business was to be treated, under the circumstances provided for, as being a something done, not for the personal benefit only of the outgoing tenant, but for the purposes of the business which was taken up and carried on by the incoming tenant. But there are cases in which it will be altogether unjust to charge an incoming tenant for taking up the trade or business. He may have no legal position at all in doing so, and therefore there is added the additional requirement that that incoming tenant shall have paid for it—not necessarily to the outgoing tenant, but either to the outgoing tenant or the owner, lessee, or mortgagee in possession; that, in fact, he shall have acquired the benefit of the trade or business for valuable consideration, and in that case I conceive that section 18 makes him on very reasonable grounds liable to the company to pay for the arrears of gas supplied to the business as well as for the continuing supply, at the same time entitling him under ordinary terms to such a continuing supply. It is clear that these receivers and managers, whether they are occupiers or not, are not persons who have paid anybody for continuing to carry on that trade or business, and yet they are carrying on the trade or business, and the Legislature does recognize, for the purposes of the 18th section, that such a carrying on in the cases provided for is equitably followed by a liability on the part of the incoming tenant carrying on the trade or business to pay for it as though it were a liability of that business which he has in that way purchased, entitling him also to get a continuation of the supply. Now, the case being in that position, how are we to deal with it? We cannot say that it is by implication included under the principle of the 18th section, because that clause is too carefully guarded to allow of such an implication. My conclusion is that it was not intended to interfere; and that there was an intermediate state of things in which they were left to the remedy given by section 16 of the Act of 1847. The remedy was to stop the supply without acquiring a right to sue the incoming tenant; but treating these sections, as I think it is right to treat them, as an independent bundle of sections reduced now to two, practically, for the protection of the gas company, I do not see that their remedy under section 16 of the Act of 1847 is taken away. I conclude, therefore, that they had an intermediate right to stop the supply, and that no right which the receiver appointed by the court might have (as to which I propose to say nothing at all) under clause 11 of the Act of 1871, or any other clause that exists as to "occupier," is intended to interfere with that. I think, therefore, the gas company were right in their contention, limited as it is to saying, "We will cut off the supply, and you have no right to interfere with what the Legislature has given us as a remedy so far as it goes; we are not bound to supply you as long as the difficulty exists, you may get rid of it if you please by paying the amount, and of course, then we shall be in the same position with regard to you as we are now with regard to all other consumers." They have never refused to continue the supply on the terms that would be open to any occupier. They have not challenged, in fact, the position of the receivers appointed by the court as occupiers or consumers, or whatever you call them. They only say "You have not got out of the provisions of the general Act which have not been varied except as we find them here, but you have gone on and acted under the provisions in favour of other consumers and occupiers, and therefore you are bound by that."

Appeal allowed.

Solicitors, *Bedford, Monier-Williams, & Robinson*; *Grundy, Kershaw, Saxon, Samson, & Co.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — July 28, 30, 1896.

In re MARRIAGE, NEAVE, & CO. (LIMITED). (*a.*)

Poor law—Rating—Arrears—Right of distress—Change of occupation—Receivers and managers appointed by the court—No order for delivery of possession of premises—Poor Law Act (43 *Eliz.* c. 2), *s.* 2—*Metropolis Management Act*, 1855 (18 & 19 *Vict.* c. 120), *s.* 161—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict.* c. 41), *s.* 16.

The appointment of receivers and managers of the business of a company by an order which does not direct the company to deliver up to them the possession of its premises does not produce a change of occupation within

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

the meaning of section 16 *of the Poor Rate Assessment and Collection Act*, 1869; *nor does the existence of an equitable charge protect the goods subject thereto from a distress for rates. Leave will, therefore, in such a case, be given to the overseers to distrain for rates in arrear upon goods on the premises.*

Richards *v.* Overseers of Kidderminster, 44 *W. R.* 505, [1896] 2 *Ch.* 212, *discussed.*

Appeal by the overseers of the parish of St. Mary, Battersea, from the decision of Kekewich, J.

The above-named company carried on business at certain mills in the appellants' parish. The company had issued debentures secured, under a deed of trust, by way of a floating charge on all property of the company other than the company's interest in the said mills. On the 17th of February, 1896, an order was made by the court, in an action brought by the debenture-holders, appointing receivers and managers of the business of the company, but the order did not direct the company to give up possession of the mills to the receivers and managers, who, however, entered on the premises for the purpose of managing and carrying on the business. On the 21st of February, 1896, the company were served by the overseers with a justices' summons for the payment of rates made in advance for the half-year ending the 25th of March, 1896, in respect of the said mills, and on the hearing of the summons the usual distress warrant was issued. On the 10th of March, 1896, the overseers applied by way of summons for liberty to distrain upon the goods of the company notwithstanding the appointment of the receivers and managers.

Kekewich, J., held that the order of the 17th of February had caused a change in the occupation of the mills from the company to the receivers and managers, and that the goods upon the premises were not liable to be distrained upon for the full amount of the half-year's rates.

The overseers appealed.

Warrington, Q.C., and *Lyttelton Chubb*, for the appellants, referred to *Paterson* v. *Gas Light and Coke Co.*, *ante*, p. 39; 43 Eliz. c. 2, s. 2 (section 3 in Chitty's Statutes); the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 161; the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), ss. 16, 20; *In re Smith, Ex parte Mason*, 41 W. R. 159, [1893] 1 Q. B. 323; and the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), s. 14. [LOPES, L.J., referred to *Richards* v. *Overseers of Kidderminster*, 44 W. R. 505, [1896] 2 Ch. 212.]

Levitt, Q.C., and *A. R. Kirby*, for the respondents, the debenture-holders, relied upon *Richards* v. *Overseers of Kidderminster*, and *In re Opera (Limited)*, 39 W. R. 795, [1891] 3 Ch. 260; *Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; and *Stevens* v. *Evans and Others*, 1 Wm. Blackstone 284.

Warrington, Q.C., in reply.—The decision in *Stevens* v. *Evans* did not depend merely on an equitable change, for there was a change in the legal ownership. He also referred to the form of a writ of *fi. fa.* in Annual Practice, 1896, vol. ii., p. 88.

July 30.—LINDLEY, L.J.—Now that the case has been argued out, I do not think there is really any difficulty in it. The first part of the case turns upon the question, whether there has been such a change of occupation in these premises as to bring into operation section 16 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41). I address myself first to that question. The facts are these: On the 17th of February, 1896, Messrs. Paterson & Stephens were appointed by the court receivers and managers in an action instituted by debenture-holders against Marriage, Neave, & Co. (Limited). When you look at the order appointing them receivers you do not find—and that admission is very important—any direction for delivery up of possession to them. There is nothing in the order about that. When you come to look at the facts you do not find that they have taken possession of the land in any sense at all. They have gone on the property for the purpose of receiving and managing the income and business of the company, not doing anything to change the ostensible possession of the land; and the possession—the occupation—has not been changed at all. Mr. Levett argued that, inasmuch as corporations could only keep possession by their servants, the appointment of receivers in this way was quite enough to put them out of possession. But corporations can possess in the same way as individuals; and the mere fact that receivers have been appointed by an order like this, which does not order the delivery up of possession, does not dispossess the company. I do not think, therefore, that such a change of possession is made out as is requisite to bring into operation section 16 of the Poor Rate Assessment and Collection Act, 1869. [The Lord Justice read the section and continued:—] The old "occupier" certainly was Marriage, Neave, & Co., who were also "assessed in the rate." The overseers have not "entered in the rate book the name of" any person as "succeeding or coming into the occupation," nor in my judgment is it necessary for them to do it. The real truth is that the company were and are still in occupation. They cannot interfere with the receiver, of course, and he is there as a manager of their business; but though he has a limited right to discharge the servants of the company, he has no right that I know of to do so contrary to a contract made by the company. It is a mistake to suppose that because the receivers can dismiss servants therefore they oust the company from possession. They are simply receivers and managers instead of the company. If you look to the legal possession, that remains just where it was.

That difficulty having been got over, we must look a little further. It is said that under the provisions of the Acts, this rate can be distrained for only upon the person assessed—that is, the offender. I agree that the offender here was the company, and that the only goods which can be taken are the goods of the company. Therefore what we have to ascertain is, Are there any goods of the company on these premises which are liable to distress? It is said there are not; first of all because the goods on the premises belong to the trustees for the debenture-holders. That turns on the true construction of the trust deed, and when you look at the trust deed you find that the goods of the company are expressly excepted, not by way of precaution only and by reference to the Bills of Sale Act, but in language which is perfectly unmistakable. These goods were therefore never the goods of the trustees for the debenture-holders, but, so far as that argument goes, remain the goods of the company. The next point is that the debentures appear to be expressed in language so large as to include the goods of the company. But when you look at the debentures it is plain that their only effect is to give an equitable charge on those goods, and no right even to take possession of them or to appoint a receiver, but only the right to institute an action to get a receiver appointed by the court. The goods, therefore, are not the property of the debenture-holders in any sense whatever. They are the goods of the company, subject only to an equitable charge.

Let us now go back and see what the rights of the overseers are. The rights of the overseers, under the statute of Elizabeth, and under the warrant which they have obtained, are to distrain for these rates

upon the goods of the offender, which goods, we find, are subject to an equitable charge. Mr. Levett started the point, which was new to all of us, that if there was an equitable charge you could not distrain upon the goods at all. I agree that the power of distraining under the statute of Elizabeth is not like a landlord's power of distress. We all know the difference. A landlord can take any goods, no matter whose, which are brought on the premises, while the overseers' power of distraining is much more restricted. But it is a strong thing to say that the existence of an equitable charge prevented the overseers from recovering the rates. Their duty, as was pointed out by Mr. Warrington, is to seize the goods of the company—that, therefore, they can plainly do—and to sell the goods of the company—that they can plainly do—therefore you get rid of all equitable charges up to that point. About the money due to the equitable mortgagee, the statute and the distress warrant show that the bailiff has nothing to do with that. It is in accordance with what everybody understood, that rates should have priority over equitable mortgages and everything else. I do not see anything in the Acts about Queen's taxes. But, as Mr. Warrington pointed out, it is the duty of the bailiff to pay the rate out of the offender's goods, and to hand the balance to the owner; and that does give priority over all other charges. There is no action for these rates; and there is sense in that being the legislation on that subject, for when you come to giving rights of action questions of priority at once arise. I think the appeal must be allowed, and the overseers must be at liberty to distrain on the goods of the company.

LOPES, L.J.—I am of the same opinion. The first point arises out of section 16 of the Act of 1869. It is said that in this case, a receiver having been appointed, there was a change in the occupation. Directly the order is looked at it is plain that view cannot be maintained. When that order is looked at we find nothing in it that directs the possession of the premises to be given up to the receiver. What the receiver is to do is simply to go there and manage the company's business. The possession remains in the company precisely in the same way as it did before. The company continues to keep possession of the premises; and when that is so there is no change of occupation as contemplated by section 16. Something was said about a corporation keeping possession. It was said they keep it by their servants, and that this occupation was at an end because the receiver had powers of discharging the servants of the company, and various other powers. In my opinion the receiver has no power at all to discharge any servant employed under contract—I mean any contract by which the company has agreed to be bound for any definite period. The company, and the company only, can discharge the servants who are doing service under such a contract.

Then the question arises with regard to what goods can be seized. From the Act of Elizabeth it appears that the only goods which can be seized are the goods of "the offender"—in this case the company. Then it is said that the goods in question are not the goods of the company, because they passed under a certain trust deed to the trustees for the debenture-holders. But when that trust deed is looked at we see that these goods are expressly excepted, and do not pass by it at all. They cannot, therefore, be said to belong to the debenture-holders. But it is said that, the goods being undoubtedly subject to an equitable charge created by the debentures, no distress for rates could be issued against them. That argument took me a good deal by surprise. I have had a good deal of experience in regard to enforcing payment of rates, and I never heard of that point being raised before. The law on the subject, I think, really comes to this. There is a preferential charge in favour of rates. The rates are to be paid in preference to anything like an equitable charge. That is why there is a power to distrain for rates, while no action can be brought to recover them.

I think all the points made on behalf of the respondents fail, and the appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. The affairs of this company, Marriage, Neave, & Co. (Limited), have given rise to two questions somewhat of the same sort of nature, one of which was decided in *Paterson* v. *Gas Light and Coke Co.* That decision, however, had nothing at all to do with the present case. It was a decision on particular sections of the Gas Companies Acts. We arrived at the conclusion that that case was within the general words of the section enabling the gas company to cut off the supply of gas, and not within a clause introducing the exceptions to the general power. In that case identically the same persons were receivers under the same circumstances; but I do not think we decided anything there which covers the present case, because here we have other Acts of Parliament to construe. It is only where there is a change of occupation that section 16 has any operation. I do not think I have anything to add to show that there has been no change of occupation under that section. To say that because a receiver and manager has been appointed the company has *primâ facie* ceased to have possession is, I think, to say that which is not even plausible. Those receivers, for anything I can see, might have done all their duties without ever seeing this property at all. They were to carry on the business; but they might have done that by directing the manager under them to come and take instructions from them. That it is said that the servants of the company became their servants. The servants became liable to obey their orders, because a competent power has appointed them managers of the business, and it may be that the servants, if they do not choose to obey the receivers' orders, will have to go. So the receivers may re-engage the servants; but to say that the servants become the receivers' servants, or that the receivers become liable to pay the salaries or to fulfil any other contract of the company, is a doctrine that cannot be established, at any rate in the way it has been advanced before us. They are receivers and managers, that is all. It may very well happen that as such managers, and for the purposes of such management, the court may direct that they should be put into possession of the premises; and if so it may be that they become the occupiers within section 16. But in this case no such order has been made, no such idea has occurred to anyone. The occupation of the company has not been interfered with, and therefore section 16 does not apply. If that is so, we must go back to the Act of Elizabeth to know what can be done. Clearly the distress there authorized is distress of the goods of the offenders. Marriage, Neave, & Co. (Limited) were the persons assessed to the payment of this particular half-year's rate, and they are the offenders because they did not pay it. Therefore, a question arises as to certain goods, which admittedly are on the premises. It is said that those goods are not the goods of Marriage, Neave, & Co. I have nothing more to say about the construction of that trust deed, which to my mind did not carry the goods and chattels. But a charge on the goods is given by the debentures themselves: does that prevent the goods being the goods of Marriage, Neave, & Co.? Let us, in considering the

question, put aside the Bills of Sale Acts, and carry our minds back to a time before 1854, when there was no Bills of Sale Act. Can it be said that because a man wrote on a piece of paper the words, "I charge my household furniture with the payment of £5," or even "with the payment of 5s.," he thereby practically secured himself from the payment of rates? That would be an easy way of getting quit of the liability, if it could be done; and the argument requires us to go as far as that. The authorities are quite the other way. The bailiff must deal with the goods of the offender as and when he finds them, and must distrain and sell them. If and when he has paid the rates the balance may have to be handed over to the equitable mortgagee, or it may not; but the bailiff's first duty, in relation to the balance, is to pay it to the owner.

A case of *Richards* v. *Overseers of Kidderminster* was cited to us, and it was said that North, J., there held that there had been a change of occupation. But that case is absolutely different from this. The terms of the deed in that case may be somewhat similar. But the deed in this case has nothing to do with the point. North, J., decided that case upon the terms of the deed before him, and upon the particular circumstances of that case. I see no reason why what had happened there should not be a change of occupation. No doubt, in the judgment in that case there are some words which imply that the case of a distress under these statutes falls within the same principle as the case of execution. I do not know whether that question was argued before North, J. So far as appears from the report, it was not necessary for the purposes of that case to decide that question. If North, J.'s, judgment is to be treated as a considered judgment with reference to the possession of the overseers and their right to distrain under these Acts, I must say I think that conclusion cannot be supported.

The result is that the appeal must be allowed.

Appeal allowed.

Solicitors, *W. W. Young & Son; Grundy, Kershaw, Saxon, Samson, & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } July 17, 24, 1896.

ERNEST v. THE LOMA GOLD MINES (LIMITED). (a.)

Company—Meeting of shareholders—Special resolution—Proxies—Mode of taking votes—Voluntary winding up.

At a meeting of the shareholders of a company, the articles of which provided that every motion submitted to a general meeting should be decided, in the first instance, by a majority to be ascertained by a show of hands; that every member should have one vote for every share he should hold in the company; and that votes might be given either personally or by proxy—the chairman of the meeting refused to count proxies on taking votes by show of hands.

Held, that the chairman was right in so refusing.

In re Bidwell Brothers, 41 *W. R.* 363, [1893] 1 *Ch.* 603, *disapproved.*

Under certain circumstances proxy forms, the dates of which were filled in after signature, might be valid within section 80 *of the Stamp Act,* 1891.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Motion.

This was a motion by the plaintiff, a shareholder of the defendant company, for an interim injunction to restrain the company from carrying out a special resolution, passed by an extraordinary general meeting of the company on the 3rd of June, 1896, and confirmed by another meeting on the 1st of July, 1896, for the voluntary liquidation and reconstruction of the company.

By article 60 of the defendant company's articles it was *inter alia* provided that "at any general meeting every motion made and submitted shall be decided in the first instance by a majority in number of the members to be ascertained by a show of hands"; by article 62, that "Every member shall have one vote for every share which he shall hold in the company"; and by article 66, that "Votes may be given either personally or by proxy."

The plaintiff attended the meeting of the 3rd of June, and held 431 proxies representing 102,000 shares, which were duly lodged with the defendant company.

Upon the chairman's putting the resolution to the meeting, on a show of hands twelve shareholders voted for it and the plaintiff and one other shareholder against it. The plaintiff stated that he had claimed at the meeting to vote on behalf of himself and the proxies which he held, but the chairman ruled against his claim and declared the resolution carried. The plaintiff then demanded a poll. The chairman refused the demand on the ground that it was not supported by the requisite number of shareholders present at the meeting either according to the articles of the company in that behalf or according to section 51 of the Companies Act, 1862. The plaintiff contended in support of his motion that the chairman, on the show of hands, ought to have taken notice of proxies and that every member present by proxy was entitled to one vote upon a show of hands, and relied on the decision to that effect of Vaughan Williams, J., in *In re Bidwell Brothers*, 41 W. R. 363, [1893] 1 Ch. 603. It further appeared that upon the resolution being carried at the meeting of the 1st of July a poll was demanded and the plaintiff was appointed a scrutineer. The plaintiff took the objection that a number of proxy forms as received by the secretary of the company on behalf of the resolution had the date of the meeting left in blank and that such date had been filled in by a person other than the person giving such proxy after the proxy had been lodged. The plaintiff contended that such omission of date avoided the proxy paper within section 80 of the Stamp Act, 1891. It appeared that the secretary of the company had sent to the members of the company notice of the intention to hold the confirmatory meeting and specifying the date of the meeting and setting forth the special resolution. Accompanying the notice there was also a circular, signed by the secretary and emanating from the chairman and other directors, with a form of proxy to be returned, and giving reasons why the proxies should be sent as requested by the directors. The form enclosed was regular with the exception that it omitted to state the day and hour of the meeting. The secretary having discovered this omission, sent out a postcard to each member mentioning the omission requesting them to fill up the blank and stating that, unless they dissented, he would fill in the date. The chairman, however, for the purposes of the poll, admitted the proxies completed by the secretary, and had declared the confirmatory resolution carried.

Ashton Cross, for the plaintiff.—The votes of the proxies ought to have been taken by the chairman on a show of hands. *In re Bidwell Brothers* is a clear

authority for the plaintiff. Unless the votes of proxies can be thus taken, it might in some cases be impossible to get the view of the real majority of the members to pass a special resolution in accordance with section 51 of the Companies Act, 1862, as there might not be enough members of one mind present to demand a poll. As to the second point, section 80 of the Stamp Act requires the proxy to be complete at the time of signature. If this section be not complied with the proxy is void.

E. W. Stock, for the defendant company, relied on the decision of Kay, J., in *In re Caloric Engine & Siren Fog Signals Co. (Limited)*, 52 L. T. N. S. 846, and of Jessel, M.R., in *In re Horbury Bridge Co.*, 27 W. R. 433, 11 Ch. D. 109, and referred to Palmer's Company Precedents, 6th ed., i., pp. 338 and 525.

CHITTY, J.—The chairman on the show of hands did not in fact count the proxies. The articles provide, by article 60, that "at any general meeting every motion made and submitted shall be decided in the first instance by a majority in number of the members, to be ascertained by a show of hands, . . . unless a poll is demanded by at least three members holding at least one-tenth of the shares of the company. . . ." If a poll is demanded, then by article 61 "it shall be taken in such manner and form as the chairman shall direct." By article 66 "votes may be given either personally or by proxy." That article does not say that votes may be taken by proxy on a show of hands. I have never seen such an article. There are two well-known modes of voting in this country—by show of hands and a poll. The essence of voting by show of hands is that hands on each side are held up, and one is counted against the other; it is the eye that is called upon to decide. If the proxies are to be counted on a show of hands, what is the chairman to do? If he is told that there are proxies, he must call for another show of hands for the proxies, he may have to call for more, one man may hold one proxy, another ten, and so on, and the chairman will have to call for shows of hands until he has exhausted all. He must do more, he must call for the proxies, he must identify the members who hold the proxies, and must examine the proxies. I am told that unless this method of counting proxies be allowed, the wishes of members voting by proxy will have no effect given to them. But a poll could be demanded as here, by three members, if holding one-tenth of the shares of the company. The proxies come in when the poll is demanded. I think it is a fallacy to say that the person who had given the proxy would be disabled from voting, unless his proxy were counted on a show of hands. These reasons lead me to think that the chairman was right. I think he adopted the course which the reasoning of Sir George Jessel in *In re Horbury Bridge Co.* would lead him to take. I also think that course is supported by the decision of Kay, J., in *In re Caloric, &c., Co.* I have been furnished with a copy of the articles of the company in the latter case, and they contain a provision that votes may be given personally or by proxy. Kay, J.'s, decision seems clear; against that decision is that of Vaughan Williams, J., in *In re Bidwell Brothers*. It is unnecessary for me to state that I treat any decision of Vaughan Williams, J., with the greatest respect, but I am bound in this conflict of authorities to state my opinion on this subject, and I reluctantly hold that the decision in *In re Bidwell Brothers* is inconsistent with the former decisions, and cannot be supported. Vaughan Williams, J., might have decided otherwise had he had an opportunity of seeing the articles in the *Caloric Co. case*.

A point was made for the plaintiff that by section 51 of the Companies Act, 1862, a chairman is compelled to count proxies in taking votes by show of hands. [His lordship read the section.] But the provisions of this section have nothing to do with the particular mode of voting, that is left to the general law. I think it would be not only inconvenient but almost impracticable to count proxies on taking votes by show of hands. This is the view expressed by the learned author in Palmer's Company Precedents, 6th ed., i., p. 338.

I decline to grant this injunction, and as the point may well be worthy of consideration elsewhere, the motion is dismissed with costs, to be paid by the plaintiff.

With regard to the objection taken on behalf of the plaintiff that the date of the meeting had been filled in on the proxy forms after signature, it must be remembered that the notices sent out by the direction of the board mentioned the date of the meeting for which the proxies were intended. The intimation conveyed by the postcards could confer no authority on the secretary, who sent them out, to fill in the dates, but inasmuch as the date was mentioned in the circular, and the circular also contained a statement that the secretary had been directed to request the members to sign and return the proxies to him at once, the enclosed form of proxy being endorsed with an address to the secretary, it is clear that the proxy was intended to be used at the meeting, the date of which had been mentioned, and at no other meeting, and that members signing the proxy intended it to be so used. In these circumstances, in my opinion, the secretary was authorized to fill in the date of that meeting, although not of any other. It was contended that section 80 of the Stamp Act avoided the proxy unless completed at the time of signature. That section, however, does not say that the date of the meeting must be filled in by the person giving the proxy, but only that the proxy is to "specify the day upon which the meeting at which it is intended to be used is to be held." The proxy as used did specify the day, and was duly stamped. On this point also the motion fails.

Solicitors, *W. F. Hart; Powell & Burt.*

Chan. Div. } July 30, 1896.
Kekewich, J. }

ANDREWS v. GAS METER CO. (LIMITED). (a.)

*Company—Memorandum of association—Alteration of articles—Issue of preference shares—*Ultrà vires*—Restitution.*

A limited company altered their articles and purported to issue preference shares by way of increased capital. Neither the memorandum of association nor the original articles provided for the preference of any shares.

Held, that the company had no power to issue preference shares; that the holders of such shares were not members of the company, and were only entitled to restitution.

Hutton v. Scarborough Cliff Hotel Co., 13 *W. R.* 574, 631, 1059, 2 *Dr. & Sm.* 521, 4 *De G. J. & Sm.* 672, *followed.*

Clause 5 of the memorandum of association of the Gas Meter Co. (Limited), which was incorporated in 1862, provided as follows:—"The nominal capital of the company is £60,000, divided into 600 shares of £100 each, every share being sub-divisible into fifths,

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

with power to increase the capital as provided by the articles of association." The original articles empowered the company to increase its capital, but did not provide for the preference or priority of any of the shares.

In 1865 the company, being desirous of purchasing a business of manufacturing meters from the administrator of one John West, made certain additions to the original articles of the company to the effect that the directors might issue by way of increase of capital 100 shares of £100 each fully paid up bearing a non-cumulative preference dividend of 5 per cent. to the said administrator in part payment of the consideration for the purchase of his business, but the holder of the preference shares was not to be entitled to vote in the company or to participate in certain bonuses to which the ordinary shareholders were entitled or to any dividend beyond 5 per cent.

The 100 shares were accordingly allotted to the administrator of John West upon the above terms.

The dividends paid on the ordinary shares since 1862 ranged from 6 to 17½ per cent., and a sum of £35,000, profits of the company, had now become available for distribution amongst the shareholders. A question having arisen as to whether the preference shareholders were entitled to any share in the £35,000, it being doubted whether their shares had been properly issued, this action was brought by the ordinary shareholders against the company and the preference shareholders, asking (1) a declaration that all the profits of the company ought to be divided amongst the ordinary shareholders; or (2) how and in what proportion the profits (after providing for the dividend of 5 per cent. on the preference shares) ought to be divided between the preference and ordinary shareholders.

Lawrence, Q.C., and *Eustace Smith*, for the plaintiffs.—The issue of the preference shares was valid. This case is distinguishable from that of *Hutton* v. *Scarborough Cliff Hotel Co.*, 13 W. R. 574, 831, 1059, 2 Dr. & Sm. 521, 4 De G. J. & Sm. 672. Doubt has been cast upon that case by Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, and by Stirling, J., in *McIlquham* v. *Taylor*, 43 W. R. 297, [1895] 1 Ch. 53.

They also referred to *Harrison* v. *The Mexican Railway Co.*, 23 W. R. 403, L. R. 19 Eq. 358; and *In re South Durham Brewery Co.*, 34 W. R. 126, 31 Ch. D. 261. If the power to issue shares with a preference dividend was invalid, then the preferential part only ought to be dropped, the restrictions on the shares being retained: *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440, 31 W. R. Dig. 28; *In re Bridgwater Navigation Co.*, 36 W. R. 769, 39 Ch. D. 1; *In re London and New York Investment Corporation* 44 W. R. 137, [1895] 2 Ch. 860.

A. R. Kirby (*Warrington, Q.C.*, with him) for the defendants.—This case is covered by *Hutton* v. *Scarborough Cliff Hotel Co.* The issue of shares with a preferential dividend was invalid and we should be considered as being in the position of ordinary shareholders.

KEKEWICH, J.—In this case there is not a suggestion that there is anything in the original articles of association in the slighest degree to modify the meaning of the memorandum. I cannot therefore, subject to one question of construction to which I will presently refer, go beyond the memorandum itself in order to interpret it so that the case of *Harrison* v. *The Mexican Railway Co.* and other cases of that class, have no bearing on the subject here at all. I come back, therefore, to the simplest possible question, Whether a memorandum framed on the old lines—that is, on the lines universally adopted before the decision in *Hutton* v. *Scarborough Cliff Hotel Co.*, authorizes the issue of capital with a preferential dividend? It was decided in that case that, as regards the old capital that that could not be done, that it was outside the powers of the company in general meeting to interfere with the equality of the shareholders, and whether that equality is based on the Act of Parliament or whether it is based on the partnership character of a joint-stock company it cannot be interfered with. This is the decision in *Hutton* v. *Scarborough Cliff Hotel Co.*, and I am asked to say it no longer expresses the law on the subject. Sir George Jessel in the case of *Harrison* v. *The Mexican Railway Co.* used language from which it may be inferred, if you please so to construe his words, that he did not like *Hutton* v. *Scarborough Cliff Hotel Co.* If that is the proper meaning of his language its strengthens the binding character of the decison in *Hutton* v. *Scarborough Cliff Hotel Co.*, for he followed it and said he was bound by it. Lord Macnaghten in the case of *British and American Trustee and Finance Corporation* v. *Couper* no doubt said he did not approve that decision, but that is only his opinion, it is not a decision of the House of Lords. On the other hand, Stirling, J., has said, though with a "perhaps," that as regards courts of first instance *Hutton* v. *Scarborough Cliff Hotel Co.* is still binding, and Lindley, L.J., in the last edition (1889) of the Law of Companies, though he frequently refers to *Hutton* v. *Scarborough Cliff Hotel Co.*, does not suggest that it is a case which ought not to be followed.

It seems to me therefore that I am bound by that case. Now is there anything to distinguish this case. I have already said that the original articles contain nothing which can in the slightest degree control the memorandum. It is not suggested that they do, but it is argued that the articles referred to in the memorandum do not mean the contemporaneous articles, but those which may from time to time be the articles of the company. I do not think that is sound. The articles registered with the memorandum must, I think, be, in the first place, those referred to in the memorandum, and although, of course, all shareholders take their shares subject to revision by the company from time to time of the articles according to the statutory powers of the company, yet it is a strong thing to say that in a matter which affects the substance of their contract—the equality of the shareholders—it could be intended by such a reference to the articles to mean the special resolutions which may from time to time be passed by the company. It is within my knowledge that the passing of this particular clause in a memorandum exercised the minds of many experienced equity lawyers with reference to *Hutton* v. *Scarborough Cliff Hotel Co.* and other cases, and it was the universal opinion that if you wished to provide by the memorandum or by the contemporaneous document the original articles, that the power to issue preference shares was reserved, it must be done in the clearest possible terms, nothing being left to inference. Therefore I must hold that the law is that with a memorandum of this kind, unaffected by the contemporaneous articles, there is no power to issue preference shares.

Then I come to a question of very great difficulty. The gentlemen represented by Mr. Kirby take their shares through the administrator of John West, and as regards their contract with the company and their equities against it, must be in precisely the same position as the administrator of John West would have been. It seems to me that they must rely on their title; if the preference shares were not issued properly at first, I do not think they can say "we

insist on our rights because those through whom we claim have held them some time, or because there have been successive devolutions and transfers on the faith of the contract." It seems to me I am in precisely the same position, notwithstanding the lapse of time, as if I were now dealing with the administrator of John West, and on the day after the allotment of shares to him. What did the administrator take by his contract with the company? He took what for the moment I will call preference shares with some special limitations. Mr. Lawrence's argument is ingenious and sound, but my difficulty is in applying it to the case before me. He says there is nothing in any of the principles on which *Hutton* v. *Scarborough Cliff Hotel Co.* depends to prevent a company issuing shares which limit any particular amount of dividend. There is no reason why he should not contract to take shares on the footing that he shall only have 5 per cent., that he shall not vote, that he shall not be entitled to a bonus. I think that is so. You do not injure the shareholders or put them otherwise than on an equality by giving under a contract with a particular shareholder less to him than that equality would give him. But I cannot see that that is what has been done here. It is true that the administrator of John West limits himself to 5 per cent. It is true that he binds himself not to vote and not to claim any bonus. But, after all, he insists on having a dividend of 5 per cent. whether the ordinary shareholders have 5 per cent. or not. It is in that sense a preference dividend and you cannot give that less importance because as a matter of fact the dividends which he would receive as an ordinary shareholder would be in excess of 5 per cent. The bargain is that he is to have that as a minimum dividend—not cumulative, but still a minimum dividend annually, if the profits are sufficient to pay it, to the exclusion of the ordinary shareholder, who takes nothing till that dividend has been paid, and once you arrive at that, those other conditions and limitations do not seem to me to alter the contract, and I think it is a false view to say that what he really bargains for is a dividend and not a preference dividend.

Having got as far as that I think the administrator of John West has not got such shares as his contract gives him. He could not; it was *ultrà vires*, and the company are now entitled to say: "We cannot recognise you as a preference shareholder." Then it is said "that being so we are entitled to be treated as ordinary shareholders; we contracted to be members of the company subject to certain limitations, if we cannot have the shares with those limitations we are still entitled to shares." The answer to my mind is complete: "That is not the contract; the contract, no doubt, was to give you a preferential dividend, but it was to give you a preferential dividend accompanied by certain limitations and restrictions, and if you cannot have the preferential dividend neither can you have the shares with the restrictions. If one part of the contract fails so does the other. You are only a member on certain terms. If you do not take those terms you are not a member at all." That, it seems to me, is the right view. Although views have been expressed in two or three cases on this point, there has been, it is admitted, no decision upon it at all. What, then, are the rights of these so-called preference shareholders? It seems to me they are in precisely the same position as any other men who have contributed their capital to a concern upon terms which are incapable of fulfilment. They are entitled to restitution and to nothing more. There is no question of election at all. The company cannot recognize them as being preference shareholders, the company cannot recognize them even as being shareholders. Then they are entitled to have their money paid back to them. (There is no question of interest because that has been paid up to the present time.)

His lordship then made a declaration that the so-called preference shareholders were not ordinary shareholders, and that all the profits of the company belonged to and ought to be equally divided between the ordinary shareholders.

Solicitors for all parties, *Blyth, Dutton, Hartley, & Blyth.*

Q. B. Div.
(Cave and Wills, JJ.) June 3, 8, 1896.

PAIN AND ANOTHER v. BOWDEN. (a.)

Practice—Costs—County court—Administration suit—Insolvent estate—Taxation—Discretion of registrar—County Court Rules, 1889, *ord.* 50a, *r.* 20.

In an administration suit in the county court the costs of the administrator are within the discretion of the registrar as discretionary "fees or allowances" under ord. 50a, *r.* 20, *of the County Court Rules,* 1889, *and in disallowing certain costs, the registrar may take into consideration the fact that the estate is insolvent, in which case only such costs as are strictly necessary for the protection of the estate should be allowed.*

Appeal from his Honour Judge Williams, the county court judge for Glamorgan.

In this case the plaintiffs were the creditors of an estate which was sought to be administered. The action was brought in the High Court, but was transferred to the county court.

The defendant was the administratrix of the testator, her husband. The estate was wholly insolvent. The question raised was whether certain charges for letters by her solicitor to creditors and interviews with them were within the discretion of the registrar upon the taxation of the bill of costs in the administration suit.

Ord. 50a, r. 20, of the County Court Rules, 1889, provides as follows: "All fees or allowances which are discretionary shall, unless otherwise provided, be allowed at the discretion of the registrar on taxation, who, in the exercise of such discretion, shall take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the action or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances."

In taxing the plaintiff's costs the registrar acted upon the principle that where a solicitor is advising the administrator of an estate known to be insolvent, he should only charge for services strictly necessary for the protection of the estate. He should not charge for letters and attendances answering the inquiries of creditors, especially after the case is in the hands of the court, or for any work which the administrator might very well do himself. On the other hand, where a good deal of work not strictly chargeable under the above rule has been done by the solicitor for the assistance of the administrator, the registrar was of opinion that the taxing officer has a discretion (which he exercised in the present case) to allow a moderate addition under the head of letters at the end of the bill.

The costs were taxed as between solicitor and client, and the sum of £27 was disallowed out of £74 relating to charges for letters to or interviews with

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

creditors by the solicitor to the administratrix for the purpose of coming to an arrangement with them after the winding up of the estate had come into the hands of the court.

On an application to the judge for an order to review the taxation he held that the registrar had no such discretion, and referred the matter back to him for taxation.

In making the above order the learned county court judge expressed himself as follows: "Here the estate administered by the administratrix is insolvent, and that fact was taken into consideration by the registrar in exercising his discretion, and he for that reason disallowed certain charges made by the solicitor acting for the administratrix, charges which would, if the estate had been solvent, have been allowed. The question I have to decide is whether these charges are in the discretion of the taxing-master, and I am referred to the case of *Re Chennell, Jones* v. *Chennell*, 26 W. R. 595, 8 Ch. D. 492, where it was decided by Jessel, M.R., and Cotton and Thesiger, L.JJ., that the charges and expenses of a trustee are not in the discretion of the court. If, therefore, the same ruling is applicable to the administrator of an estate who is not, strictly speaking, a trustee (although as administrator he is in fact a trustee for the benefit of the creditors), these charges are not in the discretion of the court, and if not in that of the court then clearly not in that of the taxing-master. I fail to find that any distinction is drawn by the courts between the charges of a trustee in the administration of a solvent and of an insolvent estate. I therefore come to the conclusion that the learned registrar was wrong in exercising his discretion in this matter, and in disallowing the charges in question, and the bill of costs must be sent back to him for further consideration."

From this decision one of the creditors appealed.

H. C. Gollan, for the appellant.—The charges in question are fees or allowances which are discretionary within the meaning of ord. 50*a*, r. 20. The case of *Re Chennell* does not apply now, as it was a case decided under the rules of 1875. The costs of administration suits are now discretionary under ord. 65, r. 1. In *Plumb* v. *Craker*, 16 Q. B. D. 40, 34 W. R. Dig. 44, it was held that the judge has absolute discretion in respect of the costs of such an action. In distinguishing between a solvent and an insolvent estate the registrar acted rightly, and in disallowing the charges in question he acted within the principle laid down in the case of *Harbin* v. *Darby*, 8 W. R. 512, 28 Beav. 325.

Ashton Cross, for the respondent, the administratrix.—The administratrix here ought not to be put in a worse position because the estate was insolvent. In the case of insolvent estates the costs of the executors, it is stated in Seton on Decrees (vol. 2, p. 1233), as between solicitor and client are to be provided for first. In the Chancery Division it is the practice that no distinction between a solvent and an insolvent estate is made when taxing the costs of an administrator. A trustee in an administration suit is allowed costs as between solicitor and client, see *Re Love, Hill* v. *Spurgeon*, 33 W. R. 449, 29 Ch. D. 348.

Cur. adv. vult.

CAVE, J.—I am of opinion that the decision of the registrar was right, and that this appeal must therefore be allowed. When we look at the judgment of the learned county court judge it is evident that he was of opinion that the registrar could not exercise any discretion, but was bound to allow such costs as had been actually incurred. There I think he was wrong. He said that he failed to find that the courts had drawn any distinction between the charges of a trustee in the administration of a solvent estate and an insolvent estate. It seems evident to me from this that he was labouring under a mistake as to the meaning of the decision in *Re Chennell*. That case only decided that the costs of a trustee in an administration suit were not, like costs of the plaintiff or defendant in an ordinary action, within the discretion of the court. That has nothing to do with the discretion of the registrar in this case. *Re Chennell* does not decide that because certain costs were not in the discretion of the judge therefore they should not be taxed at all.

There is, however, another point which we are asked to deal with—namely, that in taxing the costs the registrar had acted wrongly in making any distinction between the costs that should be allowed in the administration of solvent estates and those that should be allowed in the administration of insolvent estates, and it was suggested to us that it is the practice in the Chancery Division to make no such distinction, but no authority was cited in support of that. My brother Wills has consulted Stirling, J., who tells us that he knows of no such practice, that no such distinction is made in cases where the estate is solvent or insolvent. Therefore we must look to what the taxation has been in the case before us and what has been its result. On our asking counsel what items he alleged were wrongly disallowed, and on what grounds his objection is made, we were only told that no distinction should be made between solvent and insolvent estates, and that therefore the case ought to go back to the registrar. But we find that there is no such rule, and therefore to send the bill back to the registrar on that ground would be no guidance to him at all. I thing the registrar acted quite rightly in disallowing the items relating to letters and interviews, and in allowing only a lump sum in respect of them, and therefore the order of the county court judge was wrong and must be set aside and the appeal allowed.

WILLS, J.—I am of the same opinion. Subsequent to the argument in this case I consulted Stirling, J., who pointed out to me that there certainly was a distinction in taxation between the cases of solvent and insolvent estates, and he cited as an instance that in the case of solvent estates the court would always allow the administrator the costs of an inquiry as to next of kin, whereas in the case of an insolvent estate no such costs would be allowed as no benefit could result to the next of kin by such inquiry. In the case before us we have to deal with a specific rule, and not with the practice of the Chancery Division. This specific rule mentions various matters which the registrar on taxation is to take into consideration, and it then adds at the end the words "and all other circumstances." Therefore I think that under the circumstances in this case it is proper and reasonable that the registrar should take into consideration the fact that the estate was not large enough to pay all the creditors, and that the administratrix should only be allowed such costs as were strictly necessary for the protection of the estate.

I am therefore of opinion that the registrar here acted perfectly rightly and within his competence, and taxed the costs in a reasonable manner. The order of the county court judge must therefore be set aside and the appeal allowed.

Appeal allowed.

Solicitors for the appellant, *Easton & Cargill.*

Solicitors for the respondent, *Riddell, Vaizey, & Co.*, for *Viner, Leader, & Co.*, Swansea.

House of Lords.

From C. A. (England). July 30, 1896.

CONQUEST AND ANOTHER v. EBBETTS AND ANOTHER. (a.)

Landlord and tenant—Underlease—Covenants to repair—Measure of damages.

Where an underlessee is liable to his immediate lessor for breach of his covenant to keep the demised premises in repair, all the circumstances must be considered and the damages assessed at such a sum as reasonably represents the damage which the covenantee has sustained. Should the underlessee have notice that the underlessor is liable over to his superior landlord, that is one of the circumstances to be considered.

The official referee, in such a case, estimated the amount at the cost of doing the repairs, less an abatement for the term of years still to run in the underlease. The immediate reversion, on the expiration of the underlease, consisted only of a few days.

Held, that he had properly assessed the damages, and the fact that the original lessee might not have to repair as required in the head lease was not a matter which could be gone into.

Decision of the Court of Appeal (44 *W. R.* 56, [1895] 2 *Ch.* 377, *affirmed.*

This was an appeal by the defendants in the action from an order of the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.), dated the 10th of July, 1895, affirming a report of the official referee, whereby the respondents were awarded £1,305 by way of damages.

The case is reported in 44 W. R. 56, [1895] 2 Ch. 377. The question to be determined was the proper measure of damages to be awarded in respect of breaches of covenant in an underlease to keep the demised premises in repair.

The premises in question were known as the Grecian Theatre, and were occupied by "General" Booth for the purposes of the Salvation Army. The original lease was granted by the trustees of St. Botolph's, Bishopsgate, in 1840, to Thomas Rouse for sixty-one years from Michaelmas, 1837, at a rent of £350 a year. Rouse in 1851 granted an underlease of a part, for his whole term less the last ten days thereof to Benj. Oliver at the same rent, being in effect an improved rent of about £100 a year. The covenants as to keeping in repair and delivering up in good repair were substantially the same in the lease and underlease.

The plaintiffs in the action—the present respondents—now represented Rouse. The appellant Conquest, one of the defendants in the action, represented Oliver. "General" Booth was assignee of the underlease and co-defendant in the action. The underlease contained a covenant to "keep" the premises in repair, and showed on the face of it that it was an underlease. At the time the action was brought there were still some years of the underlease to run. The respondents sued Conquest and "General" Booth for damages for alleged breach of the covenant. Romer, J., held that there had been a breach, and referred it to the official referee to assess the amount of damages, which he assessed as above stated.

The defendant Booth appealed, and the decision of the official referee was affirmed. The defendants Conquest and Booth then brought the present appeal.

Haldane, Q.C., Sargant, and *Courthope-Munroe,* for the appellants.—The damages should be based on the real loss—*i.e.*, the diminution in value to the respondents' reversion, which if the repairs were done would be of little value: *Penley* v. *Watts*, 7 M. & W. 601, and Parke's, B., judgment therein; *Logan* v. *Hall*, 4 C. B. 598. The covenant the appellant would have had in view would have been his obligation to his immediate landlord. They also cited or referred to: *Joyner* v. *Weeks*, 39 W. R. 583, [1891] 2 Q. B. 31; *Henderson* v. *Thorn*, 41 W. R. 509; *Vivian* v. *Champion*, 2 Ld. Raym. 1125; *Doe d. Trustees of Worcester School* v. *Rowlands*, 9 C. & P. 734; *Wigsell* v. *School for Indigent Blind*, 30 W. R. 474, 8 Q. B. D. 357; *Turner* v. *Lamb*, 14 M. & W. 412; *Smith* v. *Peat*, 9 Ex. 161, 2 W. R. C. L. Dig. 154; *Mills* v. *East London Union*, 21 W. R. 142, L. R. 8 C. P. 79.

Jelf, Q.C., and *R. F. Norton,* for the respondents.—[In the course of their argument their lordships intimated that they did not wish to hear them on *Joyner* v. *Weeks*.] The premises should be in proper repair, and the amount fixed by the referee is correct—*i.e.*, the sum which it would cost to put them in such a state, with an allowance for the unexpired term of the underlease: *Davies* v. *Underwood*, 6 W. R. 105, 2 H. & N. 570, Bramwell, B.; *Coward* v. *Gregory*, 15 W. R. 170, L. R. 2 C. P. 153.

Haldane, Q.C., replied.

The House took time for consideration.

Lord HERSCHELL.—The appellants in the present case contend that the damages for the admitted breach of a contract to keep certain demised premises in repair have been assessed on a wrong principle. The facts may be very shortly stated. In May, 1840, the then Bishop of London demised certain premises to Thomas Rouse for a term of sixty-one years from Michaelmas, 1837, at the rent of £350 a year. In March, 1851, a portion of these premises was demised to Benjamin Oliver, by way of underlease, for the original term less ten days at the same rent, being in effect an improved rent of about £100 a year. The covenants to keep the demised premises in repair and to deliver them up in good repair were in substantially the same terms in the lease and underlease. The respondents are the present trustees under the will of Thomas Rouse, the original lessee. The one appellant is the personal representative of Oliver, the sub-lessee, and the other is an assignee of the sub-lease. The premises comprised in the sub-lease not having been kept in repair pursuant to the covenant contained in it, the action in which this appeal arises was brought. The assessment of damages was referred to Mr. Ridley, one of the official referees, who fixed them at the sum of £1,305. At the time when the case was heard there were about three and a half years of the term unexpired. He arrived at the sum named by ascertaining how much it would require to put the premises in the state of repair in which they would have been if the covenant had been observed, and then allowing a rebate from that sum in consideration of the fact that the lease had still some years to run. The Court of Appeal considered that, there having been notice to the sub-lessee of the original lease and of the covenants contained in it, it was right to take into account in assessing the damages the liability of the respondents on those covenants, and that the damages had been properly assessed on the basis of awarding to the respondents a sum which represented the diminution in the value of their reversion due to the breach of covenant by the appellants. Where an action for non-repair had been brought during the currency of a lease, it was said by Holt, L.C.J., in *Vivian* v. *Champion*, in answer to the objection that it was a hard action, for maybe the

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

lessee might leave the premises in repair at the end of the term, and that therefore it was usual to give but small damages: "We always inquire in these cases what it will cost to put the premises in repair, and give so much damages, and the plaintiff ought in justice to apply the damages to the repair of the premises." In the case of *Doe d. Trustees of Worcester School* v. *Rowlands* Coleridge, J., said: "In estimating the damage in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of damages. . . . The true question, therefore, is, to what extent is the reversion injured by the non-repair of the premises? If the lease had ninety-nine years to run it could not make much difference in the value of the reversion whether the premises were now in repair or not. This lease, however, will expire in about six years." I may observe that what the learned judge said with regard to a lease having ninety-nine years to run would not be applicable in all cases. There are circumstances in which it might be of the utmost importance to the reversioners that the buildings should be in a proper state of repair. Holt, L.C.J.'s statement of the law has been subjected to criticism in other cases, notably by Parke and Alderson, BB., in *Turner* v. *Lamb*. I do not think that any hard and fast rule can be laid down as to the damages which may be recovered by the covenantee during the currency of a lease in respect of the breach of a covenant to keep the demised premises in repair. All the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant. I quite agree with the criticism to which Lord Holt's view has been subjected if that learned judge intended to lay down that, whatever the circumstances and however long the term had to run, the damages must necessarily be what it would cost to put the premises into repair. On the other hand, I think it would be equally wrong to hold that this could never be the measure of damages whatever the circumstances and however nearly the term had expired. But in the present case, if the test be applied of inquiring how much the value of the respondents' reversion has been diminished by the breach of covenant—a test for which I understand the appellants to contend—I cannot see that there has been any error in the assessment of damages. If the premises were now in good repair the reversion of the respondents would secure them the improved rent of £100 a year to the end of the term, without any liability on their part, unless it were to the extent to which repairs subsequently became necessary. As matters stand they can only receive this rent subject to the liability of restoring the premises to good repair, so that they may in that condition redeliver them to their lessor. The difference between these two positions represents the diminution in the value of their reversion owing to the breach of covenant, and on this basis the damages seem to me to have been properly assessed.

It was contended for the appellants that the respondents would not be bound in any case to spend upon the premises the sum necessary to put them in repair, or at the expiration of the term to pay that sum to their lessor. It was said that, owing to the nature of the premises and the changed circumstances of the neighbourhood, the freeholder would make an entirely different use of the site when the term he had created came to an end; that he would not desire to have the buildings then upon his land put in good repair, and that he would arrive at some arrangement with his lessee by which he would accept from him a sum less than the cost of effecting these repairs. I do not think that the court would do right, in assessing the damages in the present case, to involve itself, at the instance of the appellants, in considerations of that character. The duty of the appellants as between themselves and the respondents was to fulfil the obligation of the covenant into which they entered and to keep the premises in repair. If they had done so the present question would not have arisen. They have broken their covenant, and when sued for the breach they have, in my opinion, no right to demand that a speculative inquiry shall be entered upon as to what may possibly happen and what arrangements may possibly be come to, under the special circumstances of the case, when the superior lease expires by effluxion of time.

I think that the appeal should be dismissed with costs.

Lords MACNAGHTEN and MORRIS concurred.

Judgment appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellants, *Ranger*, *Burton*, and *Frost*.

Solicitors for the respondents, *Clarke* and *Calkin*.

From C. A. (England). May 8, 11, 1896.

SADLER v. GREAT WESTERN RAILWAY CO. (*a*.)

Practice—Parties—Joinder of defendants—Nuisance—Injunction—Ord. 16, *r.* 4.

A plaintiff cannot join independent tortfeasors as co-defendants in an action for damages.

Decision of the Court of Appeal (44 *W. R.* 50) *affirmed.*

This was an appeal from an order of the Court of Appeal (A. L. Smith, L.J., Rigby, L.J., dissenting), 44 W. R. 50, [1895] 2 Q. B. 688, affirming a decision of Day, J., at chambers.

The facts are set out in the court below, and are shortly as follows:—The plaintiff, the present appellant, brought this action against the Great Western Railway Co. and the Midland Railway Co. for a nuisance in obstructing his business by their vans, &c., and he also claimed an injunction. The railway companies acted quite independently and were under different management and not responsible for the acts of each other.

The Great Western Railway Co. took out a summons to stay proceedings in the action unless the Midland Railway Co. were struck out as defendants.

Day, J., granted the application, which was affirmed by the Court of Appeal.

The plaintiff appealed.

Warmington, *Q.C.*, and *Russell Roberts* (*Chester Jones* with them), for the appellant.

Asquith, *Q.C.*, and *Hon. A. Lyttelton*, for the respondents.

Thorpe v. *Brumfitt*, L. R. 8 Ch. App. 650; *Lambton* v. *Mellish*, 43 W. R. 5, [1894] 3 Ch. 163; *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494; *Peninsular and Oriental Steamship Co.* v. *Tsuné Kejima*, [1895] A. C. 661, 44 W. R. Dig. 128, were cited or referred to.

Lord HALSBURY, C.—I really think that this case is too plain for argument, notwithstanding the period that it has lasted. If this were a matter for discre-

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

tion the whole thing has been disposed of, first by the Master, and then by the learned judge, and then by the Court of Appeal; and it appears to me hopeless to contend against that due exercise of the discretion. The real truth is that there was no difference upon the law between the two learned Lords Justices in the court below, because Rigby, L.J., who differed from A. L. Smith, L.J., said in terms: "I do not look upon this case as one where the liability of the defendants is severable. No doubt in the action they allege it; but in paragraph 5 the plaintiff alleges what may be a much more formidable case—that the concurrent action of the two creates a nuisance. I think, therefore, that if my judgment had to decide this matter I should differ from the learned judge." If I agreed with the learned Lord Justice in the proposition which he states I am not certain that I should disagree with him in the conclusion; but I think the whole fallacy is involved in his proposition. The pleader here has thought proper in some parts of the statement of claim to allege several and separate causes of action. He has set out in terms that the plaintiff has a separate cause of action against each of the two defendants. I believe the true construction of the whole statement of claim is that, and that the words which are to be found in the 5th paragraph do no more than expand, with a view to damages, what is referred to in the other paragraphs of the statement of claim. But if it were true that the 5th paragraph sets out a joint cause of action (which I do not think it does), that would not make the case any better for the plaintiff, because upon that hypothesis he would have joined several causes of action in one count with a joint cause of action in another count, which would be equally objectionable; and therefore the consequences of such a procedure would not be evaded.

It seems to me that after the decision in your lordships' house placing the construction upon the order before us, which alone could have given colour to such a contention, it is no longer possible to entertain any such contention: *Smurthwaite* v. *Hannay*. The order does no more than deal with the joinder of the parties; it has no reference to the joinder of the causes of action.

With regard to the learned Lord Justice's observation about "not knowing what a common law action means at the present day," in one sense I can understand what his lordship means. There are two branches of our judicial system; the court in each branch has now full jurisdiction over every cause; it used to be under separate jurisdictions: but I am not aware that the Judicature Act, or any principle that has ever been acted upon or affirmed in any court, has said that you may confuse several separate and distinct causes of action. What we used to know as a common law cause of action, and what is a common law cause of action, must still remain so, and as such is open to the incidents of a cause of action so as to prevent that which is a separate cause of action being made a joint cause of action. The whole point here is this: the pleader having set out the separate causes of action, which he has carefully and accurately described as separate causes of action, how can he combine these separate causes of action so as to bring one action against two defendants in respect of their several liability on separate causes of action. It seems to me that it is impossible to maintain such a proposition.

I therefore move your lordships that the appeal be dismissed, with costs.

Lord WATSON.—I take the same view. It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate respondents. I do not think, upon any fair construction of that pleading, there is set forth any joint claim against the two respondents. I do not mean to say, even if there had been another claim of that kind, it would have made any difference to the parties in the present state of the record. In these circumstances it has been painfully apparent from first to last of the learned argument we have heard that the contention of the appellant was not only unsupported by authority, but was in the teeth of authority.

Lord HERSCHELL.—I am of the same opinion. It is practically admitted, for it cannot be disputed, that there are in the statement of claim two separate causes of action charged against these two defendants, that either of them might be sued alone, and that the plaintiff here might recover against either of them alone. It is an action in which there is a claim for damages, first, against both of them jointly, and then against each of them, as well as a claim for an injunction.

It is quite unnecessary to express any opinion as to what might have been the case if the claim had been limited to a claim for a declaration of right or a claim to an injunction. I must not be taken to be expressing any opinion that in that case the action in its present form could have proceeded, but I do not express any opinion upon it at all. In the present case there is not only a claim for an injunction, but a claim for damages against each of two separate defendants. An action of this description could only have been maintained in the common law courts before the Judicature Act; and when it is said that there is no authority, it must be observed that nobody would ever have dreamt of joining in the same action two defendants against whom he made separate claims for damages. In my judgment there is no pretence for joining them now merely because you also claim an injunction, even in a case where, if your claim had been only for an injunction, a joinder might have been allowed.

For these reasons I think the appeal should be dismissed.

Lord SHAND.—As something has been said in this case about the rules of practice that are observed in Scotland, I should like to say that I think that there is very little substantial difference, and that in some respects, as it appears to me, is a favourable difference in the law of that country with regard to proceedings of this kind. I give no opinion as to whether this would or would not have been a competent proceeding in Scotland further than to say that certainly, if it were a case of an interdict only, I should have thought that the parties could, under the *dictum* in *The Duke of Buccleuch's case*, have had the whole case tried as one. Whether or not it would have been different upon a claim for damages, having regard to what fell from Earl Cairns, L.C., is another question. For my own part, I think even in a case of damages where there are only two people concerned, and not so many as there were in *The Esk River case* (*Cowan* v. *Duke of Buccleuch*, 2 App. Cas. 344), where there were six or seven of them, it might be convenient to have the cases of damages tried together.

But the rules and practice of England seem to be entirely different, and I think there has been no precedent cited for what is here proposed. I agree in thinking that these grounds of action are not only separable, but separate, and that each of the defendants is called upon to answer for his own acts only. I think, looking to what has been decided in the previous cases, and what appears to be the practice in England, the majority of the learned judges in

this case have come to the right result according to the law of England.

Lord DAVEY.—I quite agree, and I have very little to add to the reasons which have been given by your lordships. I only desire to say, as we are differing from the view taken by Rigby, L.J., that I think we differ from that learned judge, not so much in the view of the law as in the view we take of the effect of the allegations in the statement of claim. What the learned judge says is this: "It appears to me if it is made out to be a nuisance" (that is to say, if what is stated in the 5th paragraph is made out to be a nuisance), "not two nuisances, but one." And he repeats that line of reasoning when commenting upon the case of *Smurthwaite* v. *Hannay*. He says that, as he understands it, the effect of that decision, stated shortly, is "that you cannot bring plaintiffs, and, by parity of reasoning, you cannot bring defendants, before the court where the causes of action vested in the different plaintiffs or the causes of action which exist between the different defendants are separate. I do not look upon this case as one where the liability of the defendants is severable."

Now, I believe there is not a scintilla of allegation, nor was it intended, as the appellant's counsel fairly said, to state in the statement of claim that there was anything else than a separable cause of action—that there was anything like a joint cause of action, or a joint action of any kind, on the part of the defendants. My present impression is that even if the plaintiff had confined his case to an injunction he could not have maintained his action; but I do not desire to express a decided opinion upon that point, and it is not necessary to do so, because this action is avowedly maintained as a common law action—as I venture to call it notwithstanding Rigby, L.J.'s criticism—a common law action for damages. The plaintiff, though invited to do so, declines, as I understand it, to limit it to an injunction.

I agree in thinking that the appeal should be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Kennedy, Hughes, & Kennedy*.

Solicitor for the respondents, *R. R. Nelson*.

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — July 29, 1896.

FRICKER *v.* VAN GRUTTEN. (*a.*)

Practice — Parties — Joinder of plaintiff — Consent of person to be joined—"His own consent in writing"—R. S. C., 1883, *ord.* 16, *r.* 11—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 34—*Striking out name after order for payment of costs by plaintiffs—Costs, by whom payable.*

The provision of ord. 16, *r.* 11, *that "no person shall be added as a plaintiff . . . without his own consent in writing thereto," makes it necessary that the consent should be actually written and signed by the person to be joined; and a consent written and signed by his solicitor in his presence and with his approval is not sufficient.*

The old rule that, when a solicitor has commenced proceedings on behalf of a person from whom he has not received a proper authority, the person so made a party remains liable for the costs of the proceedings, and has no remedy except against the solicitor, has now been altered; and an order will be made staying all proceedings by or against the person improperly joined (including all proceedings under any order already made against him), and directing the solicitor to pay any costs which such person may have been ordered to pay, and to pay such person's costs as between solicitor and client.

Appeal by Mr. Weller from Kekewich, J.

The material facts are stated in the judgment of Lindley, L.J.

Montague Shearman, for the appellant, referred to ord. 16, r. 11, and to *Tryon* v. *National Provident Institution*, 34 W. R. 398, 16 Q. B. D. 678.

T. E. Crispe, for the respondent Toppin, referred to section 34 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and section 2 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

J. A. Foote, for certain of the defendants in the action, contended that Weller, who had been made a party with his own consent, was estopped from relying upon the absence of a written consent.

Shearman, in reply, referred to the Annual Practice, 1876, vol. 2, p. 328. [LINDLEY, L.J., referred to *Nurse* v. *Durnford*, 28 W. R. 145, 13 Ch. D. 764; *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 28 W. R. 217, 13 Ch. D. 310; and *Reynolds* v. *Howell*, 22 W. R. 18, L. R. 8 Q. B. 398.]

J. A. Foote referred to the Annual Practice, 1895, p. 206, and to *In re Scholes*, 34 W. R. 515, 32 Ch. D. 245.

LINDLEY, L.J. — This case is an important one, not only to the parties, but also as a question of practice. It is an application by Mr. Weller—who is the trustee in bankruptcy of a person named Harris James and whose name has been added as a co-plaintiff in the action—to have his (Weller's) name struck out from the writ and subsequent proceedings and from an order of this court to pay certain costs.

It appears that the writ in this action was issued on the 24th of December, 1895, by the three first-named plaintiffs, Weller not being a party. Some motions or applications were made in that action, and it was considered by the plaintiff's then solicitor, Mr. Toppin, that Mr. Weller ought to be joined. Now, there was an interview upon that subject, and there is some little controversy as to what took place. Mr. Weller says that Mr. Toppin told him it was a mere matter of form, and that he would be indemnified from all liability, or that there would be no costs to pay at all, or something of that kind. I do not think Toppin quite agrees in that. What was done was this. There being an application by summons that Weller's name should be added, Comins and Drewry, who were Weller's solicitors, in Weller's presence wrote on the summons these words: "We consent on behalf of Mr. Weller, the trustee." That summons with that consent upon it was taken to the chief clerk of Kekewich, J., and thereupon he made what is called a *fiat* for the addition of Weller's name as a plaintiff, and Weller's name has been added as a plaintiff, and has been there ever since, and is there still.

Now, it appears that Weller afterwards found out that he had incurred greater liability for costs than he had anticipated. By what I may call an accident—I am not going into the particulars—he found out that orders were being made dismissing the plaintiff's appeal with costs, and that his name had been added

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

as one of the plaintiffs. He says he never intended that Toppin should, without consulting him, go on and expose him to the risk of costs. He does not deny that he did verbally consent, but he says it was upon the understanding I have mentioned, and only upon conditions. He now finds himself in a difficulty, for there is a series of orders for costs against him, and naturally he looks about to see if he cannot escape. It is now argued by his counsel that the consent given by Comins and Drewry in the words I have read did not authorize the addition of Weller's name as co-plaintiff. That question turns on the construction of ord. 16 r. 11. [The Lord Justice read the material part of the rule, and continued:—] Now, the question is, what is the meaning of that rule? Unless the word "own" means a good deal, one would have thought a person who assented to what was being done in his presence would have been bound by that. But when you come to look at what the word "own" does mean, and when you understand the history of this rule, the inference is almost unavoidable that "own" means a good deal, and is, in fact, simply an abbreviated mode of expressing what was previously found more at length in section 34 of the Common Law Procedure Act, 1852. The language of the Act makes it plain enough that the consent ought to have been the consent of the party himself in writing, and the reason for that is perfectly intelligible. The reason was to prevent any discussion about understandings or misunderstandings as to authority. A person is not be added as a co-plaintiff, nor is a person's name to be used as a next friend unless he consents in writing and signs the writing with his own hand. It must be his written consent—that is what the Common Law Procedure Act said in language that is quite unmistakeable. The word "own" appears to me to have been introduced into this rule to emphasise what the language would have been if the Act had been closely followed, and to be a short form for continuing the enactment of the Common Law Procedure Act. Now, if that be the true construction, as I think it is—though, certainly, I hesitated a little at first—that *fiat* ought never to have been made, and Mr. Weller, who I think on the whole has the merits of the case on his side, is entitled to take advantage of the defect. I think that contention is right. I think the learned judge has attached too little importance to the use of the word "own" in the rule; he seems to treat that word as not meaning anything at all. I do not doubt that the chief clerk was too lax. He ought not to have passed that consent, but ought to have said that it was not a proper consent; and Weller's name ought never to have been put on as a plaintiff.

This case illustrates the very evil which the rule was intended to prevent. It is a very serious thing to make a man a plaintiff without his consent. It exposes him to very serious risks; and the rule has accordingly provided that it is not to be done without his consent in writing.

It is said that this is a consent in writing; Weller did consent, and this writing was made in his presence and with his approval. But the rule means —I have not the slightest doubt, now that we understand it—that there must be his own personal writing. That is the first point in Weller's favour.

What, then, ought to be done? It appears that before he knew anything about it proceedings had been taken, and unsuccessfully, and the plaintiffs, includ- himself, had been ordered to pay certain costs. As soon as he found that out he did not lose any time. On the 3rd of March he took out the summons which is now before us, asking that the *fiat* of the chief clerk, giving leave to add the appellant as a plaintiff, may be rescinded and that his name may be removed from the amended writ of summons, and all subsequent proceedings in the action. The question now is, what is the right thing to be done in such circumstances? There was a time, both at common law and in Chancery, when, if a man's name had been used in litigation without his authority, and an order had been made against him, he was bound by it, and his only remedy was against the solicitor who had improperly used his name. That was discussed in *Reynolds* v. *Howell*, where Lord Blackburn reviewed the decisions, and came to the conclusion that the old practice had been departed from, and that the proper order was to stay the proceedings without ordering the party improperly joined to pay the costs. The old Chancery practice seems not to have been altered so early, or, at any rate, not much before. That is exemplified in *Bligh* v. *Tredgett*, 5 De G. & Sm. 74. There a bill had been filed in the name of a next friend, and the next friend had to pay all the costs, and was told that his only remedy was against the solicitor by whom the suit had been commenced. The question here is, which of those two rules is the correct one, or the one which ought now to be adopted. The matter was discussed twice in 1879, after the Judicature Act and the rules thereunder, in the cases of *Nurse* v. *Durnford* and *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*. In both those cases the point was raised distinctly whether the common law practice, as settled by the decision of Lord Blackburn, or the old Chancery practice, should prevail, and the decision in both was that the practice established in the Queen's Bench Division was the more reasonable and convenient, and should prevail. In *Newbiggin Gas Co.* v. *Armstrong*, Jessel, M.R., says this: "The order follows the old practice of the Court of Chancery in such cases, by which the defendant was not served with notice of the application, but was left to get his costs from the person named as plaintiff, who had afterwards to get those costs over from the solicitor. The result was that the nominal plaintiff, who had never given any authority for the use of his name, had to pay the defendant's costs, and might be unable to recover them by reason of the insolvency of the solicitor. On the other hand, according to the practice of the common law courts, the defendant was served with notice of the application, and the solicitor had to pay the costs of both the plaintiff and the defendant. That appears to me to be the better practice. The question is, which practice is now to be followed? Since the passing of the Judicature Act that must be left to the court to determine. . . . I have no hesitation in saying, as I have already said at the Rolls Court, though not with the same authority with which I now say it, that I think the common law practice in this case is founded in natural justice, and ought to be followed for the future." So that was settled; and, as I said, the same view was acted upon again in *Nurse* v. *Durnford*.

That, then, being so, what ought we now to do? If we look at the case before Lord Blackburn we see that the name was not struck out *ab initio*, but all further proceedings were stayed; and that appears to me the right thing to do now. Nothing would be gained by undoing what has actually been done; and the staying of all further proceedings in the name of Weller, and all proceedings under any order made against him, will be sufficient to protect him and to stop all executions under the orders for payment of costs. As regards the money which the defendants have obtained by execution, that money ought to be returned. Obviously, except by consent, we could not now make an order to that effect, because we have no evidence on the subject, but Mr. Foote's clients, having authorized him to consent, they must

give an undertaking that they will return the whole of the money which Weller paid to the sheriff.

As regards Toppin, he appears to me to have done that which he had no right to do. He got this informal consent and made use of it, and he has occasioned the whole of the consequences which we are endeavouring to set right. Therefore, following the authorities I have cited, I think he ought to pay to Weller all the costs which Weller has incurred or been ordered to pay up to the present time, and to pay to the defendants any costs they may have incurred; Weller's costs to be paid as between solicitor and client, and the defendant's as between party and party.

LOPES, L.J.—I am of the same opinion. This is a case, no doubt, of considerable importance in relation to practice. [The Lord Justice stated the facts, and continued:—] Then the question arises whether, under ord. 16, r. 11, that consent which I have mentioned is a sufficient consent. The important words are "without his own consent in writing thereto." What does that mean? Does it mean such a consent as was given by Comins and Drewry, Weller being present, in their handwriting, not his? or does it mean consent in writing, that writing being the writing of the person himself who consents? I am of opinion that it means the written consent of the person consenting; his own actual writing, his own actual signature. I think there is strong reason for so holding when section 34 of the Common Law Procedure Act, 1852, is looked at, because there, where provision is made for a similar state of things, we find that these words are used. [The Lord Justice read the section, and continued:—] In my opinion the words, "his own consent in writing," are intended to be equivalent to those words in the Common Law Procedure Act, "under his, her, or their hands." I have no doubt that before that Act consent might also have been given in person without writing, but that, I presume, was not thought desirable, and accordingly the rule was altered. In my judgment the consent in writing which was provided for by the rule was a consent, to be in the writing of the person consenting, and I think to be under his own hand, as provided by section 34 of the Act. Now that being so, it appears here that Mr. Weller, for some time after the proceedings were started, did not know the effect of what was being done. He happened to be in court, and in that way it came to his knowledge that he had been made liable to costs, and thereupon he takes out a summons asking that his name should be struck out. The chief clerk seems to have made the order allowing Mr. Weller's name to be added as co-plaintiff, upon materials on which he really ought not to have passed it. That is how the case stands; and accordingly Weller was improperly made a plaintiff in this action.

Then the question is, What is to be done now? I think Weller is entitled to have the proceedings stayed in the same way as in *Reynolds* v. *Howell*. It is clear that there was for a great many years a conflict between the practice at common law and the Chancery practice. For myself, I am familiar only with that at common law, and it seems to me a gross injustice, and I can scarcely believe that any court ever held that a person who has been made a plaintiff without his own knowledge and consent, and has been ordered to pay costs, should not be able to have his name struck out, but should be told he has no remedy except against the solicitor who improperly made him a party—it may be a solicitor who is insolvent. The judgment of Lord Blackburn in *Reynolds* v. *Howell* is very important. There it was held that where an attorney brings an action without proper authority, the plaintiff is entitled to have the proceedings stayed without payment of costs. The matter was subsequently discussed in *Nurse* v. *Durnford* and *Newbiggin Gas Co.* v. *Armstrong*, and finally it was held that the common law practice was that which was to be preferred. That, I take it, is the practice which is in force at the present time, both in the Chancery and in the Queen's Bench Division.

The only other question is, what order is to be made as to Toppin? He was in the wrong throughout, and was the person who brought about the making of Weller a party; and I think the order stated by Lindley, L.J., as to the costs he is to pay, is the right one. I also agree that the money actually received by Mr. Foote's clients ought to be returned; protection being given to them and also to the sheriff if he requires it against any action for trespass.

RIGBY, L.J.—I am of the same opinion. First of all, as to the construction of the rule, I cannot entertain any doubt that the emphatic words there used were intended to be literally understood: "His own consent in writing thereto" must be his own personal authority in writing, and I think those words were intended absolutely and altogether to put an end to any dispute arising, on verbal evidence, as to whether a solicitor who joins a person as a plaintiff was really authorized or not. I agree that section 34 of the Act of 1852 makes that still more clear—if it could be made more clear—than the words of rule 11 make it; but, at any rate, I think the construction of that rule is plain. Then it is said that Weller did give his consent, which has been reduced into writing with his approval, and that, therefore, he is estopped from denying that this is "his consent in writing." I wish to say, upon that, that it is idle to say that a man shall only be bound by a written consent, but that, if he consents verbally, he will be estopped from denying that he is bound by a writing. I come, therefore, to the conclusion that there was no proper authority under ord. 16, r. 11, to make Weller a plaintiff in this action.

Then comes the important question, How is the wrong that has been done to be remedied? It appears that in such cases not the Court of Chancery alone, but the courts of common law as well, were in the habit of saying to a person who had been made a defendant or a plaintiff, "Though you never authorized it, the courts cannot go behind the record, but must treat you as if you had been properly made a party, and your only remedy is against the attorney who wrongly placed you on the record." That appears to have been the common law practice right down to the case of *Robson* v. *Eaton*, 1 T. R. 62, where Lord Mansfield took a bold line, as he often did, overruled the past practice, and said, "Make the order against the attorney." That was a remarkable case, somewhat resembling the present, because there the attorney who made the mistake was acting *bonâ fide*. There was brought to him a power of attorney which purported to have been executed before the Lord Mayor, and to be attested by the Lord Mayor, and if it was worth anything it was a clear authority from the person, who was afterwards made a plaintiff, to make him a plaintiff. So far the attorney had not acted improperly, yet Lord Mansfield held that as he had acted upon an authority which turned out to be a forgery, he must take the consequences; and he was made liable for all the costs which the plaintiff would have had to pay in the action. Even that did not settle the question, for afterwards Parke, B.—no mean authority—considered that the old authorities were the more correct. But ultimately, in *Reynolds* v. *Howell*, the common law courts, under the guidance

of Lord Blackburn, emancipated themselves altogether from that doctrine, declared that they should hold themselves bound by the principle of *Robson* v. *Eaton*, and applied it to the case before them. That was followed in the Chancery Division by the two cases that have been referred to, the one being *Newbiggin Gas Co.* v. *Armstrong*, a decision of the Court of Appeal. Those decisions were afterwards followed in *Cape Breton Co.* v. *Fenn*, 29 W. R. 386, 17 Ch. D. 198, where, certain solicitors having commenced an action in the name of the company, it was held "that the action must be dismissed as having been instituted without authority, and that H. & Co."—those are the persons who had issued the writ—"must pay the costs of all parties; the costs of the company"—whose name had been used—"being taxed as between solicitor and client, and the other costs as between party and party." That case settled the matter on a more satisfactory basis.

Here Mr. Toppin may naturally feel that he has been rather a victim in this matter; but someone must be a victim when proceedings are wrongly instituted. The question is, Who is responsible for that wrong? If it be the solicitor, he is the person who ought to pay. I agree as to the form of order proposed by Lindley, L.J.

LOPES, L.J.—I quite agree with what Rigby, L.J., has said as to the common law practice being, up to *Robson* v. *Eaton*, the same as the Chancery practice. When I said that the common law practice was the other way, I meant the practice I was familiar with, and was referring to my own time.

Appeal allowed.

Solicitors, *Comins & Drewry; Sidney Toppin; Robbins, Billing, & Co.*

From County Palatine Court of Lancaster. (Lindley and Lopes, L.JJ.) July 2, 1896.

In re HIGGINSHAW MILLS AND SPINNING CO. (LIMITED).

MANCHESTER AND COUNTY BANK (LIM.) *v.* HIGGINSHAW MILLS AND SPINNING CO. (LIMITED). (*a.*)

Company—Winding up—Mortgage—Interest accrued after winding up order—Distress—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.

The liquidators and receivers of the H. Co. entered into possession of their mills and kept them in working order, so as, if possible, to sell them as a going concern at an enhanced value. The mortgagees having applied for leave to distrain, for interest accrued due after the date of the entering into possession, were refused leave, on the ground that the possession of the liquidators was as beneficial to the mortgagees as to the company and to all its other creditors.

It is easier for a landlord to obtain leave to distrain for rent than for a mortgagee to obtain leave to distrain for interest accrued since the date of the winding up.

In re Lancashire Cotton Spinning Co., 36 *W. R.* 305, 35 *Ch. D.* 656, *followed.*

Appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The company was incorporated in July, 1873.

By a mortgage deed, dated the 24th of October, 1873, the property of the company was mortgaged to Hilton Greaves to secure £40,000 and interest.

The mortgage contained the usual power of sale, and a power for the mortgagee to distrain for any interest in arrear "in such or the like manner as landlords are by law entitled to do in cases of distresses taken for non-payment of rent reserved on leases for years."

In 1888 the company issued debentures to the value of £30,000, charged upon its undertaking and property.

On the 4th of October, 1895, the company presented a petition for a winding-up order.

On the 11th of October the Manchester and County Bank, on behalf of themselves and all other debenture-holders, brought an action against the company, and on the 15th of October an order was made in the action for the appointment of a receiver, and ultimately, on the 14th of January, 1896, three receivers were appointed.

On the 24th of October the company passed an extraordinary resolution for winding up voluntarily, and the same three gentlemen were appointed as liquidators.

On the 18th of November a supervision order was made, and on the next day the liquidators went into possession of the mills.

From the 13th of December, 1895, until the 14th of January, 1896, they worked one of the mills.

On the 13th of April, 1896, the liquidators ceased to keep the machinery going, and Henry Greaves, one of the executors of the mortgagee, who had died, stated that the mortgagees would not pay any part of the expenses of keeping the machinery in working order.

The interest on the mortgage debt being in arrear, on the 8th of May, 1896, the executors took out a summons asking for leave to distrain after the commencement of the winding up.

The Vice-Chancellor gave them leave to distrain for interest accrued due to the applicants since the 19th of November, 1895, the date when the liquidators went into possession.

Section 163 of the Companies Act, 1862, provides as follows: "Where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents."

The liquidators appealed.

Buckley, Q.C., and *Radford*, for the appellants.—By section 163 of the Companies Act, 1862, a distress after a winding-up order has been made is void to all intents, but that is qualified by section 87, under which the court may give leave to proceed, distress being a "proceeding" under that section: *In re Exhall Coal Mining Co.*, 4 D. G. J. & S. 377, 12 W. R. Dig. 136. The case is governed by *In re Lancashire Cotton Spinning Co., Ex parte Carnelley*, 36 W. R. 305, 35 Ch. D. 656. The court will only give leave to distrain in two classes of cases—(1) if the lessor says he will accept a surrender, but the lessee will not, then the court will give leave to distrain; (2) if it be shown that the cost incurred is in the winding up, then leave is given. That becomes a question of fact; was the cost incurred solely for the benefit of the winding up? if so distress is granted: *In re Brown, Bayley, and Dixon*, 30 W. R. 5, 18 Ch. D. 649, is against us, but is not binding on this court. The assets are worth considerably more than the debentures, so that *In re New City Constitutional Club Co., Ex parte Purssell*, 35 W. R. 421, 34 Ch. D. 646, is not in point.

Astbury, Q.C., and *J. A. Tweedale*, for the mortgagees.—The tests laid down by this court in *In re Oak Pits Colliery Co.*, 30 W. R. 759, 21

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Ch. D. 322, apply. In that case the court accepted the *dictum* of Fry, J., in *In re Brown, Bayley, and Dixon*, and made it authoritative. If the possession of the liquidator is for beneficial purposes, he ought to pay rent and not have the place free; if the possession is only to keep the place going, then he ought to have it free: *In re Lancashire Cotton Spinning Co.* does not suggest that there is no power to distrain.

Lindley, L.J.—I think the Vice-Chancellor was mistaken in granting leave to distrain. The case is a very simple one. [His lordship stated the facts and continued:—] Up to that time (when the liquidators took possession) the mortgagees had done nothing at all. Since then the liquidators have been trying to do the best they can with the mill. It was quite as much for the benefit of the mortgagees, as of the shareholders and creditors, that the mill should be kept going; and that makes an important difference between a mortgagee and a mere landlord. The liquidators kept the works going with a view to a sale. Now, the mortgagees ask to be paid in full or for leave to distrain for the interest which has accrued due since the date when the receivers entered. Upon what principle? They must have regard to the statutes. As was pointed out in *In re Lancashire Cotton Spinning Co.*, anyone applying for leave to distrain must show good reason why leave should be given. That case shows that there may be cases in which leave to distrain will be given, and what are sufficient grounds are fully and accurately explained there, and in *In re Oak Pits Colliery Co.*, which was a case of landlords. The distinction between the two cases is against the mortgagee; it is easier for a landlord to show cause why he ought to be allowed to distrain than for a mortgagee. The reason is obvious. It would be very unjust that the landlord's property should be used by a company for the purpose of carrying on its business, and that the company should pay no rent for it. The mortgagee has his security, and if the property is so managed as to sell at a better price, he has the benefit of it. That appears to be the *ratio decidendi* of *In re Lancashire Cotton Spinning Co.*, where it was held that the mortgagees ought not to be allowed to distrain for interest accrued due after the commencement of the winding up. For leave to be given, there must be some conduct on the part of the liquidator which would make it inequitable for leave not to be given. This view is quite consistent with what Fry, J., said in *In re Brown, Bayley, and Dixon*. In my opinion this case is entirely governed in principle by *In re Lancashire Cotton Spinning Co.*, and the appeal must be allowed, and leave to distrain refused.

Lopes, L.J.—I am of the same opinion. The words in section 163 are explicit; but the section is to be read in conjunction with, and is controlled by section 87. That conclusion was arrived at thirty-two years ago, and has been acted upon ever since. This case is governed by *In re Lancashire Cotton Spinning Co.*, and I entirely agree with what was said about the case of a landlord.

The Vice-Chancellor made a mistake in giving leave to distrain. The summons must be dismissed with costs here and below.

Appeal allowed.

Solicitors, *Bowcliffes, Rawle, & Co.*, for *R. & J. Ascroft & Maw*, Oldham; *Woodcock, Ryland & Parker*, for *Tweedale, Sons, & Lees*, Oldham.

High Court of Justice.

Chan. Div. } July 24, 1896.
Romer, J. }

In re Doetsch.
Matheson & Co. *v.* Ludwig. (*a.*)

Partnership — Debt — Spanish firm — Administration action—Separate estate of deceased partner—Lex fori.

A rule of Spanish law that the separate estate of a deceased partner cannot be proceeded against by a creditor of the partnership until the joint assets are first judicially proved insufficient, is a rule of procedure, and does not prevent the creditor of a Spanish firm obtaining administration in this country of the separate assets in this country of a deceased partner. The rule as to administration is a matter of the lex fori.

Trial of action.

This was an action for the administration of the estate of H. M. Doetsch, deceased, who had been a partner in the Spanish firm of Sundheim & Doetsch, merchants, carrying on business at Huelva in Spain.

By an agreement dated the 28th of November, 1893, between the said firm and Messrs. Matheson & Co. the plaintiffs, which referred to certain previous transactions that had taken place between the parties, the firm of Sundheim & Doetsch, became bound to pay Matheson & Co. the sum of £100,000. This agreement, it appeared during the course of the trial, was made in London.

H. M. Doetsch died on the 25th of May, 1894, domiciled in London, and leaving a will whereby he appointed the defendants G. Ludwig and C. Doetsch his executors. He died possessed of assets in this country. There was still owing the greater part of the £100,000.

The plaintiffs now brought this action on behalf of themselves and all others the joint creditors of the firm of Sundheim & Doetsch, claiming a declaration that the real and personal estate of H. M. Doetsch was liable in equity to the joint debts of the firm, and that it should be administered by the court. The defendants pleaded that Sundheim & Doetsch was a Spanish firm (*sociedad colectiva*), constituted according to Spanish law, according to which this action could not be brought, as the joint assets had not been proceeded against and proved insufficient, and that, therefore, administration here should be refused. It was admitted between the parties that by the Spanish law a creditor of a partnership such as that of Sundheim & Doetsch could not proceed in the Spanish courts against the separate estate of any partner, whether deceased or surviving, until the creditor had proceeded against and exhausted the joint estate of the partnership, or until the insufficiency of the joint estate to pay the creditor's debts in full had been judicially established.

Eve, Q.C., and *Howard Wright*, for the plaintiffs.—The rules as to the administration and distribution of the estates of debtors are governed by the *lex fori*: *Wilkinson* v. *Henderson*, 1 My. & K. 582; *Thurburn* v. *Steward*, 19 W. R. 678, 683, L. R. 3 P. C. 478; *In re Kloebe, Kannreuther* v. *Geiselbrecht*, 33 W. R. 391, L. R. 28 Ch. D. 175. The rules of the Spanish law do not apply to the courts here, as they relate to matters of procedure: *Bullock* v. *Caird*, 23 W. R. 827, L. R. 10 Q. B. 276. The ultimate right of the creditors is the same in both countries. The reason why a creditor may in this country proceed at once against the separate estate of the partner is merely to avoid

(*a.*) Reported by J. W. Greig, Esq., Barrister-at-Law.

circuity of action: *Winter* v. *Innes*, 4 My. & Cr. 101, 111; *Wilkinson* v. *Henderson*.

They also cited *Lodge* v. *Pritchard*, 11 W. R. 1086, 1 De G. J. & S. 610; Westlake Priv. Int. Law, 1st ed., p. 197; *In re Melbourn*, 19 W. R. 83, L. R. 6 Ch. App. 64; *Ex parte Holthausen, In re Scheilber*, L. R. 9 Ch. App. 722; *Pardo* v. *Bingham*, L. R. 6 Eq. 485, 17 W. R. Dig. 49; and *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202.

Cozens-Hardy, Q.C., and *Cartmell*, for the defendants.—This is not a question of procedure, but of liability. By the Spanish law the only liability that attaches in respect of this debtor's liability to the firm, *sociedad colectiva*, which is treated as an entity, as is the *société commandite* by the French law, and no liability attaches to the separate partners until the firm has been proceeded against and shown to be unable to pay the debt. This is a condition precedent to the liability arising, and consequently at the present time the separate estate of Doetsch is under no liability to the plaintiffs. The contractual liability of the parties at the date of the contract should be considered. The parties contracted with reference to the Spanish law, and the contract should be so construed: see Dicey on Domicile, p. 151. [ROMER, J.—But the contract was made in London.] If certain provisions of the contract, as, *e.g.*, an arbitration clause, are to be governed by English law, still such matters as the general liability of the parties come under the Spanish law.

ROMER, J.—It is admitted that the plaintiffs are creditors of the firm of Sundheim & Doetsch. As such creditors they ask for the usual administration of the estate of Mr. Doetsch—that is to say, they ask to have the separate assets of Mr. Doetsch applied in paying the joint debts after first satisfying the separate creditors. Objection is taken to that relief on the ground that the firm of Sundheim & Doetsch is a Spanish firm, and that by the Spanish law the estate of one partner who dies cannot be reached by joint creditors of the firm until the estate of the firm has been proceeded against, or is exhausted, or there is proved insufficiency of the joint estate. I think that that objection fails. It is clear, according to English law, that, as a matter of procedure here, to avoid circuity of action, a creditor of a partnership of which one member is dead is entitled as a creditor to share in the administration of the separate estate of the deceased partner after the separate debts are paid without first proving that the surviving partner is insolvent and without being obliged first to have recourse to the joint assets. That was settled by *Wilkinson* v. *Henderson* and other cases which have been cited before me. Now from the admissions which alone are before me it appears to me that the Spanish differs from the English law only in the matter of procedure. It appears that the Spanish courts require a joint creditor before he seeks to reach the estate of a deceased partner, to first proceed against and exhaust or prove the insolvency of the joint estate. In my opinion that is unquestionably a method of procedure.

It is clear that the Spanish firm was not a corporation; that is not suggested, or if suggested is certainly not established. On the contrary the admissions show that the estate of the deceased partner can be reached after proper procedure is taken to exhaust or prove the insolvency of the joint estate, and certainly it cannot, I think, be successfully contended that the plaintiffs are to be considered as having contracted in any way not to take such proceedings as those before me.

Now, that being so, it appears to me that there is nothing here to prevent the plaintiffs asking for the relief they do. The procedure of the Spanish courts does not bind the courts here, nor does the Spanish law at all affect the right of a creditor here to avail himself of the benefits given by the English courts in administering estates here. For that *Bullock* v. *Caird* is a sufficient authority, and speaking generally, English assets have to be distributed according to the English law, according to the priorities recognized by courts in this country, and according to the rules of procedure and the course of distribution adopted here. That general proposition was pointed out in, amongst other places, the case of *Thurburn* v. *Steward* by Lord Cairns, where he says the proper order of priority of distribution of assets is always a matter for the *lex fori*, and the country where distribution takes place always claims to itself the right to regulate the course of distribution. For these reasons it appears to me, that the objection fails. I need only add that in my opinion the contract between the parties on which the rights of the plaintiffs turn is to be governed by the *lex loci contractus*, that is to say, by the English law.

Administration decreed.

Solicitors, *Freshfield & Williams; Norton, Rose, & Co.*

Q. B. Div.
(Grantham and Kennedy, JJ.) Oct. 27.

REG. v. JUSTICES OF LONDON.
Ex parte KERFOOT. (*a*.)

Justices—Bias—Hearing of an application for renewal of licence—Circular sent to magistrates to attend.

The justices of the Tower Division of the county of London refused to renew a licence to a certain public-house. Against their decision K., an aggrieved party, appealed to the Quarter Sessions. Prior to the hearing of the appeal the chairman of the Tower Bench issued a circular to all the magistrates of the county of London requesting them to attend on the day fixed for the hearing of the appeal, and informing them that on that day six appeals relating to one licensed house in the Tower Division would be heard. The appeal was heard and dismissed. K. then obtained a rule nisi *directed to the justices of the county of London, to show cause why their decision dismissing the appeal should not be set aside on the ground of bias.*

Held, that, as the circular did not ask those justices who attended to vote in any particular way, and as no interested justices took part in the proceedings except as mere spectators, the proceedings were not vitiated, and therefore a mandamus *ought not to issue commanding the justices to hear and determine the application.*

In this case a rule *nisi* for a *mandamus* had been obtained on behalf of J. R. Kerfoot, calling upon the justices of the county of London in quarter sessions assembled to hear and determine an appeal against the decision of the justices of the Tower Division on the 27th of March, 1896, refusing to renew a licence for the Wayland Hotel, Hackney.

The facts were these: A person of the name of Alfred Francis Rubury had been in possession of a public-house situated in Wayland-avenue, Dalston-lane, Hackney, called the "Wayland Hotel." At the adjourned annual licensing meeting of the Tower Division, on the 27th March of the present year, Rubury applied for a renewal of the licence to himself, and also for the transfer of the licence to a Mrs. Curtis. At the same meeting Mrs. Curtis applied to have it transferred to her or a licence granted her,

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The magistrates refused either to transfer or renew the licence to Rubury or Mrs. Curtis. Kerfoot, the freeholder of the "Wayland Hotel" and formerly its licensee, thereupon came forward, and as a party aggrieved by the decision of the magistrates, desired to have their decision reversed. Accordingly Mrs. Curtis and Kerfoot entered an appeal, but Rubury did not.

In May Mr. Martineau, the chairman of the justices of the Tower Division, thought it proper—because, as he stated in his affidavit, due information was not given to the justices of the business that was to be brought before them—to issue a circular in the following terms to all the acting magistrates of the county of London whose addresses were on the register:—

"Esher, Surrey.

"Dear Sir,—I am requested by my brother justices acting in the Tower Division, to send an intimation to all the acting justices of the county that six appeals relating to one licensed house in the Tower Division had been appointed for hearing at the Sessions House, Clerkenwell, on Thursday, the 4th of June, at 10.30 a.m. The Tower Bench attach so much importance to the case that they have instructed counsel to appear in support of their decision, and have asked me to express the hope that it may be convenient to all the justices who are interested in licensing matters to attend the hearing of the matter.—Yours faithfully,

"P. M. MARTINEAU,
"Chairman of the Tower Division."

This notice was posted to over 400 London justices. The appeal came on for hearing on the 4th of June, and was dismissed by a majority of 19 to 4. Kerfoot applied for and obtained the present rule on the ground that the decision given on the 4th of June by those magistrates who sat to hear the appeal was not given after the case had had a proper judicial hearing, as the minds of those taking part in the proceedings had been biassed by the sending of the circular.

Harper, for the justices of the county of London, expressed their regret that the circular had been issued.

Willis, Q.C. (with him *Horace Avory*), showed cause against the rule being made absolute. The rule had apparently been granted on the ground of bias on the part of the justices who heard the appeal. Whether it was a right or a wrong thing to send out a circular asking brother magistrates to attend when an important case was set down for hearing he did not intend to argue; but in justice to Mr. Martineau he put in an affidavit filed by that gentleman, in which he stated the sole object of sending out the circular was to secure at quarter sessions as large an attendance of the justices of the county as possible. The circular, he submitted, was not calculated to influence the minds of the magistrates one way or the other. [GRANTHAM, J.—There is nothing in the letter asking the London justices to vote in support of their decision.] The justices for the Tower Division present did not sit upon the bench or take any part whatever in the proceedings.

Bigham, Q.C., and *Grain*, in support of the rule.—No improper motive was imputed to Mr. Martineau, but the circular must be regarded as a four line whip asking them to support the decision of the Tower justices. The solicitor for Kerfoot had stated in his affidavit that when Sir Peter Edlin took his seat upon the bench he remarked very strongly upon having received one of these circulars, and expressed his opinion that the course which had been taken by the Tower justices was, in his experience, absolutely unprecedented, and asked that no member of the Tower Division who was present should take part in the proceedings. He submitted that in law the case had not been heard, as the tribunal had been influenced and biassed by the receipt of the circular and the presence of those who had come to take part in the proceedings in response to the invitation contained in the notice. As a fact an unusual number of justices attended. If any one of the magistrates who heard the appeal was interested in the result, the court was improperly constituted, and an order made under such circumstances would be quashed on *certiorari*.

They relied on the following cases: *Reg.* v. *London County Council*; *Ex parte Akkersdyk, Ex parte Femenia*, 40 W. R. 285, [1892] 1 Q. B. 190; *Reg.* v. *Meyer and Others, Justices*, 24 W. R. 392, 1 Q. B. D. 173; *Reg.* v. *The Justices of Hertfordshire*, 7 Q. B. R. 542.

GRANTHAM, J.—The rule must be discharged The only ground upon which the application was founded was that the magistrates of the county of London who sat at quarter sessions were biassed in their judgment in consequence of something done by the magistrates who first heard the application. All that the magistrates who first heard the case did—assuming that they were all responsible for what was done by their chairman—was to write a letter to their brother magistrates of the other divisions of the county of London, asking them to be present, as a case of very great importance was coming on. Instead of the case being heard by four or five, it was heard by something like twenty-three magistrates, and of these something like nineteen were against the appellant, and the rest in his favour. It is not suggested that the magistrates who attended were known personally to the magistrates of the Tower Division; it is not suggested that they were communicated with privately, and asked to uphold the decision which had previously been given, and the most that can be said is that they were asked as judges, so to speak, to be present in order that the matter might be dealt with before a full tribunal. Knowing the tribunal they were dealing with—namely, magistrates—gentlemen who had very important duties to perform, and who, as a rule, performed them with very great ability and undoubted honour, I think it is a great deal too much to ask the court to say that the magistrates of the county of London, whose chairman is Sir Peter Edlin, were in the slightest degree biassed or could be biassed by the receipt of such a letter. If any direct answer to such a suggestion be needed, it is to be found in the various affidavits filed by several of the magistrates, in which they distinctly state that they were in no way biassed by the receipt of the circular, and were fully prepared to allow the appeal, had the evidence in support of it been sufficient to warrant them doing so. For my own part I am not prepared to make this rule absolute on the slender evidence that has been given in support of it, and knowing as we do as a fact that the magistrates of the Tower Division never took any part in the discussion, I do not see how Mr. Grain can be surprised when we decline to extend the meaning of those cases which he cited to the extent he asked us in order to assist his case.

KENNEDY, J.—In concur. Nothing, in my opinion, is more important than that justice should be absolutely pure, untainted, and unbiassed, and however little ground there may have been for the present application, still, in view of the facts that some people have thought evil of the notice sent out, it is unfortunate that the circular was issued. One must, however, credit those who sent out this circular with the purest of motives. In my opinion they did so

solely in order that the question—which admittedly is of great importance—might not be adjudicated upon by a tribunal consisting only of three or four, but by a full bench, so that the decision in this matter might guide them in the future. It was argued that convening the attendance of the justices of the different divisions was an interference with the course of justice. I do not see how anyone can fairly take that view of the matter. I think that this is not a case in which there is any evidence shown of bias, nor evidence that in fact there was bias in the decision given by the magistrates, nor do I think that the cases cited are authorities on which we can allow the application.

Rule discharged with costs.

Solicitor for the appellant, *G. W. Coldham.*

Solicitor for the Tower justices, *E. W. Beal.*

Solicitor for the London justices, *Sir R. Nicholson.*

Q. B. Div.
(Cave and Wills, JJ.) June 8, 1896.

VESTRY OF HAMMERSMITH *v.* LOWENFELD. (*a.*)

Metropolis—Nuisance order—Recovery of costs and expenses—Limitation of time—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Public Health (London) Act,* 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 11, 117.

An action brought in the county court under section 11 *of the Public Health (London) Act,* 1891, *to recover costs and expenses incurred in respect of a nuisance order is subject to the limitation of time imposed by section* 11 *of the Summary Jurisdiction Act,* 1848, *in respect of making complaints and laying informations, and must therefore be commenced within six months from the time when the costs and expenses were incurred.*

Tottenham Local Board *v.* Rowell, 25 *W. R.* 135, 1 *Ex. D.* 514, *followed.*

Appeal by the plaintiffs from the Brompton County Court.

The action was brought to recover £43 11s., being the costs and expenses incurred by the plaintiffs in serving notice, making a complaint, and obtaining and carrying into effect a nuisance order against the defendant under the Public Health (London) Act, 1891. The amount of the costs and expenses was not fixed by the magistrate who made the nuisance order.

It was admitted that the costs and expenses were incurred more than six months before the issue of the summons in the county court.

The county court judge held that the action was barred, being subject to the limitation of six months imposed by section 11 of the Summary Jurisdiction Act, 1848, in respect of summary proceedings before magistrates.

The plaintiffs appealed.

The Public Health (London) Act, 1891, provides as follows:—

Section 11.—1. All reasonable costs and expenses incurred in serving notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made. . . .

2. Such costs and expenses and any fines incurred in relation to any such nuisance may be recovered in a summary manner or in the county court or High Court. . . .

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Section 117.—1. All offences, fines, penalties, forfeitures, costs, and expenses under this Act or any bye-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts.

2. Proceedings for the recovery of a demand not exceeding fifty pounds, which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken into the county court as if such demand were a debt.

The Summary Jurisdiction Act, 1848, provides:—

Section 11.—In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

Macmorran, Q.C., for the appellants.—The limitation of time imposed by section 11 of the Summary Jurisdiction Act, 1848, as to complaints and informations does not apply to actions brought under section 11 of the Public Health (London) Act, 1891. If the action were brought under section 117 of the latter Act, *Tottenham Local Board* v. *Rowell*, 25 W. R. 135, 1 Ex. D. 514, would be in point, and the limitation of time would apply. That case was decided on the ground that the enactment under which the action was brought (section 24 of the Local Government Act, 1858, Amendment Act, 1861) gave an option to proceed in the county court instead of before the magistrates in cases where the demand was under £20. But in section 11 of the Act of 1891 there is no limit as to the amount of the demand and no such "option" given as in section 117. The language of the two sections and the subject-matter with which they deal are different, section 11 creates a civil debt recoverable without any special limitation of time.

H. Courthope Munroe, for the defendant.—It cannot have been intended that the local authority should be permitted to lie by for years before bringing their action under section 11. That section does in effect give an option to recover their costs and expenses, either summarily or in a county court or in the High Court, although the word "option" does not occur: *Tottenham Local Board* v. *Rowell* therefore applies, and an action under section 11 of the Act of 1891 must be brought within the period of six months mentioned in section 11 of the Summary Jurisdiction Act, 1848. The action does not lie unless the magistrate who made the nuisance order has assessed the amount of the costs and expenses: the amount to be recovered is within his discretion, and the county court is not the tribunal to ascertain it.

Macmorran, Q.C., in reply.—The magistrate is not required to assess the costs, and it is obvious that he cannot do so as far as regards the carrying into effect of his order.

CAVE, J.—I am of opinion that the defendant is entitled to our judgment. The action was brought under section 11 of the Public Health (London) Act, 1891. [His lordship read the section.] We are bound to follow the decision in *Tottenham Local Board* v. *Rowell* if it applies. I think this case is really not distinguishable from that. The first mode pointed out by the Act of obtaining and enforcing a nuisance order is to go before the magistrate. If the order be made, or if a fine be imposed and not paid, an option is given of recovering the costs and expenses or the

fine either by summary proceedings or by an action in the High Court or county court. The first and most natural thing to do is to proceed summarily; and if that course be taken, the limitation of time provided by section 11 of the Summary Jurisdiction Act, 1848, applies. The decision in *Tottenham Local Board* v. *Rowell* is that when an option is given to proceed either summarily or in the county court, and a limitation of time is imposed with respect to proceedings summarily, that limitation applies also to the proceeding in the county court. The arguments by which that decision was arrived at may seem to run rather fine, but we are bound by it unless the case can be distinguished from the present. I am of opinion that it cannot be distinguished; and, therefore, upon that ground the judgment appealed against was right.

WILLS, J.—I am also of opinion that the decision of the county court judge was right. It is admitted by the appellant's counsel that if their action had been brought under section 117 of the Act of 1891 it would be impossible to contend that this case was not governed by the decision in *Tottenham Local Board* v. *Rowell*. The Court of Appeal there held that where under statutory provisions similar to those contained in section 117, the recovery of costs might be enforced at the option of the person seeking to recover them either in a court of summary jurisdiction or in the county court, the limitation fixed by the Summary Jurisdiction Act, 1848, of the time within which summary proceedings may be taken, applied to an action in the county court—that the remedy in both cases was subject to the same limitation of the time within which it could be enforced. I think it is impossible to draw a distinction between section 117 and section 11.

The language of section 11 is somewhat different, but there is no difference in substance. Section 11 says that "such costs and expenses may be recovered in a summary manner or in the county court or High Court." What is that but saying that the person entitled to recover them may at his option select either the court of summary jurisdiction or the county court or the High Court in which to pursue his remedy? I cannot see that the option given is any the less an option because the words "at the option" are not used. If that view be right, no real distinction can be drawn between section 11 and section 117. I am of opinion that the case before us is really governed by the decision of the Court of Appeal in *Tottenham Local Board* v. *Rowell*, and, therefore, that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellants, *Watson, Sons, & Room.*

Solicitors for respondent, *A. Arnold Hannay.*

Q. B. Div. (Pollock, B., and Bruce, J.) — May 13, 14, 22, 1896.

SMELTING CO. OF AUSTRALIA *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp duty—Conveyance on sale—Share in a Colonial patent—Licence to use patent—"Property"—"Property locally situate out of the United Kingdom"—Stamp Act, 1891 (54 *&* 55 *Vict.* c. 39), *s.* 59, *sub-section* 1.

An agreement made in England for the sale of a share in a Colonial patent, and a licence to use the patent in a specified district of that colony, is an agreement for the sale of an interest in "property" within the meaning of of section 59, *sub-section* 1, *of the Stamp Act,* 1891, *and therefore is liable to an* ad valorem *stamp duty "as if it were an actual conveyance on sale." Further, that such patent and the licence to use it are not "property locally situate out of the United Kingdom" within the meaning of the exception in that sub-section.*

Case stated by the Commissioners of Inland Revenue pursuant to the 13th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On the 13th day of November, 1895, an instrument, a copy of which was annexed to and formed part of this case, was presented on behalf of the Smelting Co. of Australia (Limited), the appellants, to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39) for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was an agreement under seal for the sale of the several rights and properties specified in the schedule thereto annexed under eight heads, and was dated the 1st day of August, 1895. It was made between the Camden Syndicate, Limited, of the one part, and the appellants of the other part. It was made and executed in England, and the syndicate and appellants were respectively companies incorporated under the Companies Acts, having registered offices and carrying on business in England.

By clause 1 of the instrument it was agreed that the syndicate should sell, and the appellants should purchase, the rights and properties, the particulars whereof were specified in the schedule thereto as mentioned above.

By clause 2 the consideration for the said sale was fixed at £300,000, to be paid and satisfied partly in cash and partly in shares, as therein mentioned.

The appellants satisfied the commissioners that all the rights and properties mentioned in the schedule, except those secondly and thirdly therein mentioned, came within one or other of the exceptions contained in the first sub-section of the 59th section of the Stamp Act, 1891, and were therefore exempt from the duty imposed by that sub-section. The proportion of the consideration attributable to the rights and properties so exempt was £250,000, leaving the sum of £50,000 attributable to the rights and properties secondly and thirdly described. These last mentioned rights and properties, as appears by the said schedule, consisted of a half-share in a patent which had been granted in New South Wales to Messrs. Marsh & Storer, and had been assigned to the syndicate, and also a licence to use this patent in a particular district of the colony which had been assigned to the syndicate.

These rights and properties were, by an indenture dated the 26th day of November, 1895, and executed in Australia, assigned unto the appellants. This indenture was stamped in accordance with the law of New South Wales with a stamp duty of £250, being Colonial stamp duty on the said consideration of £50,000. A copy of this indenture (which recites the licence mentioned in the second paragraph of the schedule to the agreement and also the assignment from the owner of the patent to the syndicate of one half-share therein mentioned in the third paragraph of such schedule) was made part of this case.

The commissioners were of opinion that the rights conferred by the said patent and licence were respectively interests in property within the meaning of section 59 (1) of the Stamp Act, 1891, and that

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the appellants had failed to show that the same came within any of the classes of property which, under the terms of the said sub-section, were excepted from liability to duty thereunder. They therefore held that the instrument was chargeable under the same section and sub-section with the duty chargeable under the head "Conveyance on Sale" in the first schedule to the Stamp Act, 1891, and they therefore assessed such duty at £250, being 5s. for every £50 of £50,000, the portion of the total consideration which was attributable thereto as above mentioned. The commissioners were also of opinion as to the rights and properties other than those secondly and thirdly in the in the schedule described, that the instrument was as an agreement under seal further chargeable under the head "Deed of any kind whatsoever not described in this schedule" in the first schedule to the Stamp Act, 1891, with the additional duty of 10s. They assessed the duty thereon accordingly, and the instrument was stamped in conformity with the assessment.

The questions for the opinion of the court were: (1) Whether the instrument was chargeable with the duties of £250 and 10s. in accordance with the assessment of the commissioners; (2) if not, with what duty the instrument was chargeable.

By section 59, sub-section 1, of the Stamp Act, 1891 (54 & 55 Vict. c. 39), it is provided that "any contract or agreement made in England or Ireland under seal or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom . . . . . shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property, contracted or agreed to be sold."

A. T. Lawrence (*J. W. St. L. Leslie* with him) for the appellants.—This conveyance is not liable to an *ad valorem* duty under section 59 of the Stamp Act, 1891. Sub-section 1 is a new provision in order to meet cases where agreements are treated by the parties thereto as actual conveyances so as not to necessitate a formal conveyance. But in this case there has been a carrying out of the agreement by the deed of 26th November, 1895, which was stamped with an *ad valorem* duty. It was never intended that the duty should be paid twice over, which is what would happen if the contention of the Crown were right. Even if the patent and the licence to use it are "property," they are "property locally situate out of the United Kingdom" within the exception n sub-section 1. These words apply to a patent because the patent is only operative in a particular district. By the Colonial Acts (16 Vict. No. 24 and 51 Vict. No. 3) it is necessary that patents should be locally registered. The patent is, therefore, locally situate in New South Wales and the licence to use it must also be locally situate there. All property has some local situation, *Attorney-General* v. *Bouwens*, 4 M. & W. 171, see judgment of Abinger, C.B., at p. 191. A licence in itself, however, is not "property" at all, and unless coupled with a grant confers no property or interest. *Heap* v. *Hartley*, 38 W. R. 136, 42 Ch. D. 461, *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue*, 20 W. R. 610, L. R. 7 Ex. 211. A patent is a "franchise" within the meaning of the proviso in section 56 of the County Courts Act, 1888, see *Reg.* v. *County Court Judge of Halifax*, 39 W. R. 545, [1891] 2 Q. B. 263.

Sir R. Finlay, S.G. (*Danckwerts* with him), for the respondents.—Both the patent and the licence to use it are "property" within the meaning of section 59, sub-section 1. In *Potter* v. *Commissioners of Inland Revenue*, 2 W. R. 561, 10 Ex. 147, 23 L. J. Ex. 345, it was held that the assignment of the goodwill of a business was a conveyance of property, *a fortiori* a licence to use a patent would be property, and in many cases is property of a very great value. The *Limmer Asphalte case* is not in point; there it was held that no property was conveyed because the company had no ownership in that which was purported to be conveyed. *Heap* v. *Hartley* again is not in point; there it was only held that a licensee of a right could not sue in his own name for an infringement of such right. Further, neither the patent nor the licence comes within the exception "locally situate out of the United Kingdom." Those words refer to real property or something in the nature of it; but a licence to use a patent is only personal property to be enjoyed in a particular locality. Personal property can have no locality, and therefore a patent can have no local situation.

A. T. Lawrence replied.

Cur. adv. vult.

May 22.—The following judgments were delivered:—

POLLOCK, B.—The question raised in this case is whether a conveyance of a sole licence to exercise a Colonial patent in New South Wales, and of a half-share in the patent, is the subject-matter of stamp duty under section 59, sub-section 1, of the Stamp Act, 1891, and the title to the schedule to the Act, which relates to "any deed for the conveyance of property." The first question we have to determine is whether the patent and licence are "property." The word "property" is, of course, a word of very general meaning, and one of the most comprehensive words that can be used. It is very well defined in Stroud's and Sweet's Dictionaries. In the latter many interesting authorities are referred to, and, amongst others, Austin's Jurisprudence, vol. 2, where at p. 477 an attempt is made to define "property." There are decided cases, however, which I think show that the patent and licence are "property" within the meaning of this statute. In *Birchall* v. *Pugin*, 23 W. R. 923, L. R. 10 C. P. 397, it was held that a judgment debt was "property" recovered within the meaning of section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 27). And certainly if it were asked whether a person who had bought this licence had an interest that could be called property in the ordinary meaning of laymen, there could be no doubt about it. In *Potter* v. *Commissioners of Inland Revenue*, it was held that the goodwill of a business was property. It has frequently been said by judges that in construing Revenue Acts the popular sense of words rather than the strict legal meaning ought to be looked at, and the reason for that is obvious. The object of these taxing Acts has nothing to do with the strict legal meaning of words, except when the words used are terms of art, such as words which describe an estate in real property, or other technical terms which are peculiar to the English law. The proposition is very well put in Maxwell on the Interpretation of Statutes at p. 29, where it is said: "To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act"; and at p. 77 it is said that, "In dealing with matters relating to the general public statutes are presumed to use words in their popular sense, *uti loquitur vulgus*." Two cases were cited to show that this licence could not be called "property."

In *Muskett* v. *Hill*, 9 L. J. C. P. 201, 5 Bing. N. C. 694, which was a very technical case, the question was whether the plaintiff had such an interest in land as would enable him to sue in trespass; and in that particular case it was held that a mere licence did not convey such a right as to enable the plaintiff to sue in trespass. Upon that case was founded the decision of *Heap* v. *Hartley*, where it was held that an exclusive licence is leave to do a thing and a contract not to allow anyone else to do it; but that, unless coupled with a grant, it confers no interest or property in the thing, and the licensee has no title to sue in his own name. That decision is exactly on the same lines as *Muskett* v. *Hill*, and they both depend on technical rules of law, which in no way assist one in coming to a conclusion as to what is the meaning of the word "property" in this section. Speaking for myself, I am clearly of opinion that, looking at the object and scope of this statute, the word "property" does include this licence.

Then we come to the question whether it is "property locally situate out of the United Kingdom." It is well known that there can be no locality of a debt. It is said that the person of the creditor, wherever he may be, draws to him the debt. The subject has been very learnedly discussed in several decisions in the ecclesiastical courts when discussing the question of where probate can be obtained. But that law is not applicable to the present case, and the only question is, Can this licence be said to be property in itself which is locally situate out of the United Kingdom?

The expression "locally situate" seems to me clearly to be applicable properly to lands, tenements, hereditaments, or heritages, and there may be some other property *ejusdem generis* (*quasi*-real property, as it has been sometimes called) which may fitly be said to be locally situate out of the United Kingdom; and therefore those words "locally situate" are necessary for the purpose of carrying out the object of the Act. But I do not think that the expression "locally situate" applies to a thing which in truth and fact has no locality. In the result, therefore, I have come to the conclusion that this particular licence is "property," and is therefore the subject-matter of this stamp duty, and that it is not property which is locally situate so as to be within the exception.

BRUCE, J.—I am of the same opinion. I think that the benefit of a sole licence to use a patent in a specified district is an interest in property within the meaning of the section. The authorities cited by my learned brother are, I think, sufficient—if, indeed, authorities are needed—to establish that the words "any property whatsoever," used in the enacting part of section 59, are wide enough to include such rights as those in question.

Whether the interest of the appellants in improvements in the patent which may be hereafter patented is an interest in property may be open to doubt, but it is not necessary to decide that point. Then arises the question whether the interest of the appellants in the licence and patent comes within the exception. I think it does not. The words "lands, tenements, and hereditaments" in the exception are used with reference to land, and interests arising out of land; they are English law terms, and are used to include all such rights arising out of land as are known to, and recognised by, English law. The word "heritage" is a term of the real property law of Scotland, and I think that it is used in the section to include all such rights arising out of land as are known to, and recognised by, the law of that country. But, lest in dealing with rights of property beyond the United Kingdom the terms of the law of England and Scotland should not be comprehensive enough to include rights arising out of land recognised by other systems of law, the word "property" is added to the exception. I think that the word "property" in the exception is used to indicate rights of the same class and description as the preceding words. The words "locally situate" govern the whole exception, and shew that the legislature is dealing only with such rights of property as issue out of land or are connected with the user or enjoyment of land, and so may be said to have a local situation. What is manifestly intended is to exempt such property as is known to jurists as immovable property, if situate out of the United Kingdom.

Appeal dismissed, and judgment for the respondents.

Solicitors for the appellants, *Ince, Colt, & Ince.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Wright, JJ.) — Aug. 4, 1896.

In re NEWTON.

Ex parte NATIONAL PROVINCIAL BANK. (*a.*)

Bankruptcy—Proof—Secured creditor—Amendment of valuation of security—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., rr.* 11, 12 (a), 13.

By the Bankruptcy Act, 1883, *Schedule II., r.* 11: "*If a secured creditor does not either realize or surrender his security, he shall . . . state in his proof . . . the value at which he assesses it.*"

By rule 12 (a): "*Where a security is so valued, the trustee may at any time redeem it on payment of the assessed value.*"

By rule 13: "*Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing . . . that the security has . . . increased in value.*"

The creditor in this case stated in his proof the value at which he assessed his security. The security increased in value, and the trustee tendered to the creditor the amount at which he had assessed it. The creditor refused the offer, and moved to amend the valuation and proof. The trustee opposed, on the ground that he had redeemed the security by tender of its assessed value.

Held, that tender was not equivalent to payment; therefore the security had not been redeemed, and the creditor still had a right to amend.

Appeal by the trustee in bankruptcy against a decision of his honour Judge Austin in the County Court of Bristol, allowing the bank to amend their proof.

The receiving order was made upon the 10th of December, 1894.

Upon the 9th of August, 1895, the bank proved for £517 15s. 7d., stating that they held as security a policy on the debtor's life for £500, and valuing the same at £10.

Upon the 10th of December, 1895, the debtor died, and upon the 21st of December the trustee tendered the £10 to the bank, which they refused to accept.

Upon the 9th of January, 1896, the bank served notice of motion upon the trustee for leave to amend their proof by increasing the valuation of their security to £500. The motion was heard before Judge

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Austin on the 7th of February, when his honour gave the bank leave to amend.

The trustee appealed.

Muir Mackenzie, for the appellant.—The tender by the trustee of the assessed value of the security was equivalent to payment, and amendment cannot be allowed after the trustee, in the exercise of his right of redemption, has paid the assessed value of the security: *Ex parte Norris, In re Sadler*, 35 W. R. 19, 17 Q. B. D. 728.

Reed, Q.C., and *Weatherley*, for the respondent, were not called upon.

VAUGHAN WILLIAMS, J.—I am of opinion that the decision of the learned county court judge was perfectly right. The question depends entirely on the construction of rule 13, schedule II., of the Bankruptcy Act, 1883, which provides that a creditor who has valued his security may "at any time" amend his valuation and proof. Now, Lord Esher, M.R., in *Ex parte Norris, In re Sadler*, pointed out that the words "at any time" must be subject to some limitation, because, he says, "it is impossible to suppose that after the trustee has paid the amount of the valuation and has thus, on behalf of the general body of creditors, become the purchaser of the security, the creditor can undo all that." He goes on: "Is there any other implied limitation? I think that there may be another with reference to the right which by clause (*c*) of rule 12 is given to the creditor to require the trustee to elect whether he will redeem the security. But no such limitation applies to the present case, for the conditions which give rise to that right of election do not exist. Therefore the only limitation which could apply is this: that after the trustee has paid the amount at which the security has been valued by the creditor, the creditor cannot re-open the transaction." In the case before us we have to say whether such time has elapsed or such events have happened as to deprive the creditor of his right of amendment, having regard to the limitation laid down in the Court of Appeal. In my judgment nothing of the sort has happened. It is not denied that there has been no payment by the trustees of the amount at which the security was valued, but it is said that there has been a tender of the amount, which is equivalent to payment. I may point out, however, that the distinction between this case and *Ex parte Norris, In re Sadler* is a very fine one, because there the trustee wrote to the creditor's solicitors giving notice that it was his intention to redeem the policy valued in the creditor's proof, and unless the additional fact relied on here as taking away the creditor's right to amend—namely, that the notice to redeem was coupled with a tender of the amount at which the policy was valued—makes a difference, there is none. I do not think that additional fact ought to make any difference whatever. I think the Court of Appeal meant to say, as a matter of principle, that the rule ought to be so construed as to give the creditor the right to amend, unless by something which has happened the position of the trustee and the creditor has become so altered that the rights of the parties concerned may be considered to be fixed on the basis of the alteration. That would be so where the trustee had paid the creditor the amount at which his security had been valued; but it is not so here. It is perfectly clear that the Legislature did not mean that the mere fact that the creditor's security had increased in value since his valuation of it, should take away his right to amend; because, by the very terms of rule (*b*), he may amend on showing to the satisfaction of the trustee or the court that his security had increased in value since its previous valuation. It is suggested that the Legislature intended there should be an unseemly race of this sort between trustee and creditor—that the trustee, on hearing of the death of the insured person, could rush off to the bank, tender the amount at which the policy had been valued, and require them to hand over their security. I cannot think that the Legislature intended anything of the kind. The creditor has a right to amend until the amount at which he has valued his security has not only been tendered to him, but accepted by him. I may add that I am very much inclined to doubt whether tender and acceptance together would be sufficient to take away the creditor's right to amend if he did not know the true facts at the time he accepted the amount tendered.

I am of opinion that this appeal fails.

WRIGHT, J., concurred.

Appeal dismissed; leave to appeal refused.

Solicitors for the appellant, *Meredith, Roberts, & Mills*, for *Sibley & Dickenson*, Bristol.

Solicitors for the respondents, *Wilde, Berger, & Moore.*

Prob. Div. & Adm. Div. Divorce. } April 27; May 4, 1896.

CRAIG v. CRAIG AND HAMP. (*a*.)

Practice—Divorce—Sequestration—Damages against co-respondent—Interest of co-respondent in settlement—Motion against the trustees.

The right of sequestrators to attach moneys alleged to be held by third persons for the judgment debtor, but denied by them to be so held, cannot be determined upon a motion in the suit to which the third persons are not parties, unless they appear and submit to the jurisdiction of the court.

So held, on a motion by sequestrators against the trustees of a co-respondent's marriage settlement to enforce payment of damages ordered to be paid by the co-respondent to the petitioner in a suit for dissolution of marriage.

Motion against the trustees of the co-respondent's marriage settlement to show cause why they should not pay into court the sum of £50. The petitioner, on the 11th of March, 1892, obtained a decree *nisi* against the respondent for the dissolution of his marriage with her on the ground of her adultery with the co-respondent, and the co-respondent was ordered within fourteen days to pay to the petitioner the sum of £50, damages assessed by the jury. On the 8th of November, 1892, this decree was made absolute. The said sum of £50 was not paid by the co-respondent, and on the 27th of March, 1896, a writ of sequestration was issued against his property. On the 1st of April, 1896, it was ordered by the President, on the *ex parte* application of the sequestrators, that James Edward Wilkin and Charles Josiah Etherington, the trustees of an indenture of settlement dated the 10th of February, 1887, do verify by affidavit the funds or sums due or to accrue due to the co-respondent Horatio Hamp in their hands, and that they be restrained until after the 20th day of April, 1896, or further order, from paying the same or any part thereof, either to the said co-respondent or on his account, and that, unless cause be shown on the 20th of April, 1896, the said sums due or to become due be paid into court. The

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

time for showing cause was extended to the 27th of April.

April 27.—*Inderwick, Q.C.*, and *Chubb*, for the trustees of the settlement, showed cause.

Bayford, Q.C., and *Whinney*, for the sequestrators.

Cur. adv. vult.

May 4.—BARNES, J., after stating the facts, said:—When the case was argued before me two points were raised on behalf of the trustees of the said settlement. First, that the court had no power to make an order against them in this suit on motion; and, secondly, that, according to the terms of the settlement and in the events which had happened, the trustees could not be compelled to pay any moneys to or for the co-respondent in discharge of liabilities contracted or incurred by him. The trustees are trustees under an indenture dated the 10th of February, 1887, made between the co-respondent and trustees in pursuance of the "Hamp's Estate Act, 1868," and certain orders in Chancery by which the trustees were to stand possessed of certain funds upon certain trusts for the benefit of the co-respondent, for his wife, and for his children, and in default of children as in the indenture declared. And the indenture contained certain powers and provisions, and amongst them a provision upon which the trustees relied in support of the second point above mentioned.

It was admitted that the trustees have in hand at the present time £21 14s. 1d. representing income of the said trust funds, and that further sums would be received by them from time to time in respect of income of the said trust funds. The co-respondent was married in December, 1892. The attempt is made by this motion in a suit to which the trustees are not parties to compel them to pay to the sequestrators £50 out of the income which it is alleged that the co-respondent should receive under the settlement. The trustees allege that under the circumstances which have happened the co-respondent is not entitled to receive any money from them, and they dispute the right of the sequestrators to proceed against them.

No argument in support of the application of the sequestrators on principle was addressed to me, but some of the cases which I will later on refer to were mentioned. If there had been no cases in which the subject had been considered I should have been of opinion that upon principle the right of sequestrators to attach moneys alleged to be held by third persons for the judgment debtor but denied by them to be so held could not be determined upon a motion in a suit to which the third persons are not parties unless they appear and submit to the jurisdiction of the court. Such third persons are entitled to have their liability determined in the usual way, in which it would be dealt with in an action. But the matter has been considered in many cases. In the year 1827 the case of *Johnson* v. *Chippindall*, 2 Sim. 55, came before Shadwell, V.C. All the earlier cases were then carefully examined and discussed in argument, and amongst them *Franclyn* v. *Colhoun*, 3 Swanston 276, where the debt seems to have been admitted, and an order was made partly in a certain interpleader action, see 2 Sim. p. 60 note (i.); *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735, where a bill for discovery and account against bankers who were alleged to have moneys of the plaintiff's debtors in their hands was filed and argued on demurrer. In his judgment Shadwell, V.C., says, 2 Sim. p. 64: "I find no instance in which the court has compelled a third party to pay in a *chose in action* without a bill, where any resistance has been made by the holder of the *chose in action*." The later cases are *Wilson* v. *Metcalfe*, 1 Beav. 263; *Crispin* v. *Cumano*, 17 W. R. 535, L. R. 1 P. & D. 622; *Manton* v. *Manton*, 40 L. J. Ch. 93, 19 W. R. Ch. Dig. 88; *Slade* v. *Hulme*, 30 W. R. 28, 18 Ch. D. 653; *Claydon* v. *Finch*, L. R. 15 Eq. 266, 21 W. R. Dig. 146; and *Miller* v. *Huddlestone*, 31 W. R. 138, 22 Ch. D. 233; and the result of examining these is that there appears to be no case in which an order was made to enforce a sequestration against third persons, who disputed their liability to the debtor, on motion in a suit to which they were not parties.

The present proceeding is not taken under Order 45 R. S. C., and I was not asked to consider whether that order can be used in this divorce suit to enforce proceedings against the trustees; but I may observe that under that order, if the garnishee disputes his liability to the judgment debtor his liability is not determined on motion, but an order is made that any question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried and determined, rules 3 & 4 of order 45.

I am of opinion, therefore, that the trustees are entitled to have the orders of the 1st of April and those continuing that order against them discharged. I express no opinion upon the merits of the second question raised by the trustees, which depends upon the construction of the settlement, and perhaps may have to be argued in other proceedings, possibly in the Chancery Division, where the terms of the settlement can be conveniently considered.

Leave to appeal was refused.

Solicitor for the sequestrators, *F. A. R. Doyle.*

Solicitors for the trustees, *Whitehouse & Etherington.*

House of Lords.

From C. A. (England.) June 18, 1896.

LOCK v. QUEENSLAND INVESTMENT AND LAND MORTGAGE CO. (LIMITED). (*a.*)

Company—Shares—Shares paid up in advance of calls—Payment of interest out of capital as such prepayments—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 14, *Table A, clause* 7.

Where one of the articles of association of a company authorized the directors to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms as they thought fit, and also to pay out of the capital of the company interest on sums paid up on shares in advance of calls,

Held, that the above article, being in substance Table A, clause 7, *of the Companies Act,* 1862, *was not* ultra vires; *that advances obtained from shareholders under it were in the nature of a debt due to an ordinary creditor of the company; and, consequently, it was lawful to pay the stipulated interest out of capital, though the company had made no profits.*

Decision of Court of Appeal (44 *W. R.* 257, [1896] 1 *Ch.* 397, *affirmed.*

This was an appeal by the plaintiff from an order of the Court of Appeal (Lindley, Smith, and Kay, L.JJ.), reported 44 W. R. 257, [1896] 1 Ch. 397, which affirmed a decision of Stirling, J.

The facts are set out at length in the report in the court below, and raised the question whether articles of association of a company can lawfully authorize

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

directors to pay interest out of capital to shareholders who have prepaid their shares in full in advance of calls.

There had been no profits during the year.

The article empowering the directors so to do was substantially Table A, clause 7, of the Companies Act, 1862.

The Court of Appeal held that the company was entitled to pay interest out of capital on the amount prepaid.

Millar, Q.C., and *Brodie Cooper*, for the appellant.—The clause was *ultra vires*. These shareholders cannot be considered as outside creditors: *Dale* v. *Martin*, 11 L. R. Ir. 371, 32 W. R. Dig. 36, is distinguishable.

They referred to *Oorejum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125; *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; *McDougall* v. *Jersey Imperial Hotel Co.*, 12 W. R. 1142, 2 H. & M. 528; *In re Sharpe*, 40 W. R. 241, [1892] 1 Ch. 154.

Graham Hastings, Q.C., and *C. E. E. Jenkins*, for the respondents, were not called upon.

Lord HALSBURY, L.C.—I have heard with surprise that some difficulty has been supposed to arise with regard to the true construction of the statute to which reference has been made in this case. It appears to me that, applying the ordinary principle of construing statutes in the usual way, by giving to each member of a sentence its true and ordinary meaning, there is no difficulty in the proper decision of this case.

The language of the 7th clause of Table A seems to me not susceptible of any doubt at all. Whatever might have been argued with reference to what has been called the general law without Table A, or without that portion of it to which reference has been made, I confess I do not think it very material to consider; because, to my mind, the insertion of Table A with the 7th clause, giving a sanction by the Legislature to an arrangement which is exactly the same as the present arrangement in principle, and indeed almost in words, seems to me to remove all doubt whatever from this matter. The relation between a company and the members is intelligible enough, and, but for the example given in Table A, some of the arguments that we have heard might have found some place. I suppose it was by reason of there being a doubt in the minds of the Legislature as to whether or not that would be considered to be a legitimate arrangement that the 7th clause was expressly inserted. Whatever may be the meaning of it, or whatever reason the Legislature may have had for placing it there, there it is, and to argue that it is *ultra vires* to do that which the Legislature has expressly sanctioned in the example it has given of articles of association in the statute itself, seems to me to be somewhat absurd.

Of course, if you can introduce into the language which the Legislature has used other language which would have a different effect (and that has been practically the argument addressed to your lordships), you may turn any statute or any section of any statute into an absurdity. But Table A and the 7th clause expressly say that "the directors may, if they think fit," make such an arrangement as has here been made; and every effort to turn those plain words into something else has resulted, on the part of the learned counsel who argued it, in an admission that, without the addition of some words, they cannot get into that 7th clause that which their argument requires.

Then it remains that that is an arrangement which the Legislature has sanctioned in the case of Table A, and the statute expressly gives that as an example of what may be done unless the company think proper to adopt articles of their own. In this case they have adopted articles of their own which have precisely the same effect. Under these circumstances it appears to me that it is an undue compliment to the doubts which have been suggested to do more than say that I entirely concur in every word of the judgment of FitzGibbon, L.J., in Ireland (in *Dale* v. *Martin*), and in every word of the judgment of Lindley, L.J., in the present case.

The only commentary I am disposed to make is that Lindley, L.J., does seem to suggest that the words are not absolutely apt for the purpose. With the greatest deference to his lordship, I do not concur in that opinion. It seems to me that the words are very plain and apt for the purpose for which they are designed by the Legislature, and it would be, to my mind, a most perverse proceeding to construe these words in any different sense, because by some improper use of the power thus given it might be made mischievous in its operation. If it were mischievous in its operation and necessarily mischievous in its operation it would, to my mind, be no argument, if the statute has expressly authorized the thing to be done. But, as a matter of fact, what has been done in this particular case is admitted to have been done perfectly *bona fide*, and with no such abuse as it has been pointed out might result. What the case would be if any directors thought proper to abuse the power so given for the indirect purpose of doing that which the statute forbids, it is not necessary to consider, because that question does not arise here. It appears to me that the argument is reduced to this: that because a particular provision is capable of being misused, although the Legislature has sanctioned the use of it, therefore your lordships are called upon to repeal the statute, and to say that the legitimate and proper use should not be permitted. That seems to me to be a view which is wholly inadmissible.

I therefore move your lordships that this appeal be dismissed with costs.

Lord HERSCHELL.—I am of the same opinion, and I shall trouble your lordships with very few words, because I entirely agree with my noble and learned friend that the case is a particularly clear one.

It is not susceptible of contention that to do what clause 7 of Table A provides for can be *ultra vires*. The Legislature can never have enacted that if the company do not otherwise provide their articles of association shall be such as will provide for something *ultra vires*. The present case comes within the very terms of clause 7 of Table A.

But then it is said that these terms must be qualified or limited, inasmuch as it never can be lawful to make a payment to a member in his character of member out of the capital of the company—that such a payment could only be made out of profits. It seems to me that there is no justification for inserting any qualification or limitation in the very clear words used in clause 7 of Table A.

But, besides that, I think it is a fallacy to speak of this payment of interest as being a payment made to a member in his character of member. As member he has no right to have that interest paid to him: he could not claim it. As member he was under no obligation to make the payments in consideration of which the company undertook to pay the interest. When, therefore, the company, although they received the money from a member, received it from him without any obligation upon him as a member to pay it, and undertook to make a payment to him in consideration of it, which they were not under any obligation to make to him as a member, it

seems to me that it is manifestly erroneous to describe this as a payment made to a member in his character of member. If so, the whole argument falls to the ground.

Lord MACNAGHTEN.—I agree. Clause 7 of Table A authorizes the directors of a company limited by shares to agree with any member for an advance of money, on the terms that the money so advanced is to be applied in discharge of the member's liability on his shares, when and as that liability ripens into a debt presently payable, and that in the meantime the member is to be entitled to interest on the advance as if he were an ordinary creditor of the company. The interest is to be due to him in the character of creditor, not in his character as member. I think that is the plain meaning of the clause, and that you cannot give the section another meaning unless you qualify the word "interest" by reading in or inserting the words "contingent on profits," or some other words indicating that interest is payable only out of moneys applicable for the payment of dividends. Of course, an arrangement of this sort to be good and valid must be made in good faith and in the honest exercise of the discretion confided to directors. Directors acting otherwise would be exposed to very serious liability, and might be called upon to repay all moneys improperly paid out of capital under colour of paying interest.

Lord MORRIS.—I concur.

Lord SHAND.—I am of the same opinion. I think the reasons in support of the judgment have been extremely well expressed, if I may venture to say so, by Lindley and Kay, L.JJ., in the court below, and I entirely concur in the reasons which your lordships have also given for affirming the judgment.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Ashurst, Morris, Crisp, & Co.*

Solicitors for the respondents, *Trinder & Capron.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 6, 20, 21; Aug. 7, 1896.

In re CHAPMAN.
COCKS *v.* CHAPMAN. (a.)

Trustee—Mortgages of agricultural land—Will authorizing such investments—Duty to call in—Liability for retaining—Trustees acting honestly and without wilful default.

Trustees under a will authorizing investments in mortgages of real estate will not, if they have acted honestly and with reasonable care, be held liable for loss caused by their retention for more than twelve months after the the testator's death of mortgages of agricultural land originally made to the testator himself. Nor is the fact that the trustees never had the mortgage securities valued by a professional surveyor conclusive against them.

Decision of Kekewich, J. (44 *W. R.* 311), *reversed.*

Appeal from a decision of Kekewich, J. (reported 44 W. R. 311, where the facts are fully stated).

By her notice of appeal as originally framed, the defendant Miss Chapman did not seek to vary the chief clerk's certificate, but during the hearing of her appeal the court suggested that it was necessary for her to do so, and gave her leave to issue a summons to vary. The plaintiffs then issued a similar summons and also appealed against the decision of Kekewich, J.

Swinfen Eady, Q.C., and *E. C. Macnaghten*, for Miss Chapman.

Warrington, Q.C., and *Gatey*, for the plaintiffs.—The respondents must prove that the trustees have been guilty of wilful default.

Warmington, Q.C., and *Micklem*, for the defendant Sydney Cozens Hardy, the remainderman who had served the trustees with notice alleging a breach of trust.—These securities were doubtful ones even at the date of the testator's death, and the trustees ought at once to have called in the money. They cited *In re Whiteley, Whiteley* v. *Learoyd*, 34 W. R. 450; on appeal, 33 Ch. D. 347, pp. 350, 358; *In re Brogden, Billing* v. *Brogden*, 37 W. R. 84, 38 Ch. D. 546; *In re Medland, Eland* v. *Medland*, 37 W. R. 753, 41 Ch. D. 476, 481; and *Ames* v. *Parkinson*, 7 Beav. 379.

Swinfen Eady, Q.C., replied.

Cur. adv. vult.

Aug. 7.—LINDLEY, L.J.—After stating the facts of the case, and analysing the evidence as to each of the mortgages, continued:—It is true that the trustees did not consult professional surveyors or valuers, but there was nothing special in the nature of the property, as there was in *Whiteley* v. *Learoyd*, to render the assistance of an expert really necessary for the guidance of a prudent man. A man need not be a professional surveyor or valuer to form a trustworthy opinion of the value of ordinary agricultural land, and the law is not so stringent as to compel us to say that the trustees were guilty of a dereliction of duty in not seeking advice from such persons. Mr. Henry Chapman, the acting trustee, was himself well acquainted with land and its value, and the testator thought well of him and trusted his judgment. He had no personal interest to serve in not doing his best for the trust estate. When he felt that he wanted further advice he consulted the two Carters, Mr. Robins, and Mr. Francis, all men of good judgment and experience. Mr. Francis was a solicitor in Norwich, and he told us—what I entirely believe—that for some years after the testator's death Mr. Henry Chapman's opinion and the general opinion in Norfolk was that the fall in value of land would be temporary only, that its value would improve, and that it was unwise for mortgagees to attempt to realise their securities.

These, however, are merely general observations, and it is necessary to examine more closely what the duties of the trustees were at various periods, and to ascertain whether and in what respects there was any failure to discharge those duties. The same persons being executors and trustees, it will be convenient to consider their duties, first as executors, and secondly as trustees, as if the same persons did not fill both characters.

Under such a will as this the duty of the executors was simply to call in the testator's unsecured debts, and to convert into money so much of his personal estate as was necessary to enable them to pay his funeral and testamentary expenses, and his debts and pecuniary legacies, and to hand over to the trustees whatever personal estate was not wanted for those purposes. No doubt, speaking generally, it is the duty of executors to get in debts due to their testator; but it was no part of the duty of the executors as such

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

to realize mortgage securities of their testator not wanted for the above-mentioned purposes: see *Orr* v. *Newton*, 2 Cox 274, which contains some useful observations upon that point; and the executors were not, as executors, guilty of any *devastavit* in not realizing such securities.

The duties of the trustees have to be considered, first, with reference to their acceptance of these mortgages from the executors in the first instance; secondly, with reference to their retention of the mortgages up to the present time. As regards the acceptance of the mortgages from the executors in the first instance, or, in this case, the retention of the mortgages as part of the trust estate at the end, say, of a year from the death of the testator, it must be borne in mind that investments on mortgage were authorized by the will. The trustees had to consider, not whether they should invest money on a particular security, but whether they ought to get rid of a security of a kind which they were authorized to invest money upon. These two considerations are by no means practically the same. Confining myself at present to the end of a year after the testator's death, what the trustees had then to consider was whether they ought to refuse to keep the mortgages as part of the trust estate. Most of the mortgages were for two-thirds of the prices paid for the lands. Some were for less. But, as pointed out in *In re Medland*, the retention of such a mortgage is not necessarily a breach of trust. Having regard to the evidence in this case, I am not prepared to hold that there was any breach of trust in not realizing the securities by calling in the mortgage debts, or by proceeding to sell or foreclose in 1881 or 1882. In July, 1881, no one foresaw that the value of land would deteriorate more and more, as we now know that it has done, and to have called in the mortgages at that time would have been to do what no competent person would seriously have advised the trustees to do. No witness says that Heading's, Boldero's, Francis's, or even Aves's mortgages were so insecure that the trustees acting with reasonable prudence ought to have called them in. Banham (who was an auctioneer and valuer, and gave evidence on behalf of Mr. Cozens-Hardy) no doubt says that if the mortgages had been called in shortly after the testator's death there would have been no loss; but that is quite another matter. The chief clerk has found that these mortgages ought to have been got in or realized in July, 1881. I cannot adopt that view. The evidence is entirely the other way as to all the important mortgages. There may be some doubt about some of the smaller ones. But as regards those which are of any importance, it would, in my opinion, be wrong to hold that the trustees committed a breach of trust in retaining the testator's mortgages in the first instance as part of the trust estate.

But the mortgages are still unrealized, and it is now unfortunately true that, with one or two exceptions, they cannot be realized except at a great loss, and the real question is whether the trustees are liable for this loss. A mortgage security is unlike an ordinary investment, inasmuch as it consists of a debt which can be enforced by action, and also of a security which can be realized by sale or foreclosure. A trustee of a mortgage security is, therefore, liable for loss sustained by his wilful default in not obtaining payment in either of these ways. But a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not *per se* proof of such wrong. We have to deal here with authorized investments, and this must never be lost sight of. Everything turns upon it. Bearing this point in mind, and bearing also in mind that we have to deal with honest trustees, placed in great difficulties by the constant fall in value of land, what is it that they have done wrong? First, it is said that they ought long ago to have called upon the mortgagors for payment. But so long as the land was a satisfactory security, the trustees committed no breach of duty in not calling in the money; and when the land ceased to be a satisfactory security the mortgagors were themselves in such difficulties that nothing could be got from them. Moreover, the mortgagors for the large sums were farmers, and could not have paid off or materially reduced the mortgage debts and have kept on their farms. To have pressed them would have been to have thrown the farms on the hands of the trustees, and this certainly would not have been for the benefit of the trust estate. What could the trustees have done? They might have given up their securities, and have proved for their debts; or they might have sold or valued their securities and proved for the difference; or they might have held aloof and retained their securities. The trustees adopted the last course, not hastily nor without consideration and advice, but after advice. Mr. Francis now says it was, in his opinion, the best course they could have taken. No one says the contrary; for Banham refers to a time when the mortgagors were still solvent. I cannot say that the trustees were guilty of such imprudence as to render them liable for the consequences of adopting the course they did. Then it is said that the trustees ought to have realized the securities; but how? Foreclosure would have cost money, and would have benefited no one. The trustees have the mortgaged lands now, and nothing has been lost by not foreclosing. On the other hand, the expenses of foreclosing have been saved to the trust estate. The only other mode of realizing would have been by sale. But not a single person is called to say that it would have been a prudent or judicious step to try to sell. On the other hand, there is evidence that it would not; and it is clear that, unless the mortgaged property had been sold whilst the securities were good, sales, even if effected at all, would have resulted in serious loss. There is no rule of law which compels the court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly with ordinary prudence, and within the limits of their trust, are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances falls upon and must be borne by the owners of the property—that is, the *cestuis que trust*—and cannot be thrown by them on their trustees, who have done no wrong, though the result may prove that they possibly might have done better. *Whiteley* v. *Learoyd* is a clear authority to this effect; so are *Buxton* v. *Buxton*, 1 My. & Cr. 80, and *Marsden* v. *Kent*, 25 W. R. 522, 5 Ch. D. 598.

The case is an important one, not only to the trustees of this particular will, but to trustees of mortgages generally. Owing to the great fall in the value of agricultural land, trustees of mortgage securities have been placed in a position of great difficulty. To throw on the trustees the loss sustained by the fall in value of securities authorized by the trust, wilful default, which includes want of ordinary prudence on the part of the trustees, must be proved; but it is not proved in this case. In my opinion, wilful default is disproved in all the important cases, and is not proved in the doubtful ones. The appeal must be allowed.

LOPES, L.J., read the following judgment: In this

case it is sought to throw upon the trustees under the will of James Chapman, trustees who were also his executors, a loss in the value of certain mortgage securities occasioned by the depreciation in the value of land. The case is a most important one; and, having regard to the gradual and persistent depression of the agricultural industry in this country, most intimately concerns the position of a large body of persons who have incurred the responsibility of trustees. The testator, James Chapman, died in July, 1880. The securities in question were authorized by the trusts, and were all created during the life of the testator (a man who had largely invested in real securities and had acquired much experience as to their desirability), and were at the time of their creation respectively of sufficient value to justify the mortgage debts secured by them.

The facts of the case, so far as necessary, have been fully stated. I propose to deal with the case only so far as concerns the liability of the trustees. In 1879 the depression in the value of land, caused by the importation into this country of foreign produce, began first to be sensibly felt; a series of bad seasons followed; the season of 1879 being probably the worst of all. The depression, though it has fluctuated at times, has gradually increased. Expectation, however, of improved times has never, in the minds of those most competent to judge, become extinct. I unhesitatingly say that it would have been considered unwise until quite recently, when each succeeding year had rendered the future less hopeful, to have realised real securities such as these mortgages, when that realization would of necessity have been attended with heavy loss. It is very easy to be wise after the event; but, in order to exercise a fair judgment with regard to the conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time, and determine for ourselves what, having regard to the opinion prevalent at that time, would have been considered the prudent course for them to have adopted.

As I have said, the trustees and executors were the same persons, and it was faintly urged that they as executors ought to have realized these real securities at the end of a year after the testator's death. That is easily disposed of; it cannot be seriously contended that it was the duty of the executors to realize mortgages created by the testator himself, when their realization was not required for any testamentary purpose, and when the securities themselves were not in any peril.

I will now state what I believe to be the law applicable to trustees circumstanced like the trustees in the present case. A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment, when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection. The liability of trustees should not, in my judgment, be extended. What was said by Jessel, M.R., in *In re Speight, Speight* v. *Gaunt*, 31 W. R. 401, 22 Ch. D. 727, is very applicable to this case. He says, at p. 746: "I think it is the duty of the court in these cases, where there is a question of nicety as to construction or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit. I think that is the view which has been taken by modern judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation. It appears to me that the Vice-Chancellor has adopted an entirely different view. I think he has inferred that which is not fairly to be inferred in this case; and even if he were right it could only be inferred by taking one of two views, and we ought not to take the adverse view if the other view, being equally as good, can be adopted." See *In re Medland*, 37 W. R. 753, and *Whiteley* v. *Learoyd*.

Adopting that as my formula, have the trustees in this case sinned against it? In 1881 they took the mortgages from the executors, and most certainly would not have been justified in realizing them—mortgages created by the testator, authorized by the trust, and at that time in no possible jeopardy. But they retained them. What was the state of things in 1881? No one could anticipate what was about to happen; it was not a question of value, it was a question of the prospects of the landed interest. Those prospects depended on an infinite variety of circumstances, the happening and effect of which no one but a prophet could foresee. The trustees admittedly were honest, admittedly they were competent. It is said they ought to have consulted valuers. I do not believe any valuer could have given any advice which would have assisted them Valuers could have ascertained the then value of the land; but with regard to the prospects of land, or of its ultimate recovery, absolute or partial, they were powerless to express an opinion. I doubt much whether the opinion of a practical farmer, cultivating his own land, was not preferable to that of any ordinary expert. Henry Chapman was a practical farmer, and well acquainted with land, and able, therefore, to form an opinion as to future prospects. Francis said, in answer to me in the witness box, that the preponderance of opinion in the county was in favour of retaining mortgage securities rather than of realizing them, and no evidence was adduced to rebut that statement. But it is said that the largest mortgagors were unable to pay the interest due on the mortgages, and that then the trustees ought to have adopted means to realize the debt. This, no doubt, is the strongest point made against the trustees, and involves considerations which require careful examination. The trustees might have brought an action on the covenants, they might have exercised the powers of sale contained in the mortgage deeds, or they might have foreclosed; and if any of these remedies could be shown to have been imprudently neglected by the trustees, and thereby loss to the trust estate caused, they would be liable for wilful default. But the answer is that it would not have been wise as things then stood to have pressed any of these remedies. So long as the land afforded a sufficient security, it would clearly have been unwise to precipitate events which there was reasonable ground for believing never would happen; and even in the case of the smaller mortgages it would be difficult to say that, having regard to the general opinion then prevalent, it was unwise to wait for better times, when it was clear that taking proceedings would in all probability have placed the land in the hands of the trustees for them to cultivate without any available capital, and would have resulted in a sale at a ruinously low price. When it was apprehended that the securities were insufficient, the trustees were placed in a most difficult position. I do not believe anything substantial would have been obtained from the mortgagors if actions had been brought on the covenants, and if those mortgagors who were farming the land, the subject-matter of the mortgages, had been pressed, the probability is that

they would have been compelled to give up their farms, or, at any rate, for want of capital, to cultivate them in such a way as to make them unremunerative, and in that case the farms would have been thrown on the hands of the trustees, who would have had to find new tenants or to have cultivated the land themselves, and have found capital for so doing. The same answer may be made to the suggestion that the trustees ought to have foreclosed. Clearly this would not have been desirable, nor do I think giving up their securities and proving for their debts, or selling or valuing their securities and proving for the difference, would have benefited the trust estate.

The only other course was to retain the mortgages as they have done. I am unable to say that this was unwise, or amounted to a breach of trust; having regard to the very peculiar circumstances in which the trustees were placed, bearing in mind that the securities were authorized securities, and that nobody could, with any degree of certainty, anticipate the contingencies to which land was subject, or form any reliable opinion as to its future. There is evidence, and I believe it, to show that the better-received opinion was that it was advisable to retain mortgage securities like these in hopes of better times. I cannot find that the trustees committed, in these circumstances, any breach of trust or made wilful default. I think the appeal should be allowed.

RIGBY, L.J., stated the nature of the case, and continued:—I think that the misconception in this case has arisen altogether from confounding two totally different questions—the one, What is the duty of trustees who have money in their possession for investment? the other, What is the duty of trustees with respect to investments for which they are not primarily liable, and which, in the exercise of their discretion, they have chosen not to call in? The things are totally different. In the one case you have the money safe, and capable of being invested in securities which would involve no risk at all—I mean investments such that the court would not anticipate any risk—and no liability on the part of the trustees. It is to be remembered that as to any investigations into the value of the property offered as a security, and for any fees payable to experts, the mortgagees can, and do as a matter of fact, throw those expenses upon the intended mortgagor. Therefore these things can be done without throwing any expense upon the estate. If in these circumstances the trustees choose to disregard the well-known general rules of the court, including the rule—which is most material for this purpose—that they are not to invest on the security of agricultural land to an amount more than two-thirds of its value, they are incurring a risk with their eyes open—a risk which is the consequence of their own acts altogether. The case is entirely different when you have to deal with existing securities. So far as I know, the court has never laid down that even with regard to risky securities—Turkish bonds, for instance—there is an absolute unvarying obligation on executors or trustees to get them in within the twelve months, regardless of what the opinion of the trustees may be as to the advisability of doing so. *Buxton* v. *Buxton* and *Marsden* v. *Kent* show that there is no such rule.

What is the duty of trustees who get possession of an estate consisting wholly or partly of mortgage securities? If the mortgage securities appear to be good, certainly there is no obligation on the trustees to call in those securities. It would be a very idle thing to do so for the purpose of investing in other securities perhaps no more advantageous to the estate. At any rate, the supposed rule does not exist. The trustees must act honestly; and here they did that. One of them, Miss Chapman, was tenant for life of the property. Her interest, of course, was to have the property safe. Further, trustees must act prudently; as a prudent man acting prudently would do with regard to his own affairs.

Now let us consider the state of things as to these mortgages. [The Lord Justice examined the evidence as to the several mortgages, and continued:—] I do not mention all the cases which were cited in argument, but, with regard to *Ames* v. *Parkinson*, decided by Lord Langdale, Mr. Warmington asked us to come to the conclusion, on the authority of that case, that there was a duty on trustees to call in mortgage debts, corresponding and in fact co-extensive, with the duty which they are under when they invest money on mortgage. I do not think that is the effect of that case at all. The question there was between a specific legatee of a legacy of £1,500 and the residuary legatees, one of whom was the very trustee it was sought to make liable. The evidence was that it was not a sufficient security, and therefore as between the specific legatee and the residuary legatees it was not a proper mortgage to appropriate. The trust there was to invest on mortgage securities or Government securities, one of which is somewhat risky, the other perfectly safe. The trustees were carrying out their trust to invest in that case by appropriation, and Lord Langdale said that under the circumstances they were bound to get in this security in order to invest the money. I do not think that that is a case at all like the present, where the investment has taken place without any responsibility on the part of the trustees, and where the only question is what, under difficult circumstances, the trustees ought to do. I quite agree with the order that Lindley, L.J., has proposed.

Appeals allowed.

Solicitors, *Collyer-Bristow, Russell, Hill, & Co.*, for *J. C. Taylor & Sons*, Norwich; *H. A. Maude*, for *Francis & Back*, Norwich; *Waterhouse, Winterbotham, & Harrison.*

From Q. B. Div.
Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 30, 1896.

BALLANTYNE & CO. v. MACKINNON. (a.)

Insurance—Marine—Salvage—Absence of sea peril—Towage services—Award—Conclusiveness of judgment of Admiralty Division as to supervening of sea peril.

The plaintiffs' ship, while insured by a time policy, sailed from port with an insufficient supply of coal, and by reason thereof she sailed in an unseaworthy condition. The coal having run short, she was towed by a trawler and a tug to her port of destination. There was no rough weather, neither did any accident or casualty happen to the ship. The Admiralty Division awarded salvage to the trawler and the tug. The plaintiffs having brought an action to recover from the underwriters the amount which they had been adjudged to pay,

Held, that the judgment of the Admiralty Division was not conclusive to show that some peril of the sea must have supervened; and that the plaintiffs were not entitled to recover.

Appeal from the judgment of Lord Russell of Killowen, C.J., at the trial of the action without a jury.

The action was brought by shipowners under a

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-at-Law.

time policy of marine assurance to recover from the underwriters a sum of money which the plaintiffs had been adjudged to pay for salvage services rendered to their steamship *Progress*.

The policy ran from the 20th of February, 1894, to the 20th of February, 1895.

On the 11th of December, 1894, the steamship sailed from Hamburg for Sunderland with a cargo of wheat. She left Hamburg with an insufficient supply of coal, and by reason thereof she sailed in an unseaworthy condition. When she was distant from Sunderland about forty-one miles it was discovered that the coal had run short. The weather was then fine and clear, and there was a bright breeze and a moderate sea, which was rapidly decreasing. The captain, observing a steam fishing trawler about two miles distant, fired a small rocket, and ultimately *The Progress* was towed to Sunderland by the trawler and a tug.

The Admiralty Division awarded £350 to the trawler and the tug for the salvage services rendered.

It was admitted by the plaintiffs at the trial that there was no weather which rendered salvage assistance necessary, and that the need for the assistance of the trawler and tug was occasioned by the want of coal.

Lord Russell of Killowen, C.J., gave judgment for the defendants, holding that the salvage services were not rendered necessary by reason of any peril insured against, but that the need of salvage aid, if any, was caused by the unseaworthiness of the ship, and that no peril of the sea supervened.

The plaintiffs appealed, and the principal question argued on the appeal was whether the judgment of the Admiralty Division was not conclusive as to the existence of some supervening peril of the sea.

Bigham, Q.C., and *H. F. Boyd*, for the plaintiffs.

Joseph Walton, Q.C., *J. Hurst*, and *H. C. S. Dumas*, for the defendants.

Cur. adv. vult.

July 30.—A. L. SMITH, L.J., delivered the judgment of the court:—This is an action by shipowners against an underwriter upon a time policy which covered their steamship *Progress* against losses occasioned by perils of the sea, and the plaintiffs' case is that, whilst so covered, by reason of such perils, salvage services were rendered to their ship for which they have been compelled to pay the sum of £350, and the plaintiffs now seek to recover this amount from their underwriter as being a loss caused by the direct and immediate consequences of perils of the sea. If they make out this case, the loss is recoverable under an averment that there has been a loss by a peril of the sea, and this was so held in the House of Lords in *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755, and it is not recoverable under the sue and labour clause in the policy. The defence set up is that the loss sued for did not arise from a peril of the sea, but solely from the vice of the subject-matter insured—in particular, that the loss arose solely in consequence of the plaintiffs' ship when she sailed having an insufficiency of coal on board for the contemplated voyage without the intervention of any sea peril, and this is what, as we understand, the Lord Chief Justice has found to have been established by the evidence before him. [The judgment then referred to the evidence and to the facts as found by the Lord Chief Justice, and proceeded:—] Upon this evidence how can this court find, as we were invited to do by the plaintiffs, that the Lord Chief Justice came to a wrong conclusion upon this question of fact as to the non-existence of a sea peril when the towage services were rendered to the *Progress*? There was no weather, no sea on, no accident or casualty of any kind to the ship, no incursion of salt water into the ship, which could have completed the voyage under sail, and no reasonable apprehension of danger. Cases were cited on the one side and on the other to show what did or did not constitute a sea peril. For instance, *The West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.*, 29 W. R. 92, 6 Q. B. D. 51, where the explosion of a boiler was held covered by the policy; *The Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.*, 36 W. R. 337, 12 App. Cas. 484, where the last case was disapproved of and damage to a donkey engine was held not to be covered by a policy covering perils of the sea; the case of *Hamilton, Fraser, & Co.* v. *Pandorf & Co.*, 36 W. R. 369, 12 App. Cas. 518, where sea water was let into a ship and damage resulted therefrom by reason of rats gnawing a hole in a pipe, in which it was held that this damage was a danger and accident of the sea; and the ruling of Lush, J., in the case of the *Golden Fleece*, which will be found cited by Blackburn, J., in his judgment in *Dudgeon* v. *Pembroke*, 22 W. R. 914, L. R. 9 Q. B. 581, where Lush, J., pointed out to the jury, when considering what was or was not a peril of the sea, that the question was whether the loss arose from injury from without, or from weakness from within, and that what underwriters insured against were casualties that might happen, and not consequences which must happen.

These cases and others which might be cited are obviously not decisions which can be applied as decisions to the present case, for they arose under totally different circumstances and different facts, but they are of value in showing the reasoning by which in given states of facts it has been held that a loss was or was not occasioned by a peril of the sea. We agree with the Lord Chief Justice when he held upon the evidence before him that the loss sustained was not occasioned by a peril of the sea, for, in our judgment, the loss complained of arose solely by reason of the inherent vice of the subject-matter insured—we mean the insufficiency of coal with which the ship started upon her voyage, the consequence of which was that, what in fact did happen, must have happened—viz., that the ship ran short of coal, no sea peril bringing this about in any shape or way or placing the ship in a position of danger thereby.

But a further point is now taken before us, which was not taken before the Lord Chief Justice, and it is that the Admiralty Court had held that the owners of the steamship *Progress*, her cargo, and freight, were liable to the owners of the steam trawler for salvage services amounting to the sum of £350 rendered by the trawler in towing the steamship into Sunderland, and it is said that this judgment concludes the matter as to the existence of a supervening of perils of the sea. What happened in the Admiralty Court was this. The owners of the steam trawler instituted a salvage suit against the owners of the steamship *Progress*, her cargo, and freight, for salvage services rendered to her. The owners of *The Progress* in that suit admitted that salvage services had been rendered to her by the steam trawler, and paid £300 into court, and asserted that this amount was sufficient recompense to the plaintiffs. Upon these pleadings the Admiralty Court proceeded to try the case, and there was awarded to the owners of the steam trawler for their admitted services £50 in excess of the £300 paid into court, making £350 in all. Upon what ground the owners of the steamship admitted that £300 was due does not appear, and whether it was based upon the fact of an agreement, or upon the fact of the trawler having been hailed, as she was, by the steamship, or upon a salvage service proper having been rendered, it is immaterial for the reasons below to inquire.

That this suit was a proceeding against the steamship *Progress*, and that the judgment was a judgment *in rem* which constituted an effective maritime lien upon the steamship we do not doubt, but the defendant was no party to this suit, and the question is as to what, as against the defendant, is this judgment conclusive. Unless it concludes the question in the affirmative that a sea peril did supervene, the defendant, in our opinion, is entitled to judgment. That a judgment *in rem* by a court of competent jurisdiction is conclusive against all the world as to the *status* of the *res*—that is, of the thing adjudicated upon—is clear, and consequently as regards the question as to whether a lien attaches to the steamship *Progress* for £350 there can be no doubt, for this has been conclusively determined by this judgment of the Court of Admiralty and against all the world. The question is whether this judgment is also conclusive as to the grounds upon which the judgment must have proceeded. There is a passage in the judgment of Blackburn, J., in *Castrique* v. *Imrie*, 19 W. R. 1, at p. 5, L. R. 4 E. & I. App. 414, p. 434, when delivering his own opinion and that of Bramwell and Cleasby, BB., Mellor and Brett, JJ., in the House of Lords, which is so pertinent to this point that I will read it. The learned judge says: "A judgment in an English court is not conclusive as to anything but the point decided, and therefore a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged." As to a judgment being only conclusive as to the point decided, there is as to this, in our opinion, no distinction between a judgment *in rem* and a judgment *in personam*, except that in the one "the point" adjudicated upon (which in a judgment *in rem* is always as to the *status* of the *res*) is conclusive against all the world as to that *status*, whereas in the other "the point," whatever it may be, which is adjudicated upon, it not being as to the *status* of the *res*, is only conclusive between parties or privies.

Now, what was "the point" decided by the judgment *in rem* in the Admiralty Court in the present case? It was that a valid maritime lien to the amount of £350 attached to the steamship *Progress*, and to this extent its *status* was conclusively determined. It was argued that there might be a claim for salvage without the intervention of a sea peril, and a judgment of Dr. Lushington in *The Batavier*, 1 Spink 169, was cited. It is not necessary to decide whether this can be so, but we say if it can, then such a salvage claim is not recoverable upon a policy against sea perils, for the obvious reason that the risk covered will not have occurred. Authorities were referred to in which judgments of prize courts condemning vessels as being the property of an enemy were held to be not only conclusive evidence that the vessels were condemned, but also were conclusive evidence of the fact that the vessel was not a neutral. Counsel for the defendant asserted that these were exceptional cases. We agree that they are, and that they have no application to judgments *in rem* in general. This will be found by looking through the cases cited in the *Duchess of Kingston's case*, 2 Smith's Leading Cases, 10th ed., p. 713, and we refer also to what Blackburn, J., for himself and the other learned judges in *Castrique* v. *Imrie* stated as to this.

For these reasons we think the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiffs, *Stokes, Saunders, & Stokes*, for *Lietch, Dodd, Bramwell, & Bell*, North Shields.

Solicitors for the defendants, *Botterell & Roche.*

High Court of Justice.

Chan. Div. } Chitty, J. } Oct. 29.

In re HORN & FRANCIS. (*a.*)

Solicitor — Remuneration — Lease — Premium — Negotiating fee—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *General Order, Sched. I., Part II., rule* 5.

Where a lease is granted partly in consideration of a premium and partly in consideration of a rent, the lessor's solicitors are not entitled, under rule 5 of part 2 of Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, *to a fee for negotiating in respect of the premium further than what is included in the scale fee chargeable in respect of the rent.*

In re Robson, 38 *W. R.* 556, 45 *Ch. D.* 71, *discussed.*

Summons.

This was a summons to review taxation, raising a question arising under the General Order under the Solicitors' Remuneration Act, 1881. A lease of a house in Charles-street, Berkeley-square, having been granted in consideration of a premium of £5,000 and a rent of £250 a year, the lessor's solicitors included in their bill of costs in respect of the transaction a fee of £40 for negotiating, in addition to the rent scale fee amounting to £29, and the deducing title fee chargeable on the premium amounting to £45. The taxing-master disallowed the £40 for negotiating. The lessor's solicitors appealed to the court, contending that although in the case of a lease at a rent only the scale fee on the rent provided by part 2 of Schedule I. to the General Order covered all negotiations, yet where a lease was granted for a premium as well as a rent, rule 5 of this schedule authorized the allowance of a scale fee for negotiating as well as a scale fee for deducing title.

C. E. Jenkins, for the summons. — The taxing-master has relied on *dicta* in *In Re Robson*, 38 W. R. 556, 45 Ch. D. 71, in a way which would extend the effect of the judgment in *In re Field*, 33 W. R. 553, 29 Ch. D. 608, further than was intended. There is no direct authority on the question in this case. The lessor's solicitors are clearly entitled to something more under rule 5 in a lease such as in the present case than the scale fee on a lease at a rent only. There is no reason why the negotiation fee should not be divided into two parts, allowing the further sum on the premium corresponding with what would be allowed on a sale.

O. L. Clare, for the lessee.—The negotiation fee has been paid already in the scale fee allowed on the rent, and as decided in *In re Field* cannot be specifically charged for.

CHITTY, J.—The question is whether the lessor's solicitors are entitled to the scale fee prescribed for negotiating a sale where the lease is at a rent and in consideration of a premium. The taxing-master has allowed the scale fee calculated on the rent, and he has also made an allowance in respect of the premium,

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

but he has confined the allowance in respect of the premium to the scale fee allowed in the case of a sale for deducing the title, and he has declined to allow the solicitor the fee for negotiation.

The taxing-master's certificate, so far as it has allowed to the solicitor the fee for deducing title, is in accordance with North, J.'s, decision in *In re Robson*, 38 W. R. 556, 45 Ch. D. 71, and there is no question in regard to that allowance; but the solicitor is dissatisfied, and asks for the further allowance that I have mentioned. Now, it is plain that solicitors, where the lease is such as the present lease, are entitled to something more than the scale fee calculated on the rent. Rule 5 of part 2 of Schedule I. prescribes that there shall be paid to the solicitor in such a case a further sum equal to the remuneration on a purchase (which is distinctly a slip for on a sale) at a price equal to such money payment or premium. The language is not happy, it is referential, and the question is, to what does it refer.

North, J., in the case of *In re Robson* carefully considered the rule where the lease was partly at a premium, and ascertained, according to his judgment, to what portion of part 1 of Schedule I. reference was made. He says: "The remuneration on sales is given by part 1 of Schedule I. to vendors' solicitors for three things: (1) Negotiating a sale by private contract; (2) conducting a sale by public auction; and (3) deducing title to property and perusing and completing conveyance. The first of these cannot be intended." Now, this was part of the groundwork of the learned judge's decision; no doubt he was not there asked to decide the point whether the solicitor could claim the negotiation fee. In that case the taxing-master had not allowed the solicitor anything under the latter part of rule 5 to which I have referred. North, J., considered that the solicitor was entitled to something, and I think it is clear, on the rules, that he was entitled to something more than the scale fee calculated on the rental, and he held that the reference was made to deducing title because he allowed him that remuneration, although in that particular case the solicitor appears not to have deduced the title at all. He allowed it on the ground that he was bound to allow something more by virtue of the express words of the 5th rule, but he made it plain, as part of the ground of his decision, that the solicitor was not entitled to any fee for negotiation. In his decision North, J., referred to the case of *In re Field*, 33 W. R. 553, 29 Ch. D. 606, which decided that in the ordinary case of a lease at a rent (and there there was no question of premium) the allowance prescribed in the way of percentage included the solicitor's trouble for negotiating. There is no express remuneration by way of percentage given to the solicitor, but the percentage remuneration given to the solicitor in that case includes payment for his trouble for negotiating.

Now, in the case before me, the solicitor has got by reason of the allowance calculated on the rent, payment for the negotiation. That, I think, is quite plain, having regard to the decision in *In re Field*, which has been approved by the House of Lords in Savery v. *Enfield Local Board*, 42 W. R. 33, [1893] A. C. 218. In my opinion the solicitor here is asking to be paid twice over in respect of the negotiation.

The 5th rule, as is obvious, might have been framed in a different way. It might have been framed in this manner—that where there is a lease at a rent, and also in consideration of a money payment the transaction shall be divided into two parts, and in regard to the rent the rent scale shall apply, and in regard to the premium the sale scale shall apply. But that is not the form, nor in my opinion the substance of the rule, and there is no division into two parts. The rule merely provides that a further sum shall be added to the remuneration, which the solicitor obtains according to the scale fee in respect of the rent. Then, as I said before, arises the question what that further sum is to be, and it is not, I admit, easy to find out exactly to what part of the scale reference is made. I think North, J., was right in what he said, although he had not the question before him of allowing or disallowing the negotiation fee. The solicitor in that case was not bold enough to claim it, and it appears to me that I should be allowing the solicitor to be doubly paid for negotiating if I acceded to the solicitor's request in the present case. The scale fee calculated on the rent does not attribute any portion of the amount of remuneration that the solicitor gets on that footing, to the negotiation. It is impossible to say how much mathematically was allowed to the solicitor on that head, but he is paid for it. And I think it would be inconsistent to give him the fee prescribed on a sale at a percentage in reference to the premium for negotiating. For these reasons I think the application fails, and is dismissed with costs.

Solicitors, *Horn & Francis; Walfords.*

Chan. Div. }
Stirling, J. } Oct. 30.

GRIFFITHS v. TOWER PUBLISHING CO. (LIMITED) AND MONCRIEFF. (a.)

Contract—Author and publisher—Agreement with a limited company—Assignability of contract.

The principle laid down in Stevens v. Benning, 3 *W. R.* 149, 6 *De G. M. & G.* 223; Reade v. Bentley, 6 *W. R.* 240, 4 *K. & J.* 656; *and* Hole v. Bradbury, 28 *W. R.* 39, 12 *Ch. D.* 886, *that a contract between an author and a publisher is of a personal nature, and therefore not assignable, is not affected by the publisher being a limited company instead of an individual or a partnership firm consisting of individuals.*

Action for an injunction to restrain the defendants from selling without the consent of the plaintiff any of the property or assets in their possession, under or by virtue of certain agreements in writing entered into between the plaintiff and the defendant company, and also from selling or assigning without the like consent the benefits, rights, or interest alleged by the defendants to be vested in them under the agreement.

The plaintiff, who was the author of three novels which had been published in serial form in *Pearson's Weekly*, entered into agreements with the defendant company for the publication of the works in volumes. The agreements were made by letters passing between the company's manager and the plaintiff, and were upon the terms that the company took all risks, and that the plaintiff was to be charged only with the actual out of pocket cost of printing and advertising, and was to receive half profits. The plaintiff and Mr. Pearson were to retain the copyright in the books, but the company were to have the sole right of producing the works in volume form, subject to the terms of the agreements.

The company having become insolvent, an action was brought against it by a debenture-holder, and the defendant Moncrieff was appointed receiver in the action. He informed the plaintiff that it was his intention to sell, without the plaintiff's consent, the whole of the assets of the company, including the benefit of the agreements between the plaintiff and

(a.) Reported by J. I. STIRLING, Esq. Barrister-at-Law.

the company. The plaintiff now moved for an injunction in the above terms. The company did not appear at the trial.

Millar, Q.C., and *T. B. Napier*, for the plaintiff.—This is a personal contract, and therefore not assignable.

They referred to *Stevens* v. *Benning*, 3 W. R. 149, 6 De. G. M. & G. 223; *Reade* v. *Bentley*, 6 W. R. 240, 4 K. & J. 656; *Hole* v. *Bradbury*, 28 W. R. 39, 12 Ch. D. 886.

Graham Hastings, Q.C., and *E. Ford*, for the defendant Moncrieff.—The cases cited only apply to agreements between individuals. With regard to the first part of the motion we will undertake not to dispose of the books and plates in our possession except under the direction of the court.

STIRLING, J., stated the facts, and continued:—Now, if this agreement had been made with a single individual or a partnership consisting of individuals, the cases are clear that the contract is of a personal nature, and on that ground is not assignable. There are three authorities which were referred to in the course of the argument. I do not go through them, but they seem to me to be clear that an agreement of this kind is not assignable. I will refer to one point which struck me, that the copyright is to remain with the plaintiff and Mr. Pearson, subject to the right of the company to produce the novels in volumes under the several agreements. That seems at first sight to give something in the nature of a copyright interest to the company, but on consideration it seems to me that it simply gives a right of production in the volume form. That simply forms a license to produce the novel for the purpose of the agreement. Similar agreements were entered into with regard to the other two novels. Unfortunately, now, the Tower Publishing Co. has become insolvent. It is unable to perform the agreement, and a receiver has been appointed. It is suggested that there is a difference between a company contractor and an individual contractor. It is said that although a contract of this nature entered into between an author and a publisher who is an individual, or publishers who are a firm consisting of individuals, may not be assignable, yet a contract entered into with a limited company is assignable. I should hesitate long before laying down such law as that. If the contract is assignable it must be assignable at any moment, and not merely in the case of winding up or liquidation, and I think it would be startling to those authors who have entered into agreements with publishers in the city of London, who have recently been converted into limited companies, if they were told that although the agreements they entered into were not assignable by the old firms who converted themselves into companies, yet they were assignable by the companies. It seems to me that that would be pushing too far the doctrine that the non-assignability of contracts such as these rests on the personal confidence placed in individuals. I cannot hold that the non-assignability of agreements such as these rests on the view that the contract is entered into with persons in whom the author has confidence. An author may have confidence in a limited company as well as in an individual. A limited company may have a reputation for producing books in a good form, and in a mode that attracts the public, and an author selecting the company as his publishers may do so in the reasonable expectation that the company, though the members and officers may fluctuate, will nevertheless consider themselves under an obligation to maintain the reputation they have acquired. In the present case what attracted the plaintiff to this company was that they had published one novel in a style of which he approved. No doubt part of the inducement was that the company had at that time a very efficient manager, and it is said that the company might have dismissed him the next day, without giving the plaintiff cause of complaint. That observation is well founded. They might have discharged the manager next day, and new officers of the company might have been appointed, but I repeat that the plaintiff would be entitled to assume that the Tower Co. and those under its direction would, in selecting a manager and officers, have regard to the best interests of the company. It seems to me I should be doing wrong if I drew any distinction in law between agreements made between an author and an individual or a firm consisting of individuals on the one hand, and agreements made between an author and a limited company on the other hand. If agreements of the former class are, as is well established, non-assignable, I think that contracts of the second class should not be assignable either. I think, therefore, that as regards the second part of the motion an injunction ought to go. It is quite true that an assignment might be ineffective, but nevertheless it might give rise to conflicts between the plaintiff and other persons who might become innocent assignees of the defendants, and so increase the costs of this action.

With regard to the other part of the motion, his lordship said that the case had been very fairly met by the defendant, and he accepted the undertaking.

Injunction granted as to the second part of the motion, and the defendant's undertaking accepted as to the rest.

Solicitors, *Harrison & Davies; McKenna & Co.*

Chan. Div. Stirling, J. } April 15, 16; Aug. 5, 1896.

In re HERBAGE RENTS CHARITY, GREENWICH. CHARITY COMMISSIONERS *v.* GREEN. (*a.*)

Rent-charge—Tenant for years—Personal liability—Charitable Trusts (Recovery) Act, 1891 (54 *Vict.* c. 17), *ss.* 3, 5, *sub-section* 2.

A mere tenant for years is not liable in an action of debt for non-payment of a rent-charge issuing out of the land of which he is in occupation, except under special circumstances.

When a legal rent-charge has been created for charitable purposes, the Attorney-General may in equity enforce payment against the persons legally liable to pay, even though the legal title may not be clear, or be defective; but, in the absence of special circumstances, there is no legal liability on the tenant for years to pay such a charitable rent-charge, which can be enforced in an action in the Chancery Division, either by the Attorney-General or by the Charity Commissioners, under the Charitable Trusts (Recovery) Act, 1891.

This was a summons taken out by the Charity Commissioners under the Act 54 Vict. c. 17, asking for a declaration that a freehold house at Blackheath, occupied by the defendant, was subject to the payment of a perpetual rent-charge of £3 for the benefit of the above-named charity, which was regulated by a scheme of the Charity Commissioners dated the 16th of January, 1877, that an account might be taken of what was due for arrears in respect of the said rent-charge, and that the defendant might be

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

ordered to pay what was found due to the official trustees of charitable funds.

The house in question formed part of the possessions of the Crown, and was occupied by the defendant under a lease for twenty-one years, commencing from the 10th of October, 1886, at a rent of £150.

The house was occupied as a private house, and the defendant received no profits from his occupation.

The Crown, admitting that the property was subject to the rent-charge, the lessee was made the sole defendant to the summons.

It did not appear in whom the rent-charge was legally vested, but it was not disputed that the proceedings were properly instituted under the Act, and that the house was liable.

The defendant alleged that he knew nothing about the rent-charge when he took the house, and it was admitted that it had not been paid during his occupancy.

Vaughan Hawkins, in support of the summons.—The person liable both at law and equity is the person legally in possession. *Christie* v. *Barker*, 63 L. J. Q. B. 537, 33 W. R. Dig. 217, and *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368, show that an action for debt will lie against the person in occupation. The person to be sued can only be the tenant in possession. In the case of a lease for years the person liable is the temporary owner of the lease. This is not a legal action for debt, but takes the place of the action by distress. Proceedings under the Statute of Charitable Uses are all in the nature of suits for breach of trust. The case of *Attorney-General* v. *Jackson*, 11 Ves. 365, which was followed in *Attorney-General* v. *Naylor*, 12 W. R. 192, 1 H. & M. 809, shows that where there are several owners you can sue any one of them. Here it is impossible to say who can distrain. Where there is no power to recover a rent-seck, you can come into Chancery: *Collett* v. *Jacques*, 1 Ch. Cas. 120, 147, cited in Gilbert on Rents, at pp. 117, 110. If you have a right to come into equity as in the case of a rent-charge that shows that the person on whom you can distrain is the person liable. The plaintiffs are entitled to the whole of the arrears and the question of the Statute of Limitations ought to have been raised by the defendant in his affidavits (ord. 19, r. 15).

He also referred to *Grant* v. *Ellis*, 9 M. & W. 123; *Searle* v. *Cooke*, 43 Ch. D. 519, 38 W. R. Dig. 49; *Cook* v. *Fountain*, 3 Swans. 585, 596; *Inhabitants of Woodford* v. *Parkhurst*, Duke's Charitable Uses, p. 70, (edit. 1805) p. 378; *Corporation of Burford* v. *Lenthall*, 2 Atk. 551; Story's Equity Jurisprudence, section 1161; *Cocks* v. *Foley*, 1 Vern. 359; *Steward* v. *Bridger*, 2 Vern. 516; Gilbert on Rents, pp. 3, 73, 75, 101; Gilbert on Uses, Sugden's Edition, pp. 23 and 25; Duke's Charitable Uses, pp. 148 and 149.

Ingle Joyce, contrâ.—The terre-tenant, according to the definition in Sweet's Law Dictionary, is not the occupier, but the person who has the seisin. The argument in this case goes beyond *Thomas* v. *Sylvester*. It is that you can go against anyone in possession. According to this a person with a mere possessory title would be liable. Such an action as *Thomas* v. *Sylvester* will not lie against a man who is not a freeholder and has not all the estate of the grantor of the rent (*Swift* v. *Kelly*, 24 L. R. Ir. 107, 478). This case is analogous to that of an underlessee and a lessor. A lessor cannot maintain an action on the covenant for rent against an underlessee (*Holford* v. *Hatch*, 1 Douglas, 183.) [STIRLING, J.—Your goods and chattels can be distrained. If this charge were vested in the official trustee of charity lands, he or any other duly appointed trustee could distrain for arrears. Cannot the Attorney-General sue in equity as being *cestui que trust* without having a trustee appointed?] The legal owner could not sue. He could distrain, and my remedy would be replevin. I am not liable for an unlimited amount. [STIRLING, J.—I do not say an unlimited amount, but you are liable. *Parkhurst's case* in Duke seems to me to be very near an authority.] That was the case of a rent-charge granted by the owner in fee, and the land was held liable to the charge. [STIRLING, J.—The person against whom distress would have lain is liable. Tudor on Charitable Trusts, at p. 244, says that the person liable to pay a rent-charge in favour of a charity commits a breach of trust if he does not.] A personal liability cannot depend on the possession of goods and chattels to distrain. The pernor of rents and profits is the Crown. [STIRLING, J.—As you are liable for distress, are you not equally liable for the amount that may be levied and distrained?] If this were law the doctrine would only apply to the owner of the freehold. All the cases cited have been cases where a person has had the seisin. There is no one who can distrain, and in any case only six years' arrears can be recovered under the Statute of Limitations. My client has taken a rack-rent, and he is now said to be liable for rent-charges of which he had no notice, and which had been allowed to fall into arrear.

Vaughan Hawkins, in reply.—The defendant would be liable in an action at law upon *Thomas* v. *Sylvester*. The case in the Year Book, 22 Hen. 6, fol. 16, referred to in Reeves's History of the English Law, vol. 2, p. 537, shows that a landlord merely receiving rent is not a pernor of the profits, and could not be sued in a real action. *Swift* v. *Kelly* is not to the point; it only decided that the person sued was not pernor. Here privity of estate exists (Gilbert on Rent, p. 96). There is no difference between a grant for years and a lease for life. Terms of years were ignored in the real actions, because when they were established the possession of the freeholder was the actual possession (*Bushby* v. *Dixon*, 3 B. & C. 298).

He also referred to Littleton, section 572; Gilbert on Uses and Trusts, pp. 24 and 25; *Bernard Hide's case*, Duke 76; *Peacock* v. *Thewer*, Duke 82.

Cur. adv. vult.

August 5.—STIRLING, J., stated the facts and continued:—] It is not disputed that the legal owner of the rent-charge, if known, might have distrained for the arrears; and if by means of a vesting order or otherwise the legal estate was vested in trusts for the charity, those trustees might, I apprehend have distrained upon the tenant's goods. This course, however, has not been adopted. The question which is raised by the summons is whether the defendant, as tenant for years of the property subject to the rent-charge, is personally liable for the payment of those arrears. Regard being had to the not infrequent occurrence of charitable rent-charges of small amounts such as that which is the subject of these proceedings, this question is one of considerable importance to the applicants. It is also one of some difficulty, and in my judgment cannot be decided simply on considerations turning on the liability of the respondent's goods to distress, for the goods of a perfect stranger might be taken in distress if they happened to be on the land, although no action whatever could lie against him. The liability of the respondent was sought to be based on two grounds. It was said, first, that under the present law the occupier of land subject to a rent-charge is liable to an action for debt in respect of arrears of rent-

charge; and secondly, if that was not so as regards rent-charges generally, still there was in the case of a charitable rent-charge a personal duty to pay, which might be enforced by the Attorney-General, and under the statute 54 Vict. c. 17 by the charity commissioners. These two propositions I propose to consider separately in the order in which I have stated them.

The question beng one of personal liability I do not concern myself either with the legal remedy by distress against goods found on the land charged or the equitable remedy against the land itself as illustrated in the series of cases of which *Cupit* v. *Jackson*, 13 Price 721, and *Hambro* v. *Hambro*, 43 W. R. 92, [1894] 2 Ch. 564, may be taken as examples.

As regards the first question, the leading authority on the liability of the possessors of land subject to a rent-charge to an action for debt is *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368. There the declaration stated that the plaintiffs, being seised in fee of certain messuages granted them by indenture to C. subject to the payments to the plaintiff, his heirs and assigns, of a rent-charge, and C. covenanted to pay the rent-charge. Afterwards all the estate of C. vested in the defendants, who did not pay the rent-charge and it was held on demurrer that the declaration was good. The person there sued was the person in whom the land had become vested, for all the estate of the grantor of the rent-charge and the grounds on which he was held liable are thus stated: [His lordship then read from the judgment of Blackburn, J., p. 370 of the L. R.: "I think the only question . . . . entitled to the rent-charge"; and "If the present case . . . he may maintain the action"; and continued:—] Quain, J., puts it thus: "If a man comes into possession of lands as tenant in fee he is the pernor of the profits of the land and was liable to a real action for the non-payment of the rent-charge created by a former tenant in fee; if this be so, since real actions are abolished an action of debt will lie." Now, that case has been repeatedly followed in subsequent decisions. It was followed by the Court of Appeal in the case of *Christie* v. *Barker* in 1884 where the decision in *Thomas* v. *Sylvester* and the reasons given for it were approved, and it was there held that the action of debt would lie against the owner and occupier of a portion only of the lands subject to a rent-charge. Then, in the case of *In re Blackburn and District Benefit Building Society*, 38 W. R. 178, 42 Ch. D. 343, it was explained by the Court of Appeal that though an action of debt lay the rent-charge itself did not constitute a debt. [His Lordship then read from the judgment of Cotton, L.J. *ibid* at p. 349: "Undoubtedly an action for debt . . . while he holds the land," and continued:—] And it was there decided that the liquidators of the building society who got no profits and did their best to get rid of the land were not personally liable. In *Searle* v. *Cooke* the Court of Appeal again followed *Thomas* v. *Sylvester* and ordered the tenant on the roll of the copyholds who was in possession and receipt of the rents to an amount exceeding the rent-charge to pay personally the arrears of the rent-charge. In *Swift* v. *Kelly* it was held by the Court of Queen's Bench in Ireland that where by a marriage settlement lands were granted to a trustee to the use that A., in case she should survive the settlor, should, after his decease, take and enjoy for her own benefit a yearly rent-charge of £100 by way of jointure during her life and subject thereto to the use of trustees for the term of one hundred years upon trust for securing payment of the rent-charge and subject thereto to the use of the grantor in fee, and the grantor died having devised the lands to the defendant, who entered into possession, the defendant, as terre tenant, was liable to an action of debt whether he received profits from the land or not; but this was reversed on appeal on the ground of the existence of the term of 100 years. It was afterwards held by the Vice-Chancellor of Ireland, in *Odlum* v. *Thompson*, 31 L. R. (Ir.) 394, that the owner of the rent-charge was only entitled to the amount of the profits received by the owner of the land. But in a recent case in this country of *Pertwee* v. *Townsend*, [1896] 2 Q. B. 129, 44 W. R. Dig. 58, Collins, J., has come to the same conclusion as that arrived at by the Court of Queen's Bench in Ireland—namely, that where the action lies, the owner of the rent-charge is entitled to recover, whether the defendant in possession has or has not received profits. I have had an opportunity of reading the judgment and I agree with the conclusion at which the learned judge arrived. The fact, therefore, if such it be, that the respondent has not received any profits from his occupation affords no answer to the claim made against him.

In all these cases, however, the action was brought against the owner in fee of the land, and the question of whether a tenant for years is liable to an action of debt is one on which I have been unable to find any reported authority, and I feel compelled, therefore, to enter into the construction of the law as found in the more ancient authorities.

In section 233 of Littleton the nature of the remedy given to the owner of a rent-seck is thus stated. [His lordship read the passage: "If a man who hath . . . the costs of his writ and of his plea," and continued:—] And in section 238, Littleton deals with the case of rent-charge, and there he says: "Denial is a disseisin of a rent-charge as is said before of a rent-seck." It appears therefore that against the person designated in that section as tenant the owner of the rent-charge might by assize of novel disseisin recover not merely seisin of his rent, but the arrears of the rent-charge and damages. A form of judgment in accordance with the law thus laid down is to be found in Rastell's Entries at p. 78*b*, and it appears to me that the conclusion is that the person liable in law for payment of the rent is the person thus designated as tenant. Who is the "tenant" thus referred to? Must he be the tenant of the freehold or does it include a tenant for years? On this light may be thrown if we discover who is the proper defendant to an assize of novel disseisin for non-payment of rents. Now, this point is discussed in *Brediman's case*, 6 Co. 56*b*. It was there held that the payment of a rent-charge by the tenant for years created no seisin so as to bind the tenant of the freeholds and enable him, the owner of the rent-charge, to sue in an assize of novel disseisin. This was supported on several grounds. The first is this: [His lordship read from, "In respect of the imbecility and smallness . . . of the interest of the tenant for years . . . he who had a freehold," and "It was further agreed" to "the perfection thereof," and continued:—] It appears, therefore, that in an action of novel disseisin all the terre-tenants whose lands were liable for payment of rent ought to be named, and it was further laid down that if they were not named the defendant might plead an abatement (see Dyer's Reports, fol. 31, placitum 216).

According to our modern practise, as has already been decided in the case to which I have already referred of *Christie* v. *Barker*, it is no longer necessary that all terre tenants should be parties, but the passage which I have just quoted appears to me to show that the tenant of the freehold was the proper and necessary defendant to an assize of novel disseisin for rent-charge or rent-seck, and *prima facie*, therefore

the person contemplated in section 233 of Littleton as liable for payment of it.

In *Ognell's case*, 4 Co. 48*b*, it was held that as long as the rent-charge continued an action of debt could not lie. In *Lillingstone's case*, 7 Co. 38a, it was held that when the rent-charge ceased an action of debt would lie even though the deed creating the rent-charge contained a provision that the grantor should not be charged on a writ of annuity, and the report states the law thus at p. 39*b*. [His lordship read the passage "It was also resolved . . . he hath no other remedy," and continued:—] The person therefore against whom the action lay was the terre tenant—that is, the tenant of the freehold. One reason why a tenant for years could not by payment of the rent give seisin as against the tenant of the freehold was, as already pointed out in *Brediman's case*, "the imbecility and smallness of the interest of tenant for years."

Where the freehold interest is preceded by a chattel interest only, the freehold is, as laid down in Burton's Compendium, 8th ed., p. 270, a present interest in most of the circumstances and incidents of the title. Th freeholder is in possession through the tenant for years who, in early times, was looked upon by the law as merely the bailiff of the freeholder. This may be the reason why no mention is made in these early cases of the tenant for years being liable in an action for non-payment of the rent-charge; and in only one reported case have I been able to find any judgment against the tenant for years. That is the case of *Cutts* v. *West*, 1 Dyer, fol. 141, plac. 47, and there the tenant for years not merely did not pay the rent-charge but deliberately paid it to a person not entitled. It was there held that the true owner might, under these circumstances, treat him as a disseizor and have a remedy against him by assize.

By the statute 32 Hen. 8, cap. 37, provision was made for the recovery of arrears of rent in certain cases where the common law gave either no remedy or an imperfect remedy; and under that statute the liability of the tenant for years was discussed in three cases but was not finally determined. The first is the case of *Lambert* v. *Austin*, Cro. Eliz. 332, more fully reported in Owen's Reports, 117. I will read from the shorter report. [His lordship read: "The defendant avowed . . . upon this it was demurred." and continued:—] "The question," it is stated by the reporter, "rests only for the rent incurred during the term if by the statute he may distrain for it after the term expired upon him in the reversion." [He also read from the judgments of Gawdy and Turner, JJ.: "The tenant of the freehold . . . in the life of the testator," and Clench and Popham, JJ., *contra*: "That the tenant for years . . . the intent of the statute," and continued:—] Then they discussed the statute. There the court was equally divided on the question and no decision appears to have been come to. It will be observed, however, that all the members of the court are agreed that during the continuance of the rent-charge assize lay against the tenant of the freehold and that the tenant for years could only be affected by distress. Is is not suggested that in the cases in which the common law gives a right of action of debt the tenant for years could be sued, and the point on which a difference of opinion arose was really on the true construction of 32 Hen. 8, cap. 37. The same question was raised in *Bingham and Parkhurst's case*, Littleton's Reports, 93, and caused a similar division of opinion; but no decision was called for in the peculiar circumstances of that case. In *Danah* v. *Smith*, Aleyn's Reports, p. 62, an action was brought under the statute 32 Hen. 8 for arrears of a rent-charge against a mere occupier [His lordship read the report—"In an action for debt . . . inclined against the plaintiff"—and continued:—] This was an action brought against a mere occupier, and it would be inconsistent with the decision arrived at by the Court of Appeal in Ireland in *Swift* v. *Kelly* to hold that mere occupation imposed an obligation to pay the rent-charge.

Such is the state of the authorities so far as I have been able to discover, and in my judgment they do not support the conclusion that a mere tenant for years is liable in an action of debt for non-payment of a rent-charge arising out of the land of which he is in occupation, except under special circumstances, such as occurred in the case of *Cutts* v. *West*.

I now pass on to consider the second proposition—namely, whether, if the Attorney-General were suing, he could recover from the respondent the amount of the arrears in an action in the Chancery Division. It is well established that the Attorney-General may enforce payment of arrears of a rent-charge created in favour of a charity against the person liable for the payment. Examples are to be found in *Attorney-General* v. *Bolton*, 3 Anst. 820, and *Attorney-General* v. *Gascoigne*, 2 My. & K. 647. In the cases of *Attorney-General* v. *Jackson*, 11 Ves. 365, and *Attorney-General* v. *Naylor*, 12 W. R. 192, 1 H. & M. 809, which were cited and relied on in the arguments, the suits are spoken of as directed against the terre tenants, or the tenants of the freehold, and in no case, so far as I have been able to find, has the defendant ever been a mere tenant for years. The case of *The Inhabitants of Woodford* v. *Parkhurst's* is referred to in Duke's Charitable Uses, p. 70. The case which is reported at p. 378 (edit. 1805) of that volume was this: [His lordship read the report—Sir Henry Leigh did purchase . . . resolve that these points . . . also it being objected . . . accrue in their time"—and continued:—] Then the remedy by distress is spoken of, but still only as against the terre tenant or tenant of the freehold, and there are to be found other passages in Duke to the like effect. I have considered them all, but in my judgment they do not go beyond this, that when a legal rent-charge has been created for charitable purposes the Attorney-General may in equity enforce payment against the persons legally liable to pay, even although the legal title may not be clear or be defective.

I therefore come to the conclusion that it is not made out, in the absence of special circumstances, that the tenant for years is legally liable, and I think that the present summons fails, and must be dismissed.

Solicitors, *Clabon; Ingle, Holmes, & Sons.*

Q. B. Div.
(Grantham and Kennedy, JJ.) Oct. 29.

TRAVERS AND ANOTHER *v.* MASON. (*a.*)

Landlord and tenant—Yearly tenancy—Notice to quit, six calendar months—Notice given on customary half-year—Notice insufficient.

In a lease for a yearly tenancy, determinable on the 13th of May in any succeeding year, it was expressly provided that six calendar months' notice to quit should be given by either side. In that part of the country (county Durham) it was admittedly the custom for tenants of small holdings to pay rent on the 22nd of November and on the 13th of May in each year; and notice to quit given after the 13th but before the 22nd

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

of November was commonly accepted as a full six months' notice expiring on the 13th of May following.

On the 21st of November, 1895, a notice to quit on the 13th of May, 1896, having been served on the tenant under the lease above mentioned,

Held, that, notwithstanding the custom, the notice was invalid, it not being a six calendar months' notice as required by the terms of the lease.

Special case stated by justices sitting in petty sessions at Barnard Castle, in the county of Durham.

The question for the decision of the court was whether a customary notice to quit given to a tenant was a sufficient notice or not.

The justices held that the notice was insufficient in point of time.

The material facts were these: A cottage situated within the jurisdiction of the justices was let some years ago to one Mason, the defendant in the action. The lease contained the following clause: "Provided also and it is hereby agreed that either party shall be at liberty to put an end to the tenancy hereby created on giving to the other six calendar months' notice of their intention to do so, such notice to expire on the 13th day of May."

It was proved that a notice to quit was served on the tenant by the solicitors acting on behalf of the trustees of the late landlord, Sampson Waller, Esq., deceased, on the 21st of November, 1895, in these terms: "We hereby give you notice to quit and deliver up possession of the dwelling-house and premises, 8, Cockfield, in the county of Durham, which you now hold of them on the 13th day of May, 1896."

The tenant, however, refused when the 13th of May came to move out, and an application was made to the magistrates under section (i) of 1 & 2 Vict. c. 74, that a writ of ejectment might be served by a constable upon the tenant, the rental of the premises being less than £20 a year.

The tenant opposed the application on the ground that the notice required under the lease was six calendar months, and that the one served upon him was insufficient in point of time.

The magistrates ruled the objection as good, and refused to issue a writ.

The trustees appealed.

Manisty, for the appellants.—The period of time between the 22nd of November, 1895, and the 13th of May, 1896, when the notice, if a good notice, must expire, is less than six calendar months, but I submit that it is in law a sufficient notice under the words of the lease, because in that part of the country it is the custom to pay rent on those two days only, and those dates are treated as the division of the year into two equal portions. I rely on the case of *Howard* v. *Wemsley*, 6 Esp. 53. There it was held that a notice given on the 26th of September to quit at the end of six calendar months was good to determine a holding commencing on the 25th of March. The case was tried by Ellenborough, L J., who, in ruling the notice to be sufficient, said "that the 25th of March was the usual half-year, by computation from the 29th of September, though not exactly corresponding in duration of time; the word calendar was surplusage, for if he had omitted the word calendar or said half-year it would be good." [*Morgan* v. *Davies*, 26 W. R. 816, 3 C. P. D. 260, was also referred to, and the cases mentioned in Woodfall's Landlord and Tenant, 15th ed., p. 372, under the heading of Customary Half-year's Notice Considered.] The question is of great importance to landlords and tenants in the North of England, especially in Northumberland and Durham, where notice given on one customary rent-day has hitherto been treated as a full half-year's notice, expiring on the next rent-day, however expressed in the lease. [GRANTHAM, J.—Your difficulty is this. In this particular lease the notice to quit must be given six months previous to the 13th of May in any particular year. The notice served fails to comply with that condition, which is perfectly clear and reasonable.]

The respondent did not appear either by counsel or in person.

GRANTHAM, J.—The appeal must be dismissed. It would not do for us—indeed we have no power—to allow such an alteration to be read into the clearly expressed condition in the lease, the meaning of which is perfectly clear and reasonable merely because we are assured, and I do not for a moment doubt correctly, that it is customary in the North of England to pay rent but twice a year, and to treat the period of time between one pay-day and the other as being equivalent to a full half-year.

KENNEDY, J.—I concur.

Appeal dismissed.

Solicitors, *Field, Roscoe, & Co.*, agents for *Maw, Teale, & Thomlinson*, Bishop Auckland.

Q. B. Div.
(Grantham and Kennedy, JJ.) Oct. 28.

BRIDGE v. HOWARD. (*a*.)

Adulteration—Food and Drugs—Certificate of analysis, Form of—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.

In a prosecution under the Sale of Food and Drugs Act, 1875, *for selling adulterated milk to the prejudice of the purchaser, the certificate of the analyst which was given in evidence stated, as his opinion, that the sample submitted to him "contained the parts as under—milk, 94 per cent.; added water, 6 per cent. This opinion is based on the fact that the sample contained 7·97 per cent. solids, not fat, whereas genuine milk contains not less than 8·5 per cent. solids, not fat."*

Held, that the certificate was good as evidence of adulteration.

Fortune v. Hanson, 44 *W. R.* 431; [1896] 1 *Q. B.* 202, *distinguished.*

Case stated by magistrates.

An information was laid by the appellant under section 6 of the Sale of Food and Drugs Act, 187 charging the respondent with selling adulterat milk to the prejudice of the appellant. A sample the milk was submitted to a public analyst, who pr pared the following certificate:

"I, the undersigned, public analyst for the coun of Middlesex, do hereby certify that I received on t 26th day of March, 1896, from Mr. Hargreaves sample of new milk, E. M. 159, for analysis (whi then weighed about six ounces), and have analys the same, and declare the result of my analysis to as follows: I am of opinion that it contains the pa as under—milk, 94 per cent.; added water, 6 cent. This opinion is based on the fact that sample contained 7·97 per cent. solids, not fat, when genuine milk contains not less than 8·5 per ce solids, not fat. The sample had undergone no chan which would interfere with the analysis. As witn my hand this 2nd day of April, 1896."

(*a*.) Reported by C. G. WILBRAHAM, Esq., Ba rister-at-Law.

The certificate was tendered as evidence of adulteration, and it was objected to on the ground that it did not specifically state, as the result of the analysis, the quantities of the parts contained in the sample analysed.

The magistrates held, on the authority of *Fortune* v. *Hanson*, 44 W. R. 431; [1896] 1 Q. B. 202, that the certificate was bad and inadmissible as evidence, and dismissed the information.

Earle, for the appellant.—The certificate is in the form approved by the Society of Public Analysts. The test of adulterated milk by means of the quantity of water contained in it was found to be unsatisfactory, inasmuch as the proportion of water in genuine milk was variable. But the proportion of solids other than fat was found to be nearly constant. Therefore the test was adopted of ascertaining the proportion of solids other than fat in the sample, and if that proportion fell below the minimum it was certain that the milk was adulterated, and the proportion of the foreign ingredient was ascertained by means of a simple arithmetical calculation. The certificate complied with section 18 of the Act, and was drawn up in the form prescribed in the schedule thereto. In setting out the grounds for the analyst's conclusion, it afforded the magistrates sufficient material from which they could judge for themselves, and it therefore complied with the decision in *Fortune* v. *Hanson*.

The respondent did not appear.

GRANTHAM, J.—The magistrates were wrong in rejecting the certificate. It is not necessary to refer to *Fortune* v. *Hanson*. All we have to do is to inquire whether the analyst has stated all that it was necessary for him to state. I say that he has done so. Those who know anything about the production of milk know how hopeless it is to go into the question of how much water there is in a sample in order to ascertain whether it is adulterated or not, because the amount of water in genuine milk varies so much. In his certificate the analyst states, as his opinion, that there was in the sample submitted to him 94 per cent. milk and 6 per cent. foreign ingredient. He goes on to give figures, which show that there was rather more than less than 6 per cent. of foreign ingredient. The certificate complies with all the requirements of the Act, and is good.

KENNEDY, J.—As I was one of the court which decided the case of *Fortune* v. *Hanson*, I should like to add a few words. In that case the question was whether the certificate of the analysis was sufficient. All that was told on the certificate to the other party was, that there was in the sample submitted to the analyst so much added water. That was clearly a matter of opinion, and that was why the court decided as it did, for there was nothing in the certificate to show on what scientific grounds the opinion was based. I still think that the fairest thing would be to set out the parts contained in the sample; but, in this instance, the analyst has not merely confined himself to saying that there was so much added water; he has given the facts on which that opinion was based, so that the magistrate was able to judge for himself. He says there was only 7.97 per cent. solids, other than fat in the sample, and he infers from that that there was 6 per cent. of foreign ingredient. This case is not similar to the case of *Fortune* v. *Hanson*.

Appeal allowed.

Solicitor for the appellant, *Sir R. Nicholson*.

Q. B. Div. (Vaughan Williams and Wright, JJ.) — Oct. 25, 1895; Aug. 3, 1896.

In re DAGNALL.
Ex parte SOANE & MORLEY. (*a*.)

Bankruptcy — Married woman carrying on a trade separately from her husband — Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (5)—*Notice of intention to suspend payment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) h.

By section 1 (5) *of the Married Women's Property Act*, 1882, *it is enacted: "Every woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a* feme sole."

Held, that a woman does not cease from "carrying on a trade" until she has paid all debts incurred by her in respect of her trading.

By section 4 (1) h *of the Bankruptcy Act*, 1883, *it is enacted that "If the debtor gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts," he commits an act of bankruptcy.*

Held, that a circular issued by the debtor's solicitors to her creditors summoning them to a meeting and requesting them to send in their accounts is equivalent to a notice of intention to suspend payment.

Appeal against the refusal of the registrar of the Brighton County Court to make a receiving order against Mrs. Dagnall.

In April, 1894, Mrs. Dagnall took a public-house at Crawley, which she carried on, trading separately from her husband, until the 15th of December, 1894, when she sold her interest in the house, the licence necessarily remaining in her name.

Upon the 2nd of January, 1895, she instructed her solicitor to send out a circular calling a meeting of her creditors and requesting each one of them to send in his account, but not stating that she was insolvent, or intended to suspend payment.

Messrs. Soane & Morley presented a petition against her, alleging that the circular was an act of bankruptcy, but the registrar dismissed the petition upon the ground that at the date of the alleged act of bankruptcy the debtor had ceased to trade, and therefore was not "a married woman carrying on a trade separately from her husband" within section 1 (5) of the Married Women's Property Act, 1882.

Messrs. Soane & Morley appealed, and the case came before the court (Vaughan Williams and Kennedy, JJ.) upon the 25th of October, 1895, when, after lengthy argument, it was remitted to the registrar of the county court for him to determine the following questions:

1. Had Mrs. Dagnall separate estate at the date of the petition? Answer: Yes.
2. Had she separate trade property at the same date? Answer: Yes.
3. Had she committed an act of bankruptcy? Answer: Yes.
4. Had she ever carried on a trade separately from her husband? Answer. Yes; from the 24th of April to the 15th of December, 1894.

The case came on for hearing again upon the 3rd of August, 1896.

Bigham, Q.C., and *R. G. Glenn*, for the appellants.—Where a woman once begins to trade separately from her husband she brings herself within the bankruptcy law, and this liability having once attached to her, she cannot get rid of it in five minutes by ceasing

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

to trade; but we admit that she should only be made a bankrupt in respect of debts incurred in connection with her trading.

They cited *Meggot* v. *Mills*, 1 Lord Raymond 286; *Ex parte Bamford*, 15 Ves. 449; *Ex parte Schomberg*, 23 W. R. 204, L. R. 10 Ch. App. 172; *Ex parte Salaman*, 31 W. R. 282, 21 Ch. D. 394; and distinguished *Ex parte McGeorge*, 30 W. R. 817, 20 Ch. D. 697.

Witt, Q.C., and *Poley*, for the respondent.—Unless the appellants contend that a married woman who has once traded is ever after subject to the bankruptcy laws, they must insert in the Married Women's Property Act, 1882, words to show that after ceasing to trade, a woman is to be liable to bankruptcy in respect of any debts incurred while trading. [VAUGHAN WILLIAMS, J.—One may say that the words "carrying on a trade" include having trade debts unpaid; we must say what is evidence of "carrying on a trade."] It would be a strong thing to say that "carrying on a trade" means more than "trading" or "being a trader." [VAUGHAN WILLIAMS, J.—Compare section 16 of the same Act, where "doing any act" means "who has done."]

They cited *Ex parte Reynolds*, 31 W. R. 323, 52 L. J. Ch. 431, and further argued that the letter of the 2nd of January, 1895, was not an act of bankruptcy, as it did not state in terms any intention to suspend payment.

R. G. Glenn replied.

VAUGHAN WILLIAMS, J.—The question in this case is whether Mrs. Dagnall committed an act of bankruptcy and was liable to the bankruptcy laws under the circumstances found by the registrar. No doubt she once did carry on a trade, but on the 15th of December, 1894, she sold her business, and on the 2nd of January, 1895, she issued a circular by her solicitors. This circular was an act of bankruptcy because, although it does not state in terms that she intends to suspend payment, yet it is such a circular as would have rendered it dishonest for Mrs. Dagnall to pay anyone of her creditors separately before the date of the meeting appointed.

Then as to the other matter; that is a serious and difficult point, turning on the words of section 1 (5) of the Married Women's Property Act, 1882: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

It was contended for the appellants that these words mean that every woman who once trades is thenceforth for ever liable to the bankruptcy laws. In my judgment that is not the true construction, though grammatically the words may be capable of bearing it. Mr. Bigham himself hesitated so to construe the words as to make a married woman perpetually liable to the bankruptcy laws, even after the trade debts are discharged.

I therefore think that where the statute says "carrying on a trade," it means so long as the woman carries on a trade, and that she is not to be liable to the bankruptcy laws after she has ceased to trade.

Whether a woman is "carrying on a trade" or not is a question of fact, and if it were not for the case of *Ex parte McGeorge* I should have said without any hesitation that so long as she had not paid her trade debts she was continuing to trade. It seems to me that the trading is not concluded until all the obligations attaching thereto had been performed. That was the view in the older cases, as is pointed out by Jessel, M.R., in his judgment in *Ex parte McGeorge*: "According to the decisions of the former bankruptcy statutes a man was in law 'using the trade of merchandize' so long as he did not pay the debts he had contracted while he was engaged in the trade"; but he goes on to point out why he does not follow them, because, in the Bankruptcy Act, 1869, which he was engaged in interpreting, the words had been altered to "being a trader," and the Court of Appeal in *Ex parte Schomberg* had defined them to mean being actually a trader at the time when bankruptcy proceedings were taken.

I think, however, that I am entitled to say here that the case of *Ex parte McGeorge* is not technically a binding decision on these words in the Married Women's Property Act, 1882, the meaning of which I have now to determine. Take the whole scope of the Act, as it enables women to do business which they could not do before, so it imposes certain liabilities upon them. It seems to me that the intention of section 1 (5) is to show the extent of their personal liability, and that it should be construed as including the *status* of being a debtor in respect of debts incurred in trade carried on separately from a husband.

I therefore think that Mrs. Dagnall was trading when she issued her circular. The collective dealing with her trade creditors after she had ceased to trade shows that she treated them as her trade creditors. A receiving order ought, therefore, to be made against her.

WRIGHT, J., concurred.

Appeal allowed.

Solicitor for the appellants, *Burnett*.

Solicitors for the respondent, *Barraud, Pegge, & Jupp*.

Q. B. Div. (Vaughan Williams, J.) } July 27; Aug. 10, 1896.

In re GOUDIE.

Ex parte OFFICIAL RECEIVER. (*a.*)

Bankruptcy—Practice—Equitable execution—Appointment of receiver—Jurisdiction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* (8)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 93—*Bankruptcy Rules*, 1886, *r.* 93.

The Court of Bankruptcy has jurisdiction to appoint a receiver by way of equitable execution for the purpose of enforcing orders of the court for the payment of money; but such jurisdiction should rarely be exercised.

Motion by the official receiver for the appointment of a receiver of the interest of one Stroud under a will.

The official receiver had obtained an order of the court against Stroud for the payment of £15 and costs taxed at £11 2s. 4d.

Stroud refused to pay, so the official receiver made this application for the appointment of a receiver of Stroud's interest under his father's will from the trustees of such will until the order of the court should be satisfied.

Macklin and *Schiller*, for the official receiver.—The court has jurisdiction to make the order. By section 93 of the Bankruptcy Act, 1883, the Bankruptcy Court is consolidated with the Supreme Court of Judicature, and has the same powers, and by section 25, sub-section (8), of the Judicature Act, 1873, a receiver may be appointed in all cases in which

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

may appear just or convenient that such an order should be made. [VAUGHAN WILLIAMS, J.—It has never been done before, and bankruptcy has been going on for a long time. As early as 1869 the Bankruptcy Court administered both law and equity. Why is there no prior instance of this?] Perhaps, because, until recently, bills in equity were always started when the appointment of a receiver was desired.

Poley and *Kimber*, for the trustees of the will.—The trustees have no objection to the order, but doubt whether the court has jurisdiction to make it.

VAUGHAN WILLIAMS, J.—I think I have discretion, but Stroud must have notice of the application. [Adjourned.]

Aug. 10.—*Schiller* stated that Stroud had been served with notice of the application, but did not appear.

Poley conceded that the court had discretion to make the order.

VAUGHAN WILLIAMS, J.—That is my idea, but these orders should rarely be made; however, as you have served the debtor you can take an order for the appointment of a receiver.

Solicitors for the official receiver, *Adams & Adams*.

Solicitors for the trustees, *Samuel Price & Sons*.

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Nov. 14.

VESTRY OF ST. MARTIN-IN-THE-FIELDS *v.* WARD. (*a.*)

Metropolis management—Sewer—Drain—New sewer—House insufficiently drained—Liability of owner to make new drain—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 69, 73.

Where a vestry, acting under section 69 *of the Metropolis Management Act*, 1855, *provide a new sewer in substitution for an old sewer, they are not entitled under section* 73 *to charge the owner of a house which was drained into the old sewer with the expenses of connecting his house with the new sewer, on the ground that the drain connecting the house with the old sewer is an insufficient drain.*

Vestry of St. Marylebone *v.* Viret, 13 *W. R.* 1064, *followed.*

Appeal by the plaintiff vestry from the judgment of Wills, J., at the trial of the action without a jury.

The action was brought by the plaintiff vestry to recover £167, the amount of costs and expenses incurred in constructing a drain to the defendant's house, and in connecting the drain with a sewer within a hundred feet of the house. The defendant's house had been formerly drained into an old sewer in the rear of the premises, but in 1894 the vestry, in accordance with a resolution adopting a report presented to them by their surveyor, made a new sewer in the road in front of the premises. The vestry called upon the defendant to connect his house with the new sewer, but he neglected to do so. The vestry then served him with notice under section 73 of the Metropolis Management Act, 1855, requiring him, on the ground that his house was not sufficiently or properly drained, to construct a drain from his house into the new sewer, and, on his failure to comply with their notice, caused the necessary work to be done, and sought in this action to recover the expenses.

Section 73 of the Metropolis Management Act, 1855, enacts as follows: "If any house or building . . . be found not to be drained by a sufficient drain communicating with some sewer and emptying itself into the same to the satisfaction of the vestry . . . , and if a sewer of sufficient size be within one hundred feet of any part of such house or building, on a lower level than such house or building, it shall be lawful for the vestry . . . by notice in writing to require the owner of such house or building . . . to construct and make from such house or building into any such sewer a covered drain . . . adequate for the drainage of such house or bulding . . . ; and if the owner of such house or building neglect or refuse, during twenty-eight days after the said notice has been delivered to such owner, or left at such house or building, to begin to construct such drain and other works as aforesaid . . . it shall be lawful for the vestry to cause the same to be constructed and made, and to recover the expenses to be incurred thereby from such owner."

The defendant contended that by section 69 of the Act it was the duty of the vestry to provide the new drain and connect it with the new sewer, and that, therefore, they were not entitled to recover the expenses from him.

Section 69 contains the following proviso: "Provided also that where the vestry alter any sewer, or provide a new sewer in substitution for a sewer discontinued, closed up, or destroyed, they may contract or otherwise alter the private drains communicating with the sewer so altered, or with the sewer so discontinued, closed up, or destroyed, or may close up or destroy such private drains, and provide new drains in lieu thereof, as the circumstances of the sewerage may appear to them to require, but so that in every case the altered or substituted drain shall be as effectual for the use of the person entitled thereto as the drain previously used."

At the trial Wills, J., found as a fact that the drain connecting the defendant's house with the old sewer was not a proper or sufficient drain, but he gave judgment for the defendant on the ground that section 73 did not apply to the case.

Macmorran, Q.C., and *T. Beven*, for the plaintiffs.—The learned judge held that this case came within section 69, and that therefore the provisions of section 73 did not apply. But the fact that the vestry were making a new sewer did not exclude the operation of section 73. The drain which connected the defendant's house with the old sewer was insufficient; it had no proper fall, and no ventilation, and the joints were leaking. That insufficiency gave the vestry jurisdiction to require the defendant, under section 73, to make a proper drain into a sewer within 100 feet of the house, or on his default to do the work at his expense.

Channell, Q.C., and *R. Cunningham Glen*, for the defendant, were not called upon.

Lord ESHER, M.R.—In this case the vestry have made a new sewer, and contrary to the will of the defendant they have made a new drain from his house to the new sewer. The question is, Can they make the defendant pay for the work of constructing this absolutely new drain? Two sections of the Metropolis Management Act, 1855—viz., sections 69 and 73—give the vestry certain powers in two different sets of circumstances. The practical effect of section 73 is that, if they have a sewer vested in them, and if

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the owner of a house within a hundred feet of the sewer has a drain running into it and he lets the drain get out of order, they may require him to repair his drain or construct a proper drain, and on his making default they may do the necessary work themselves and charge him with the expenses. Another power is given by section 69. By this section they have the right to consider the existing state of the sewerage in any district, and if they come to the conclusion that the system of sewerage is bad, they may make a new system, and they may cause any house which was drained into the old sewer to be drained into the new sewer which is substituted for it. In this case they do not repair old drains for the benefit of particular houses, but they make new drains or alter existing drains for the general welfare of the district. Under such circumstances they cannot make the owners of the houses pay for the work, they must pay for it themselves.

There may sometimes be a dispute which of its powers the vestry is exercising, the power of requiring the owner of a house to repair an insufficient drain, or the power of making a new system of sewerage. Where there is such a dispute, I think the law is as laid down by Willes, J., in *Vestry of St. Marylebone* v. *Viret*, 13 W. R. 1064, 34 L. J. M. C. 214: "But is said that the vestry has found that the drains were insufficient; assume that that is so, yet it must be ascertained whether the proceedings were proceedings properly under section 73 or section 69." Let it be taken that in the present case the defendant's old drain was insufficient. That gave the vestry the power of acting under section 73. But in my opinion they have not done that. On the contrary they have considered the benefit of the district generally, they have passed a resolution that the old system of sewerage shall come to an end, and they have made a new sewer. They have disregarded the old drains, and they have made all the houses drain into the new sewer. This has not been the case of repairing or reconstructing anything old. Everything which has been done has had reference to the new sewer. I therefore think that the vestry acted under section 69, and that they have no power to make the defendant pay the costs of work which they have done for the benefit of the public. The judgment of the learned judge was right, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The question is whether the case comes within section 69 or section 73. The alteration in the drainage of the defendant's house was rendered necessary by the substitution of the new sewer for the old sewer. It may be that the defendant's old drain was insufficient, but the old sewer was discontinued by resolution of the vestry, and the new sewer was made in substitution for it, and this was done for the improvement of the district and in the public interest. I therefore think that the case comes within section 69, and that the expense of connecting the defendant's house with the new sewer must be borne by the vestry.

RIGBY, L.J.—I am of the same opinion. The plaintiffs have tried to combine these two sections together; but I think that section 73 does not apply at all to a case where a new sewer is constructed for the purposes of section 69.

Appeal dismissed.

Solicitors for the plaintiffs, *Fladgate & Co.*

Solicitors for the defendant, *Angell, Imbert-Terry, & Page.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 5.

MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. v. GUARDIANS OF DONCASTER. (a.)

Poor law—Costs—Limitation of time—Judgment ordering guardians to pay costs—Taxation—Debt, claim, or demand incurred or become due—Poor Law (Payment of Debts) Act, 1859 (22 & 23 *Vict.* c. 49), *s.* 1.

Where guardians of the poor are ordered by a judgment of the court to pay costs, the time within which, under section 1 *of* 22 & 23 *Vict.* c. 49, *it is lawful for them to pay such costs is to be reckoned, not from the date when the judgment was delivered, but from the date when the costs were taxed.*

The decision of the House of Lords *in* Guardians of West Ham *v.* Churchwardens, [&c., of St. Matthew, Bethnal Green, [1896] *A. C.* 477, *held to apply to the case of an order for the payment of costs made by the Supreme Court.*

Appeal by the plaintiffs from the judgment of Day, J., at the trial of the action without a jury.

The plaintiff railway company claimed a *mandamus* addressed to the defendants, the Guardians of Doncaster Union, commanding them to pay to the plaintiffs the sum of £105 2s. 10d., with interest from the 9th of December, 1895.

In 1892 the railway company, being assessed to certain poor rates in respect of their property within the Doncaster Union, had appealed against such rates to quarter sessions, the respondents to the appeal being the Assessment Committee of Doncaster Union. A special case was stated for the opinion of the Queen's Bench Division and came before the Court of Appeal. On the 17th of July, 1893, the Court of Appeal gave judgment for the railway company with costs. This decision was subsequently affirmed by the House of Lords.

On the 9th of December, 1895, the company's costs of the rating appeal were taxed and were allowed by the taxing-master at the sum of £105 2s. 10d., and the plaintiffs now sought to compel the defendants to pay to them that sum.

The defendants relied on section 1 of the Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), which enacts as follows:—"With respect to any debt, claim, or demand which may after the passing of this Act be lawfully incurred by, or become due from, the guardians of any union or parish . . . such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards."

The defendants' contention was that the sum of £105 2s. 10d. was a debt, claim, or demand which was incurred by, or became due from, them at the date of the judgment of the Court of Appeal—viz., on the 17th of July, 1893—and that therefore it could only be lawfully paid by them during the half-year ending the 29th of September, 1893, or within three months afterwards.

The plaintiffs' contention was that the sum did not become due till the date of the taxing-master's *allocatur*—viz., the 9th of December, 1895.

It was admitted by the defendants that, if the latter contention was right, the plaintiffs were entitled to succeed in the action.

Day, J., at the trial, gave judgment in favour of the defendants.

The plaintiffs appealed.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

C. A. Russell and *J. W. Mansfield*, for the plaintiffs.—The learned judge based his decision on the judgment of the Court of Appeal in *Guardians of West Ham* v. *Churchwardens, &c., of St. Matthew, Bethnal Green*, 43 W. R. 419, [1895] 1 Q. B. 662. But that judgment has since been reversed by the House of Lords, [1896] A. C. 477. It is now settled that where guardians are ordered to pay costs the period limited by section 1 of the Poor Law (Payment of Debts) Act runs from the date of the *allocatur* and not from the date of the judgment; see also *Midland Railway Co.* v. *Guardians of Edmonton Union*, 43 W. R. 309, [1895] A. C. 485.

Macmorran, Q.C., and *W. A. Meek*, for the defendants.—An order for payment of costs gives rise to a debt, claim, or demand, on which an action may be brought before taxation: *Holdsworth* v. *Wilson*, 4 B. & S. 1, 11 W. R. C. L. Dig. 128; *Metropolitan District Railway Co.* v. *Sharpe*, 28 W. R. 617, 5 App. Cas. 425. The words "debt, claim, or demand" are wide enough to include unliquidated claims. The period of limitation therefore runs from the date of the judgment. In the *West Ham case* the House of Lords did not overrule the construction which this court had put upon the statute; the ground on which they allowed the appeal was that this court had not given effect to one of the Standing Orders of the House of Lords.

Lord ESHER, M.R.—In this case there were proceedings to which guardians of the poor were parties, and judgment was given against them, and they were directed to pay costs. They now say that the time within which, under the Poor Law (Payment of Debts) Act, it was lawful for them to pay those costs is to be reckoned from the date when the judgment was given, and that the period limited by the statute has elapsed, and that, therefore, they cannot pay now, and cannot be ordered to pay. On the other side it is said that the time is to be reckoned, not from the date of the judgment, but from the date of the taxation of the costs, and that the period so reckoned has not elapsed.

It is a question of the construction of the Act of Parliament. The point is whether, following the decision of the House of Lords in *Guardians of West Ham* v. *Churchwardens, &c., of St. Matthew, Bethnal Green*, and giving to it its legitimate effects, we are not bound to say that this case is governed by that case. There the question arose when the time limited by the statute began to run with regard to an amount of costs payable under an order of the House of Lords, and it was held that the time only began to run when the amount had been ascertained by taxation. It may be argued that that decision of the House of Lords was based on the true construction of a Standing Order of the House, which provides that, when an order for payment of costs does not in itself specify the amount, there shall be a taxation by an officer of the House and a certificate by the Clerk of the Parliaments, and then goes on to direct that the amount in money certified by the Clerk of the Parliaments shall be the sum to be demanded and paid under or by virtue of such order. But I do not think that the learned lords confined themselves to that. I think that they went further, and intended to put an interpretation on the statute. If it were not so it would have been unnecessary for Lord Herschell to refer to *Midland Railway Co.* v. *Guardians of Edmonton Union*. It seems to me that he meant to found his judgment on the construction of the statute which had been intimated in the previous case by Lord Watson and himself. That construction is this, that where there has been a judgment for costs, the time limited by the statute runs from the date of taxation. We must follow that construction, and the appeal must be allowed.

LOPES, L.J.—I am of the same opinion. I cannot distinguish in principle between this case and the case of *Guardians of West Ham* v. *Churchwardens, &c., of St. Matthew, Bethnal Green*, in the House of Lords. The question is whether the period of limitation prescribed by section 1 of the Poor Law (Payment of Debts) Act, when applicable to a judgment for costs, runs from the date of the judgment or from the date of taxation. The learned lords clearly intended to base their decision on the construction of the section, and they adopted the construction which made the period run from the time of the ascertainment of the debt by taxation. It seems to me that no distinction can be drawn in this respect between a taxation of costs by the Clerk of the Parliaments and a taxation by the officer of this court. The appeal must therefore be allowed.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Cunliffes & Davenport*, for *Lingard-Monk*, Manchester.

Solicitors for the defendants, *Van Sandau & Co.*, for *F. E. Nicholson*, Doncaster.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — Aug. 4, 1896.

In re AN ARBITRATION BETWEEN GONTY AND THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. (*a*.)

Lands Clauses Acts—Taking lands—Part of building—Material detriment to remainder—New access to building—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92—*Manchester, Sheffield, and Lincolnshire Railway Act*, 1892 (56 & 57 *Vict. c. lxxix.*), *s.* 42—*Costs of special case—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 7, 20.

A railway company's special Act provided that the owners of houses or other buildings, whereof parts only were required for the purposes of the Act, might, if such portions could be severed from the remainder of such properties without material detriment thereto, be required to sell to the company the portions only of the premises so required, without the company being obliged to purchase the whole.

The railway company gave notice to treat for a portion of a factory. The notice to treat comprised a portion of land over which lay the only access for vehicles from the public highway to the factory. The sole purpose for which the railway would use the land was to build a viaduct to carry the railway, and sufficient access to the remainder of the land could be provided through an archway of the viaduct. At the arbitration the company contended that the provision of such access was an accommodation work which they would be bound to make under section 68 of the Railways Clauses Act, 1845; and, whether so bound or not, they undertook to make and maintain the access in question and to grant a perpetual right of way through the archway.

Held, that, in considering whether the portion proposed to be taken could be severed from the remainder without

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

material detriment thereto, the arbitrator was entitled to take into consideration the obligation imposed upon the company under section 68 *of the Railways Clauses Act* 1845, *to make and maintain accommodation works fo, providing access to the remainder of the land.*

Held, also, by Lord Esher, M.R., *and* A. L. Smith, L.J., *that, apart from section* 68, *the company had power to grant a perpetual right of way through the archway; and that therefore the arbitrator was entitled to take that into consideration.*

The costs of a special case stated by an arbitrator appointed under the Lands Clauses Act, 1845, *are now, by section* 20 *of the Arbitration Act,* 1889, *in the discretion of the court.*

Holliday *v.* Mayor, &c., of Wakefield, 20 *Q. B. D.* 699, 36 *W. R. Dig.* 8, *upon this point held to be no longer applicable.*

Appeal from the judgment of a Divisional Court upon a special case stated by an umpire.

The Manchester, Sheffield, and Lincolnshire Railway Co., who had, in 1893, obtained statutory powers for constructing a line of railway, gave notice to Gonty, the owner of a factory at Leicester, to treat for a portion of his factory under section 42 of the company's special Act of 1893.* The factory was one of the buildings specified in the schedule to the Act. The only access for vehicles to the factory was from public highway, and this access was included in the portion of land comprised in the notice to treat. If the railway company took the portion of land comprised in the notice to treat, there would be no access for vehicles to and from the remainder of the land from and to the highway, except over the land so taken by the company. The railway was carried over portion of the land in question by a viaduct, which was in course of construction, and sufficient access for vehicles to and from the remainder of the land from and to the highway could be provided through an archway of the viaduct. The sole purpose for which the company would use or were likely to use the land was to carry the viaduct over which the lines passed and no other, and save for letting out for non-railway purposes the company were not likely to require any further or other use of the land.

The company contended that the provision of such access was an accommodation work which, in the event of their taking the portion of the land in question, they would be bound to make and maintain under section 68 of the Railways Clauses Act, 1845, and, whether so bound or not, they offered and undertook before the umpire to make and at all times thereafter to maintain for the accommodation of the owners and occupiers of the remainder of the land such an access to and from the said highway by means of a roadway under one of the arches of the viaduct, and to execute any assurance necessary to secure to the owners and occupiers a perpetual easement of such right of passage under such viaduct.

The claimant contended that in determining, under section 42 of the special Act, whether the portion of the land could be severed from the remainder thereof without material detriment thereto, the umpire was bound to consider only the effect which the taking of the portion required by the company and the severing of the same from the remainder would have upon such remainder, and that he was not authorized by the Act to take into consideration any offers, whether of works, easements, or other matters, made by the company with the object of neutralizing such effect; and the claimant further contended that the company could not in law fulfil their undertaking to convey the easement in perpetuity.

The umpire decided, first, that if the land taken by the company prevented all access to the claimants' works through or under the viaduct, the company must purchase the entire property; and secondly, that if the company had power to give the access offered through the archway, there was not such material detriment to the property as to entitle the claimant to claim that the company must purchase the whole.

The question for the opinion of the court was whether the umpire was entitled to take into consideration the matters mentioned in the above contentions in forming an opinion whether the portion of the land could be severed from the remainder thereof without material detriment thereto. The Divisional Court held that the umpire was not entitled to take the matters mentioned in the company's contention into consideration, and that the company had no power in law to give the access.

The railway company appealed.

C. A. Russell and *J. E. Bankes*, for the appellants.

J. Lawson Walton, Q.C., and *S. M. Everard*, for the respondent.

The following cases were referred to: *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611; *Grand Junction Canal Co.* v. *Petty*, 36 W. R. 795, 21 Q. B. D. 273; *Foster* v. *London, Chatham, and Dover Railway Co.*, 43 W. R. 116, [1895] 1 Q. B. 711; *Wilkinson* v. *Hull, Barnsley, and West Riding Railway Co.*, 30 W. R. 617, 20 Ch. D. 323; *Byles* v. *Ipswich Dock Commissioners*, 11 Ex. 464, 4 W. R., C. L. Dig. 178.

LORD ESHER, M.R.—Considering what the law would have been if section 42 of the Special Act of 1893 had not been enacted, and then looking at that section, in my opinion that section ought to be construed so as, if possible, to meet the grievance sought to be remedied. Formerly, if a railway company took the smallest part of a house, though the severance of that part from the rest caused no material detriment, the owner could require the company to take the whole of the house. That was the grievance which was created by section 92 of the Lands Clauses Act, 1845, and which placed a great obstruction in the way of railway construction. Section 42 seems to me to have been enacted with a view to take away that power from the landowner, upon a certain condition being fulfilled. The section throws upon the arbitrator or jury, as the case may be, the duty of determining whether that condition has been fulfilled —namely, whether, where part of a house is proposed to be taken, it can be taken so as to cause no material detriment to the rest of the house. If the tribunal determines that no material detriment will ensue, then the power of the owner under section 92 is gone.

* By 56 & 57 Vict. c. lxxix., s. 42, notwithstanding section 92 of the Lands Clauses Act, 1845, the owners of and other persons interested in the houses or other buildings or manufactories described in the schedule to the Act, and whereof parts only are required for the purposes of the Act, may, if such portions can, in the opinion of the jury, arbitrators, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto, be required to sell and convey to the company the portions only of the premises so required, without the company being obliged or compellable to purchase the whole or any greater portion thereof, the company paying for the portions required by them and making compensation for any damage sustained by the owners thereof and other persons interested therein by severance or otherwise.

Considering that section 42 was passed to remedy an acknowledged grievance affecting the railway company, it seems to me that it should be construed as widely as possible to meet that grievance. I think that the proper construction of the section is that the arbitrator or jury should take into consideration all the circumstances, and the mode in which the piece of land is proposed to be taken. Here a certain part of a manufactory is proposed to be taken, and the owner says that material detriment will be caused to the remainder by cutting off access to it. The railway company say to that, that though that might be true if they took the land simply, yet they would undertake, and they did undertake before the umpire, to enter into a deed binding them to give a perpetual right of way over the piece of land taken; that they were carrying the railway over the land on arches, and that one arch would span the very piece of land over which the owner now has access, and that the arch would be so high and so wide, and the gradients so slightly altered that the road under it would be almost exactly the same as the present road. If that is so, can anyone say that there is any material detriment to the remainder of the land? The umpire found that there was no material detriment. It is urged that the umpire cannot take those considerations into account. That contention, to my mind, would do away with the beneficial effect of section 42.

It is also urged that the company cannot give a right of way. If the right of way proposed to be given were inconsistent with the purpose for which the land was taken, I should think that the company could not give it. But looking at the cases which have been cited, they seem to me to show that the company can give this right of way, inasmuch as it is not inconsistent with any purpose for which the land is taken. The company have given the requisite undertaking before the umpire, and the court would enjoin them to carry out that undertaking. It is a positive obligation from which they cannot escape.

There is this further point. Even if the company had not undertaken to give this right of way, they could be compelled to give access under section 68 of the Railways Clauses Act, 1845. But I desire to rest my judgment on section 42 of the special Act, apart altogether from section 68. We must, therefore, answer the question by saying that the arbitrator had a right to take into consideration the mode in which the company proposed to, and bound themselves to, cross the land. The appeal must therefore be allowed.

A. L. SMITH, L.J.—I am of the same opinion. Under section 92 of the Lands Clauses Act, 1845, if a company took part of a house, the owner could compel them to take the whole house. To meet that state of the law section 42 of the company's special Act was enacted. The meaning of that section seems to me to be that, with respect to certain properties the owner shall no longer have the power I have stated under section 92, where the tribunal is satisfied that the severance will cause no material detriment to the remainder of the property. If the tribunal finds that there will be material detriment to the remainder, the owner can compel the company to take the whole. If there is no material detriment, he cannot. How is the tribunal to ascertain if there is material detriment caused by the severance? The first thing must be to ascertain how the severance is going to be effected. Is it in a tunnel, or in a cutting, or on an embankment, or in what other mode? All these things must be investigated by the arbitrator. If that is so, why is he not to inquire whether the roadway giving access to the premises is to be cut in two, or whether an archway is to be built allowing the same access as before? If that were not so, section 42 would be done away with. I think therefore that the question must be answered in the affirmative. The umpire has found that if the company have power to give the access through the archway there is not such material detriment to the property as to entitle the claimant to claim that the company must purchase the whole.

As to the case of *Mulliner* v. *Midland Railway Co.*, if that case decided that the company could never grant an easement through an archway, I should have to differ from it. I am certain, however, that case never intended to decide that if a field is cut in two the railway company cannot grant a right of way by means of a bridge under the embankment. Then, as regards the two cases of *Grand Junction Canal Co.* v. *Petty* and *Foster* v. *London, Chatham, and Dover Railway Co.*, they were both decided upon a passage in Parke, J.'s, judgment in *Rex* v. *Inhabitants of Leake*, 5 B. & Ad. 469, at p. 478. That dictum, in my opinion, shows that the company can voluntarily execute works so as to give a right of way under their line. Further, I see no reason why, under section 68 of the Railways Clauses Act, 1845, the company are not compelled to give an access.

RIGBY, L.J.—The only question we have to consider is whether the umpire was entitled to take into consideration the matters mentioned in certain paragraphs of the case. In my opinion that question must be answered in the affirmative. The company alleged that they would be bound under section 68 to provide an access to the road for the accommodation of the remainder of the land. I do not rely upon the alternative proposition that, whether they were bound or not, they agreed by their counsel before the umpire to do so. I think that the company would be bound, under section 68 of the Railways Clauses Act, 1845, to provide a sufficient and proper access to that portion of the claimant's property for which they had not given notice to treat. The archway gives an actual and physical access to the remainder of the property, and it is, in my opinion, such an access as under section 68 they would be bound to provide. It is not a question of their willingness to give access; they were bound to give it. I have no doubt that if the matter had been brought before justices under section 69 they would have held it to be a sufficient accommodation work. Therefore the company were bound to give the access, and the claimant was bound to take it as complying with section 68. The company being bound to give an access in perpetuity, it was the duty of the umpire to have regard to those facts in determining whether there was material detriment to the remainder of the land, and having taken those facts into consideration he came to the conclusion that there was no material detriment.

As to the case of *Mulliner* v. *Midland Railway Co.*, it has no sort of reference to a case of this kind. There the land was taken for building a station at Northampton. The land was required for the purposes of the railway. That case has never been disputed, and is the law. It has been attempted to extend it to other cases to which it has no application. That land taken and required for the purposes of the railway cannot be alienated without the special authority of Parliament cannot be doubted. And the late Master of the Rolls went a step further and said that a perpetual easement over it could not be granted, and I think that follows as a necessary corollary. The appeal must therefore be allowed.

C. A. Russell asked that the appeal should be allowed with costs.

S. M. Everard, for the claimant, contended that this court in *Holliday* v. *Mayor, &c., of Wakefield*, 20 Q. B. D. 699, 36 W. R. Dig. 8, decided that the costs of a special case were costs incident to the arbitration within section 34 of the Lands Clauses Act, 1845, and were to be borne as therein provided, and that the court had no jurisdiction over them.

C. A. Russell, for the railway company.—*Holliday* v. *Mayor, &c., of Wakefield* was decided in 1888, when section 5 of the Common Law Procedure Act, 1854, which gave the arbitrator power to state a case, but said nothing about costs, was in force. That section has been repealed by the Arbitration Act, 1889, and section 7 of this latter Act has been enacted in its stead, and section 20 gives the court power to make any order as to costs it may think just. *Holliday's case* is therefore no longer applicable.

Lord ESHER, M.R.—*Holliday's case* came before the court under section 5 of the Common Law Procedure Act, 1854, which has now been repealed, and wider powers are given to the court. That case, therefore, is no longer applicable. We accordingly give the appellants the costs of the appeal.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors for the appellants, *Cunliffes & Davenport*, for *Lingard-Monk*, Manchester.

Solicitors for the respondent, *Bower, Cotton, & Bower*, for *Sir Thomas Wright & Son*, Leicester.

From Chan. Div. (Lindley and A. L. Smith, L.JJ.) } Nov. 4, 10.

ERNEST v. THE LOMA GOLD MINES (LIMITED). (a.)

Company—Meeting of shareholders—Special resolution—Proxies—Mode of counting votes—Show of hands—Companies Acts, 1862 (25 & 26 *Vict. c.* 89), *s.* 51—*Blanks in proxy—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 80.

At a meeting of the shareholders of a company, the articles of which provided that every motion submitted to a general meeting should be decided, in the first instance, by a majority to be ascertained by a show of hands; that every member should have one vote for every share he should hold in the company; and that votes might be given either personally or by proxy, the chairman of the meeting refused to count proxies on taking votes by show of hands.

Held, that the chairman was right in so refusing.

In re Caloric Engine and Siren Fog Signals Co., 52 *L. T. N. S.* 846; *approved.*

In re Bidwell Brothers, 41 *W. R.* 363, [1893] 1 *Ch.* 603, *overruled.*

By a printer's error, the day and hour appointed for a meeting of shareholders had been omitted from the proxy which was sent to each shareholder with the notice convening the meeting. The secretary of the company, having discovered the error, sent a postcard to each member saying that, if the proxy had already been returned to him, he should assume that he had authority to fill in the blanks, and accordingly did so.

Held, that the proxies were valid, and had been duly stamped within the meaning of the Stamp Act, 1891.

Decision of Chitty, J. (ante, *p.* 45, [1896] 2 *Ch.* 572), *affirmed on both points.*

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Appeal of the plaintiff from a decision of Chitty, J., reported *ante*, p. 45, and [1896] 2 Ch. 572, where the facts are fully stated.

Chitty, J., held that at a meeting of shareholders of the company the chairman was right in refusing to count proxies on taking votes by show of hands, and, further, that forms of proxy, the dates of which were filled in after signature, were valid within section 80 of the Stamp Act, 1891.

The plaintiff, a shareholder in the company, appealed.

Ashton Cross, for the appellant, used the same arguments as in the court below, and referred to *Queen* v. *Government Stock Investment Co.*, 3 Q. B. D. 442, 26 W. R. Dig. 136; *In re Haven Gold Mining Co.*, 30 W. R. 389, 20 Ch. D. 151. [LINDLEY, L.J., referred to *Young* v. *South African, &c., Syndicate*, 44 W. R. 509, [1896] 2 Ch. 268.]

Byrne, Q.C., and *E. W. Stock*, for the respondent company.

Cur. adv. vult.

Nov. 10.—LINDLEY, L.J., read the judgment of the court as follows:—The question raised by this appeal is how absent members of a registered company are to vote at a meeting called under section 51 of the Companies Act, 1862, when no poll is demanded. The question is important, because different views have been taken by different judges of the High Court. Before referring to the decisions it is necessary to read section 51, on the construction of which the question really turns. [His lordship read the section, and continued:—] It will be observed that this section contemplates cases in which a poll is demanded, and cases in which no poll is demanded. A valid resolution may be carried without a poll as well as with a poll. The section does not say how votes are to be given or counted when a poll is not demanded. The section is framed upon the assumption that the mode of voting in such a case is well known, as in truth it was and is—viz., by show of hands—*i.e.*, by counting the persons present who are entitled to vote and who choose to vote by holding up their hands. We can find nothing in the section to alter or to exclude this well-known mode of conducting business, nor, so far, is there any controversy. The controversy arises in this way. Absent members who have appointed proxies vote by those proxies; but, unless a poll is demanded, the person present is only counted once, however numerous may be the persons whom he represents. Such is admitted to be the common practice. But it is contended that the practice in this respect is inconsistent with section 51, and that when that section applies, as it does in this case, each absentee whose proxy is present and who votes is entitled to be treated as present himself and as holding up his hand, so that on a show of hands each person present and entitled to vote and voting ought to be counted not once only, but once for every person present whom he represents.

It is not contended that the number of votes which each absentee can give on a poll is to be counted; the contention is that each absentee who has given a proxy, who is present and votes, is to be counted as a member present and holding up his hand. This contention is based on the words "present in person or by proxy." Absentees, it is contended, are present by their proxies, and must therefore be counted as persons present if those proxies vote. This ingenious argument, however, fails to give sufficient effect to the words "entitled according to the regulations of the company to vote." The regulations of each

company must therefore be regarded. The regulations of each company are, however, themselves framed with reference to ordinary business habits, and are based upon the assumption that business will be conducted in the ordinary way. Section 51 of the Act is intended to be worked with the regulations contained in Table A in the case of companies having no other regulations, and Table A impliedly authorizes voting by show of hands in the ordinary way if no poll is demanded; and it also authorizes voting by proxy (see Art. 48); but the proxies must be members of the company (Art. 49). The articles of association of the present company exclude Table A, but contain similar provisions as regards voting, and also an express provision (60) that "at any general meeting every motion made and submitted shall be decided, in the first instance, by a majority in number of the members to be ascertained by a show of hands." The express provision is not in Table A; but, in our opinion, it is implied although not expressed. Section 51 of the Act does not render this article inapplicable to general meetings called to pass special resolutions. The section and the article must be read together, and so read the argument of the appellant renders it necessary to say that the effect of section 51 is to introduce a mode of voting by show of hands which is quite contrary to ordinary business habits and which no one has ever known adopted in practice. Absent members who vote by one and the same proxy, when no poll is demanded vote not separately as if they were individually present but as an aggregate, their proxy, if a member, holding his hand up and so giving one vote, but only one for himself and them. Absentees, if they are to be regarded as present by proxy before a poll is demanded, vote in this way and no other. The above mode of voting and no other is that which is contemplated by the Legislature when no poll is demanded, as is shown by Table A; and this mode and no other is consistent with the articles of this company. This was Chitty, J.'s, view. The same view was taken by Kay, J., in *In re Caloric Engine Signal Co.*, 52 L. T., N. S. 846, and by the Court of Appeal in *In re Horbury Bridge Wagon Co.*, 27 W. R. 433, 11 Ch. D. 109. It is true that the only point decided in this last case was that on a show of hands shares ought not to be counted. No one suggested that absentees should be counted as present. The observations of Sir George Jessel, M.R., on the mode of voting by show of hands are clearly against the propriety of so counting them. In *In re Bidwell Brothers*, 41 W. R. 363, [1893] 1 Ch. 603, Vaughan Williams, J., however, decided that on a show of hands absent members entitled to vote by proxy ought to be counted as present if their proxy is himself present and votes. We agree that this is true if the proxy is a non-member and represents only one person—viz., the absentee for whom he votes. The proxy's vote must be counted, and that vote is in effect the vote of the absentee. But to hold that on a show of hands a proxy has more than one vote is to introduce a mode of voting never heard of in practice, and not, in our opinion, required by law. Section 51 of the Companies Act, 1862, is a reproduction of section 34 of the Joint Stock Companies Act, 1857, and if Vaughan Williams, J.'s, decision is right, a practice which has prevailed ever since 1856, if not for even a longer period, will have been improper. Such a conclusion makes it necessary to examine the grounds on which it is based with great care and some suspicion; and for the reasons above stated we have come to the conclusion that the decision in *In re Bidwell Brothers* is erroneous and ought not to be followed. The appeal must be dismissed with costs.

On the second point the court, without delivering a formal judgment, held that the proxy forms had complied with the requirements of section 80 of the Stamp Act, 1891, and were therefore valid.

Appeal dismissed.

Solicitors, *W. T. Hart; Powell & Burt.*

From Chan. Div.
Lindley, Lopes, and Rigby, L.JJ. — June 17, 26, 1896.

In re LE BRASSEUR & OAKLEY. (*a.*)

Solicitor — Costs — Taxation—Common order—Moneys received by solicitor in different capacities—Counsel's fees.

The clause in the common order to tax directing credit to be given for all sums received must be read as including and as confined to all moneys which the solicitor, in his character of solicitor or agent of the client, has received of, or on account of, or is legally or equitably liable to pay over to, the client, and against which, if sued for by the client, the solicitor could set off his costs when taxed.

Fees received, or alleged to have been received, by solicitors on account of a client, who was also a barrister, as counsel's fees are not included in the above clause, and therefore are not liable to be brought into account in the taxation of a bill of costs between the solicitor and such client.

Mr. Terrell, a barrister, employed a firm of solicitors, Messrs. Le Brasseur & Oakley, to transact some conveyancing business for him, and on the 14th of January, 1896, a common order to deliver a bill of costs and to tax was obtained by Mr. Terrell in the Chancery Division.

The form of order contained these words: "It is ordered that the said solicitors do give credit for all sums of money by them received of or on account of the petitioner."

The petitioner alleged that he had been employed by the solicitors as counsel before a committee of the House of Commons in connection with a bill promoted by two railway companies, and that his fees had not been paid. He also made an affidavit, swearing that he was informed and believed that the solicitors had received from their clients money enough to cover those fees, and that they ought to have handed them over to him.

In the proceedings the petitioner asked that those fees should be brought into account in order that they might be set off against what might be found due from him to the solicitors upon the taxation of their bill.

The solicitors, in reply, denied that they had ever received the fees, and said that there were no fees owing by them to the petitioner.

The taxing-master directed the solicitors to file an affidavit with reference to the fees, and to produce all correspondence and documents relating to them.

The solicitors thereupon gave the following notice of motion before Kekewich, J.: "That the order dated the 21st of April, 1896, by the taxing-master, Mr. Spofforth, to whom the taxation of costs directed by the order herein dated the 14th of January, 1896, has been referred, whereby he directed that the said solicitors should file an affidavit relating to the claim of Frank Arnold Hull Terrell (the petitioner named in the said order of the 14th of January, 1896) to have credit in the said taxation for fees alleged to be due to him in respect of the Great Northern and City Railway

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Bill and the London, Walthamstow, and Epping Forest Railway Bill, and should produce to the said Frank A. H. Terrell or his solicitors all correspondence and accounts relating to the expenses of the said bills or the promotion thereof, may be discharged, and that the taxing-master be directed to proceed with the said taxation without regard to such claim, and that Mr. Terrell may be ordered to pay their costs of the motion."

Kekewich, J., made no order on the motion, and the order of the court as drawn up contained the following words: "This court doth not think fit to make any order on the said motion, but is of opinion that in his taxation the taxing-master ought not to include any item alleged to have been received by the said solicitors on behalf of the said Mr. Terrell as counsel's fees."

Mr. Terrell appealed.

Cababé, for the appellant.—The proper course would have been for the bill to be delivered and taxed in the usual way, and then for the solicitors to carry in objections to the taxing-master's certificate.

Warrington, Q.C., and *George Cave*, for the solicitors.—The receipts to be brought in must be receipts connected with the particular bill of costs to be taxed: *Jones* v. *James*, 1 Beav. 307; *In re Smith*, 4 Beav. 309; *Russel* v. *Buchanan*, 9 Sim. 167; *Cooper* v. *Ewart*, 2 Ph. 362. It is a mere accident that the person who receives the money is a solicitor, and that may possibly give the court jurisdiction. We submit this is not money received to the use of the client. [LINDLEY, L.J.—The practice is uniform to exclude all receipts which have no reference to the subject-matter of the bill: that is the result of our inquiries.]

Cababé in reply.—The moneys must have been received in fact on behalf of the client and by the solicitor in his professional capacity. The principle applies to all moneys received by the solicitor in his capacity of a solicitor, and in fact received on account of the client. The true test is, Has the solicitor moneys in his hands out of which he can properly pay himself?

Cur. adv. vult.

June 26.—LINDLEY, L.J.—This appeal against an order made by Kekewich, J., in the course of the taxation of a bill of costs gives rise to three questions of some little importance, but before alluding to them I will state shortly the facts of the case. [His lordship stated the facts, and continued:—] The first question is as to the procedure. The second question is as to the meaning of that clause in the common order to tax. The third question is as to counsel's fees. They raise altogether distinct points, and must be dealt with separately.

Now, first of all as to the procedure. Kekewich, J., himself said that the procedure was all wrong, and that with regard to the supposed order of the taxing-master, which in the notice of motion is treated as an order of the 21st of April, 1896, by which the master directed the solicitors to file an affidavit and to produce documents, there never was any such order, and the whole thing is a myth. As I understand the facts, it was an expression of intention by the taxing-master that he should require those things to be done. Thus the application to the judge for an expression of his opinion was utterly irregular. Kekewich, J., felt that and said so. Then he went on to say that, inasmuch as the case had been discussed before him, and it was a matter of some importance, notwithstanding the irregularity of the procedure, he should express his opinion upon it, and he did express his opinion upon it. I cannot help thinking that it would have been very much better if Kekewich, J., had declined to hear the application at all. It is entirely contrary to the present practice. I do not say that it never was done in old times, perhaps it was. But ever since the present rules have been in existence—I mean ord. 65, rr. 39-42—the mode of procedure on questions of this kind is for the taxing-master to make a certificate; to carry in objections, and to let the master make an answer to them, and then to appeal from that. Thus the court before whom the case comes knows exactly what the facts are; whereas, by this short cut, although it has some advantages which Kekewich, J., thought justified him in making his order, the court is acting on a hypothetical state of things without knowing the real facts at all. That this course is irregular is obvious from reading the rules, which are perfectly clear. I can only venture to express my regret that the learned judge did not decline to hear the application and dismiss it altogether. However, I am not prepared to say, inasmuch as he did go into the case on the merits, and we have heard all the merits also, that it is our bounden duty to be such martinets as to dismiss the appeal without saying a word about the matter which is really at the bottom of this. Therefore I shall express my opinion on the merits of the case. At the same time I protest against any procedure of this kind, and venture to express a hope that it will not be made a precedent, and that if it is the Court of Appeal will not be so indulgent as it is now.

The next question is as to the meaning of the clause which I have read in the common order to tax. Now a discussion has been raised as to the meaning of that, and we have been asked to endeavour to expand it—not to interpret the order, but to endeavour to give some direction which may be useful for the guidance of taxing-masters and solicitors interested in taxing bills. We have all taken the trouble to make some inquiry about this, and we have seen one or two of the taxing-masters and the result is that the taxing-masters seem to differ somewhat in opinion about the exact scope of that clause in the common order to tax. In Morgan and Wurtzburg on Costs, which is a book known to all of us, and which is very accurate, there is this passage at p. 441 of the 2nd edition: "Under the common order for taxation the master is bound to take a general account of receipts and payments by the solicitor as agent to the client." A general account is exactly in accordance with the words of the clause. Nothing could be wider. The learned authors refer to *Russel* v. *Buchanan* and *Cooper* v. *Ewart* for that statement. Then they say "but see *Jones* v. *James* and *In re Smith*, from which it would seem that the master is not, under such an order, authorized to take an account of pecuniary matters between the solicitor and client generally, but must confine himself to payments by the client on account of the bill of costs, unless by agreement between the solicitor and client the moneys coming into the hands of the solicitor are to be applicable to payment of the bill of costs. See observations on these cases in *Cooper* v. *Ewart*." Now, one of the taxing-masters, as I stated when the case was before us, told us that, notwithstanding the general words directing the solicitor "to give credit for all sums of money by him received of, or on account of, the petitioner" he had been in the habit of construing them and giving effect to them as confined to all moneys received in respect of the bill of costs under taxation. That is no doubt warranted to some extent by the decision, or observations at all events, of Lord Langdale in the cases of *Jones* v. *James* and *In re Smith*, which are referred to in the book I have read and which were commented on before us. Other taxing-masters think that that is drawing the line too

tight, and having regard to the authorities we have looked into, it seems to us that it is too tight to exclude everything which does not bear upon the bill of costs to be taxed.

It appears to us that the true principle is that laid down first of all in *Russel* v. *Buchanan*, and again by Lord Cottenham in *Cooper* v. *Ewart*. That makes the net a little wider. Putting our view into language so as to assist persons as much as possible to appreciate our meaning, the clause must be read as including and as confined to all moneys which the solicitor in his character of solicitor or agent of the client has received of, or on account of, or is legally or equitably liable to pay over to such client, and against which, if sued for by the client, the solicitor could set off his costs when taxed. Therefore the set-off is made the real criterion. The way that works out in practice will be this: Supposing the client brought an action against the solicitor for the money received by him for the client, could the solicitor defend himself in such an action by setting off his bill of costs as taxed? If yes, the taxing-master must take into account the receipts. If no, the taxing-master ought to exclude them. That is to say, there may be circumstances in which the solicitor receives money from his client, against which the solicitor could not set off his bill of costs; such as receiving it for a special purpose, or under circumstances or under arrangements which would preclude the set-off. If so, the master has nothing to do with it. But if on the other hand in an action brought to recover the money the solicitor could set off his bill of costs, it appears to us that Lord Cottenham and Shadwell, V.C., were quite right in saying as they did in effect that those receipts must be brought in.

Having made those comments upon the construction of the clause which enlarges its scope as understood by some of the taxing-masters, and at the same time does not throw open the net so wide as to include everything, I pass on to consider the third question in this case, which is the matter of counsel's fees. Now this brings us to the real substance of the present case. Are the solicitors right, or is Mr. Terrell right, in saying that the taxing-master ought not to go into the matter of those fees? The solicitors say that he ought not; Mr. Terrell asks us to say that he ought. Now it appears to me—I am speaking now for myself only—that upon that matter the solicitors are absolutely right. I think that it would be very much to be regretted if this court, either by itself or by its officers, did anything to enable counsel to recover fees from his client, be that client a lay client or a solicitor client. Such fees are payable as a matter of honour. The solicitor can, if required by counsel, be compelled either not to leave the brief or to pay the fee with the brief. That is the remedy of counsel. He has it in his own hands. If he does not choose to insist on payment of the fees with the brief, it becomes a matter of honour and not legal obligation at all as to whether the solicitor pays the fees or not. Having regard to the affidavits, I do not think that there is the slightest ground for suggesting that these solicitors have received money under such terms or under such circumstances that any action could be brought against them. I doubt whether anything short of a bond would enable a counsel to sue a solicitor for fees; but we need not go into that. The case of *In re Hall*, 2 Jur. N. S. 1076, which has been referred to, proceeds entirely on a certain admission of a solicitor which it is very difficult to get over, and I say nothing about that. But it is of the utmost importance that the court should not assist counsel to recover fees. If they do the whole relation between a barrister and his professional client will be altered, and a door will be opened which will not only lead to very important consequences as regards counsel, but which will inevitably, if persisted in, do away with that which is the great protection of counsel—viz., his immunity from an action for negligence. We have nothing to do with the matter of fees. The taxing-master ought not to have gone into it at all. In that matter the solicitors are absolutely in the right and Mr. Terrell absolutely in the wrong. Kekewich, J., was right in saying that the taxing-master ought not to have gone into it, and we affirm that view of the case. But, inasmuch as the whole thing has been so utterly irregular, it appears to us that we ought to do what is regular so far as we can—that is to say, having expressed our opinion as to what is right, we ought to discharge the order of Kekewich, J., which ought never to have been made, and give no costs either below or here.

LOPES, L.J.—Mr. Terrell, under the common order to tax, seeks to set off certain fees owing to him against his solicitors' bill of costs, incurred in a private matter of his own, unconnected with the fees said to be due to him in respect of either a brief or briefs delivered to him in a matter before a committee of the House of Commons. The mode of procedure that has been adopted in this case is most irregular. The matter was brought before Kekewich, J., by means of a notice of motion, which is most distinctly not the usual way. The matter ought to be dealt with in the usual way—viz., by objections to the certificate of the taxing-master. If that course had been adopted, the matter would have come before us in a different and more definite form, and it would have been much easier to deal with. Kekewich, J., in my opinion, ought to have declined to hear the motion as it came before him. However, he did hear it at some length, and we also have heard it at some length. In those circumstances it appears to me that the preferable course is for us to express an opinion on the merits.

The main question is this, What is the effect of the clause of the common order to tax directing credit to be given for all sums received? As has been said by my brother Lindley, we have taken a good deal of trouble to inquire into what the usual practice is, and different views are entertained by different taxing-masters. Some take a very narrow view, and think that there ought to be included under these words in the order only matters which have relation to the bill of costs then under taxation. Others take a much wider view. In the result we have adopted an intermediate view, and, after careful consideration, the conclusion at which we have arrived is that which has already been expressed by my brother Lindley—viz., that the clause must be read as including and as confined to all moneys which the solicitor, in his character of solicitor or agent of the client, has received of, or on account of, or is legally or equitably liable to pay over to such client, and against which, if sued for by the client, the solicitor could set off his costs when taxed. I think that is the proper rule to adopt; it seems to me it will be easy to work.

The only other question in the case is with regard to counsel's fees. I entirely agree with what has been already said that the court cannot and ought not to assist a barrister in recovering his fees. Payment of such fees is only a matter of honour. It is open to the learned counsel, if he thinks fit, not to accept the brief at all. He may require the brief to be prepaid, but it would be contrary to all the decisions and I think against good policy to hold that such fees are recoverable. The decision in the Court of Common Pleas in *Kennedy* v. *Broun*, 11 W. R. 284, 13

C. B. N. S. 677, is one that has already been acted upon, and establishes the unqualified doctrine that the relation of counsel and solicitor renders the parties mutually incapable of making any legal contract of hiring and service in litigation. That rule has existed for a long time and, speaking for myself, I should be very sorry to see it in any way interfered with. With regard to the costs there have been irregularities on both sides. I think the proper course to take is to discharge the order and give no costs on either side.

RIGBY, L.J., agreed.

Solicitors for the appellant, *Cox & Lafone.*

Solicitors for the respondents, *Le Brasseur & Oakley.*

High Court of Justice.

Chan. Div. North, J. — Nov. 3, 4.

GUARDIANS OF WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE SOCIETY.

GUARDIANS OF WEST DERBY UNION *v.* PRIESTMAN. (*a.*)

Poor Law—Loan—Repayment—Union Loans Act, 1869 (32 & 33 *Vict. c.* 45), *s.* 5—*Poor Law Loans Act*, 1871 (34 *Vict. c.* 11), *s.* 2.

Where a board of guardians has borrowed money since 1871, *and agreed to repay such sum by instalments, if money can be obtained at a cheaper rate, the board of guardians may, with the consent of the Poor Law Board, borrow money and repay the loan at once, without the consent of the lender.*

The same point was raised in both these special cases, which were argued together. The Guardians of the West Derby Union had, since 1871, raised money payable by instalments extending over thirty years. Being able to borrow money at a lower rate of interest, they gave the defendants notice of their intention to pay off the loans. The defendants contended that the loans could not be paid off without their consent.

By the Union Loans Act, 1869 (32 & 33 Vict. c. 45), s. 5: "Any sum or sums of money borrowed by the guardians of any union or parish after the passing of this Act may, at the option of such guardians, and with the consent of the Poor Law Board, be repaid (1) by thirty equal annual payments of the principal sum borrowed, with the interest on the balance remaining unpaid each year; (2) by such equal annual payments as, reckoning principal and interest together, will repay the sum borrowed within thirty years."

By the Poor Law Loans Act, 1871 (34 Vict. c. 11), s. 2: "If any guardians or managers having borrowed, or hereafter borrowing, money under the authority of the Acts referred to, shall be able at any time to obtain a loan at a lower rate of interest than that secured by the charge previously made by them, they may apply to the Poor Law Board for an order to enable them to redeem the balance of the loan and to borrow so much money as may be necessary for that purpose; and if the said Board shall issue their order in that behalf the said guardians or managers may borrow the requisite amount to redeem such balance and charge the fund to which the original loan was charged with the repayment of this additional loan in so many instalments as shall be outstanding at the time when the loan is redeemed, but not more; provided that in the event of any loan outstanding at the time of the passing of this Act no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing."

Cozens-Hardy, Q.C., Swinfen Eady, Q.C., R. J. Parker, and *Cleaver*, for the plaintiffs.—The Metropolitan Life Assurance Society refuses to be paid off, but the consent of the lender is not required under section 2 of the Act of 1871, except in the case of money borrowed before the passing of the Act. The security is in the form given in the schedule of the Act of 1869. The contract is not to pay off with the consent of the lender, but, even if it had been, any contract by the guardians to deprive themselves of their statutory power of paying off the money borrowed would have been *ultrâ vires* (*Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112).

Sir R. Reid, Q.C., and *Danckwerts*, for the Metropolitan Life Assurance Society.—The language of the section is plain; it does not contemplate redemption without the consent of the lenders, and the section cannot be enlarged because of the proviso.

They cited *Smithett* v. *Blythe*, 1 B. & Ad. 509; *Fryer* v. *Morland*, 25 W. R. 21, 5 Ch. D. 675; *Mullins* v. *Treasurer of Surrey*, 30 W. R. 157, 7 App. Cas. 1, pp. 9, 14; *London Joint-Stock Bank* v. *Corporation of London*, 1 C. P. D. 1, 24 W. R. Dig. 144.

Crawley, for the defendant Priestman, cited *Hough* v. *Windus*, 32 W. R. 452, 12 Q. B. D. 224.

Cozens-Hardy, Q.C., in reply.—The Act of 1871 applies to loans payable in instalments; it makes no difference whether the period of repayment extends over thirty years or less. It would not be right to redeem loans payable by instalments if the advance was made before 1871, and so no power to redeem is given except by consent in the case of loans made before the passing of the Act.

NORTH, J.—In my opinion the guardians are right. In 1869 an Act was passed (Unions Loans Act, 1869), behind which I do not think it is necessary to go. By section 5 any sum borrowed by the guardians of any union or parish after the passing of the Act may be repaid by thirty equal annual payments, or by such annual payments as will repay the sum borrowed within thirty years. Section 6 authorizes a form of security. The money is payable by sixty instalments, payable half-yearly; but it is provided that nothing in the deed contained should prevent payment earlier, if the parties were willing that this should be done. The contract is for payment by instalments, but the mortgagees can receive the money earlier if they like, and the persons who borrowed are willing to pay. That is the form of security contemplated in 1869. In 1871 new powers were conferred by the Poor Law Loans Act, 1871. Section 1 deals with persons who borrowed before the Act of 1869 (31 & 32 Vict.). The second section deals with money borrowed or to be borrowed. Money can only be borrowed for the purpose of the redemption of a loan. The plaintiffs now seek to make use of the powers conferred by this section. They now purpose to borrow money at a lower rate of interest, and pay off the loan. The money was borrowed after the passing of the Act of 1871, and the lenders must be taken to have known of its existence. It is said that the plaintiffs have power to borrow, but can only pay off if the persons who lent are willing to receive the money; on the other hand it is said

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

that the plaintiffs are entitled to pay off the loans whether the persons who lent the money consent or not. The cases in which the money was borrowed before the Act are different, and on the wording of the section itself, I should hold that the borrowers were not entitled to pay off such sums without the lender's consent, because it is not absolutely clear that they are entitled to do so. Then comes the proviso, that loans due at the time of the passing of the Act can only be paid off with the lender's consent. It is said this is merely put in *ex abundanti cautela*. I do not think so. The persons whose money was lent before the passing of the Act are in a privileged position, that of not being compelled to take their money unless they are willing. The proviso shows that the section is applicable in all other cases. I declare that the guardians are entitled to redeem.

Solicitors for the plaintiffs, *Sharpe, Parker, Pritchard, & Barham*, for *Cleaver, Holden, & Co.*, Liverpool.

Solicitors for Metropolitan Life Assurance Society, *Travers, Smith, Braithwaite, & Robinson.*

Solicitors for the defendant, *Priestman, Evans, Foster, & Wadham*, for *J. & J. R. Thompson*, Bradford.

Chan. Div. North, J. } July 29, 30, 1896.

In re WINTLE.
TUCKER *v.* WINTLE. (*a.*)

Will—Construction—Vesting.

A testator gave his residuary estate to trustees upon trust to divide the same between a class upon their respectively attaining the age of twenty-one years, and empowered the trustees to apply the whole, or such part as they should think fit, of the annual income of the share of any of the class during minority for his, her, or their education or maintenance.

Held, that the shares were not vested in members of the class who died under twenty-one.

FOX *v.* FOX, 23 *W. R.* 314, *L. R.* 19 *Eq.* 286, *not followed.*

Originating summons.

George Wintle by his will devised and bequeathed his residuary estate on trust for his wife for life, "and from and after the decease of my said wife, upon trust to pay and divide the whole of my said residuary estate unto and equally between all my children, if more than one, as or in the nature of tenants in common, or unto my child if only one, and the issue of any of them who may have previously died, such last-named issue to take their parent's share for their respective sole and separate use and benefit absolutely upon their respectively attaining the age of twenty-one years. I empower the trustees or trustee for the time being of this my will after the decease of my said wife to apply the whole or such part as they or he shall think fit of the annual income of the share or presumptive share of any of my children or grandchildren during minority for or towards his, her, or their education or maintenance."

The testator died on the 14th of March, 1880, leaving eleven children living. Two of the children, Elizabeth and Louisa, died in 1881 without having attained the age of twenty-one years, leaving the testator's eldest son Robert George their heir-at-law.

Robert George made a will devising and bequeathing all his estate to his wife (now Mrs. James), and died in 1884.

The testator's widow died on the 9th of October, 1895.

Robertson Macdonald, for the trustees of the will.

Brabant, for children now living.

Gatey and *Romer*, for children of deceased children of the testator.—The direction here is to apply so much of the income as the trustees think fit. This is not a gift of the whole intermediate income and does not vest the shares: *Leake* v. *Robinson*, 2 Mer. 363; *In re Jobson*, 44 Ch. D. 154, 38 W. R. Dig. 220.

Butcher, for Mrs. James.—The trust for maintenance is sufficient to vest the shares: *Fox* v. *Fox*, 23 W. R. 314, L. R. 19 Eq. 286.

Methold and *Gilbart Smith*, for other parties.

July 30.—NORTH, J.—The question is whether the effect of the clause as to maintenance is to vest the shares which, under the earlier part of the will, by itself would be contingent. The terms of the will in *Fox* v. *Fox* were very like those of the present case, and the Master of the Rolls decided on the construction of that clause that the interests were vested; it would not be fair to say that it was a mere *obiter dictum*. He referred to a difficulty that arose in his mind on *In re Ashmore's Trusts*, L. R. 9 Eq. 99, 18 W. R. Dig. 150, and *Pulsford* v. *Hunter*, 3 Bro. C. C. 416, and dissented from these cases, and after referring to *Watson* v. *Hayes*, 5 My. & Cr. 125, says: "If that be the law it is very difficult to support the decision in *In re Ashmore's Trusts*." But in the later case of *In re Parker*, 16 Ch. D. 44, he himself points out that the decision in *Fox* v. *Fox* is not so large as the language of his judgment.

Looking at *In re Ashmore's Trusts* and *Pulsford* v. *Hunter*, they may be perfectly right, and yet consistent with the decision in *Fox* v. *Fox*. In that case the Master of the Rolls refers to *Harrison* v. *Grimwood*, 12 Beav. 192, but with great deference his statement does not quite do justice to *Harrison* v. *Grimwood*. In point of fact, the trust was not to apply the income for the whole period till the child attained twenty-six; but only till the child attained twenty-one, the legacy being contingent on its attaining twenty-six years. Though the decision was, that the shares were vested, it was only arrived at on the construction of the whole will. I should follow *Fox* v. *Fox* if it was the only case on the subject, but it has not been altogether accepted. In *In re Grimshaw's Trusts*, 27 W. R. 544, 11 Ch. D. 406, Hall, V.C., held that shares did not vest until the children attained twenty-one, and in the later case of *Dewar* v. *Brooke*, 28 W. R. 613, 14 Ch. D. 529, he clearly dissented from *Fox* v. *Fox*. The case of *In re Sanderson's Trust*, 5 W. R. 864, 3 K. & J. 497, contains a very clear statement by a very able judge of the effect of a discretionary trust for maintenance. [His lordship also referred to the judgment of Lord Cottenham in *Watson* v. *Hayes*.]

To apply those principles to the present case, Is there or is there not a gift of the whole income? It is clear from the authorities that a gift of the whole intermediate income vests a contingent legacy. It is also clear that a direction to apply the whole or part of such interest in the maintenance of the legatee makes no difference in the vesting if the whole interest is in fact given to the legatee. On the other hand, where the whole of the interest is not given, a direction for maintenance out of the interest will not vest the legacy. The authorities are in conflict, but the view I take is this: Where a legacy is given vesting at a future time, and the whole of the intermediate income is given to the legatee in any event, there the entire gift, principal and interest,

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

is absolutely devoted to the legatee's use, and vests *in præsenti*. If only some discretionary portion of the intermediate interest is given, the gift does not vest *in præsenti*.

In the present case I find no absolute dedication of the whole income to the legatee's use. If the trustees think fit to apply one moiety, where does the other moiety go? There is only a dedication of so much as is required for maintenance. The two children who died under twenty-one did not, therefore, take a vested share.

Solicitors, *Robbins, Billing, & Co.*, for *Abbot, Pope, & Co.*, Bristol; *G. A. Collyer*, for *E. A. S. Locke*, Bristol.

Chan. Div. } Nov. 11.
Kekewich, J. }

In re GURNEY.
CLIFFORD *v.* GURNEY. (*a.*)

Administration — Priorities — Judgment creditor — Liberty to sign judgment under R. S. C., ord. 14, *not acted upon—R. S. C., ord.* 41, *rr.* 3, 4.

Where a creditor had obtained an order under R. S. C., ord. 14, *in the usual form, giving him liberty to sign final judgment against the debtor's administratrix, but had never acted upon the order by actually signing judgment,*

Held, that he was not a judgment creditor entitled to priority over ordinary creditors in administration of the debtor's estate.

Adjourned summons.

This was an application in an administration action to vary the chief clerk's certificate under the following circumstances:

On the 13th of October, 1892, the "Bouillon Fleet, Limited," who were creditors of the deceased Edwin Gurney, had taken out in the Queen's Bench Division a writ of summons specially indorsed under R. S. C., Ord. 3, rule 6, against the administratrix of the deceased (who was defendant in the administration action), and, on the 31st of October, 1892, had obtained in that action an order by the master under R. S. C. Order 14 in the presence of the defendant, giving them, in the usual form, liberty to sign final judgment for the amount of the claim indorsed on their writ. The "Bouillon Fleet, Limited," however, took no steps under the order, and judgment was never signed or entered. On the 13th of November, 1893, an order for account and inquiries was made in the administration action, and under that order the chief clerk by his certificate dated the 31st of July, 1896, certified that a sum of £135 and interest thereon due to the "Bouillon Fleet, Limited" was entitled to priority over other debts which by the same certificate he allowed against the estate.

The plaintiff in the administration action now took out this summons to vary the chief clerk's certificate by striking out the finding that the "Bouillon Fleet, Limited" were entitled to priority, and substituting a finding that they were entitled to rank *pari passu* with the other creditors.

Micklem, for the plaintiff.—An order giving liberty to sign final judgment is not a judgment such as to give the right of a judgment creditor. The practice in the Queen's Bench Division is different from that in the Chancery Division of the High Court (Annual Practice 1895-96, pp. 1229 and 1241). A further step must be taken—that is to say, judgment must be actually signed by the "Bouillon Fleet, Limited"—before they have a right to priority as judgment creditors. The chief clerk acted under R. S. C., Order 41, rule 3, whereas rule 4 is the rule which applies, *In re Maggi, Winehouse* v. *Winehouse*, 30 W. R. 729, 20 Ch. D. 545.

Dunham, for the defendant.—Though the order is not technically a final judgment it is substantially the same thing. What remained to be done by the "Bouillon Fleet, Limited" in their action was merely a formal act and one to which the defendants in that action could offer no opposition. It would be strange if the fact that the "Bouillon Fleet, Limited" had proceeded in the Queen's Bench Division should bring about a result different from what it would have been had they gone to the Chancery Division.

KEKEWICH, J.—In my opinion the chief clerk is in error in this case. Looking at it as a matter of language, in my opinion the words "liberty to sign judgment" cannot in ordinary English be equivalent to "judgment." There is no compulsion on anyone to sign judgment, and as a matter of fact judgment may never be signed. Regarding it, however, as a matter of practice it is clear that liberty to sign judgment is not a judgment; a further step must be taken and a further order is necessary. The certificate must therefore be varied as asked in the summons.

Solicitors, *C. P. Pritchard; Pearce Jones & Co.*

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Q. B. Div. } Nov. 3.
(Grantham and Wright, JJ.) }

VESTRY OF ST. JOHN, HACKNEY (APPELLANTS) *v.* HUTTON (RESPONDENT). (*a.*)

Local government—Public health—Insufficient water-closet accommodation—Sanitary authority—Notice—Non-compliance therewith — Justices—Jurisdiction—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 37, *sub-sections* 3, 5.

The respondent was summoned before a magistrate for non-compliance with a notice served upon him by a sanitary authority under the Public Health (London) Act, 1891, *s.* 37, *sub-section* 3, *requiring the respondent to provide additional water-closet accommodation at premises of which he was the owner.*

Held, that the magistrate was bound by the decision of the sanitary authority that there was not sufficient water-closet accommodation at the respondent's premises; and that, on proof of non-compliance by the respondent with the notice, it was the duty of the magistrate to convict the respondent.

Special case stated by a metropolitan magistrate.

On the 2nd of August, 1895, the respondent, who was the owner of a house, No. 109, Southgate-road, in the parish of St. John at Hackney, was summoned at the North London Police Court, under the Public Health (London) Act, 1891, for having at the said premises insufficient and improper water-closet accommodation, notwithstanding a notice served on the respondent by the sanitary authority to rectify the same.

The magistrate thought that the matter was not a question of public health, but that it really arose out of a dispute between the respondent and his tenant, the latter alleging that the respondent had agreed to erect another water-closet on the premises, while the

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

former alleged that there was only a conditional promise to do so, if the tenant was a satisfactory tenant to him, which he said was not the case. It appeared that the tenant had put the sanitary authorities in motion. Evidence was given on behalf of the appellants by the medical officer of health, that he was not satisfied with the existing water-closet accommodation.

The magistrate adjourned the summons for six months to give the tenant an opportunity of bringing an action against the respondent in the county court if he desired to do so. At the end of that time no such action having been brought the magistrate dismissed the summons.

The question for the opinion of the court was whether, under the circumstances, the magistrate was bound by the decision of the sanitary authority that the house was not furnished with proper and sufficient water-closet accommodation.

Public Health (London) Act, 1891, s. 37 (3), enacts: "If at any time it appears to the sanitary authority that any house, whether built before or after the commencement of this Act, is without such ashpit or water-closet, as aforesaid, the sanitary authority shall cause notice to be served on the owner or occupier of the house, requiring him forthwith, or within such reasonable time as is specified in the notice, to provide the same in accordance with the direction in the notice; and if the notice is not complied with, the said owner or occupier shall be liable to a fine not exceeding 40s. for each day during which the offence continues; or the sanitary authority, if they think fit, in lieu of proceeding for a fine, may enter on the premises and execute such works as the case may require, and may recover the expenses, incurred by them in so doing, from the owner of the house.

(5) Any person who thinks himself aggrieved by any notice or act of a sanitary authority under this section may appeal to the county council, whose decision shall be final.

Bevan, for the appellants.—The notice of the sanitary authority not having been complied with, and there having been no appeal to the county council, the magistrate was bound to convict the respondent. The magistrate has no jurisdiction to consider whether the works specified in the notice are necessary or not. [He was stopped by the court.]

Carrington, for the respondent.—Under section 37 there are two courses open to the sanitary authority. They may either do the work themselves and recover the cost as a civil debt, or they may proceed by way of summons and fine for disobedience to the notice. In the latter case the proceedings are criminal, and the whole matter must be inquired into and determined by the magistrate. It was not intended that the sanitary authority themselves should be the judge in the matter. Under section 36 of the Public Health Act, 1878, the sanitary authority had only power to do the work, and in such a case the magistrate's duties are merely ministerial, but where a criminal offence is created the magistrate has to act judicially, and he may come to the opinion, as he has done in this case, that the proceedings are of a vexatious character and, under such circumstances, he may refuse to convict.

GRANTHAM, J.—In my opinion the magistrate was bound to convict the respondent in this case. Whether the Legislature was wise in making the sanitary authority judges in these matters may be open to question, but, in my opinion, the Legislature has done so, and the magistrate is bound to act on the decision of the sanitary authority, or, in the event of an appeal, of the county council.

That leaves another question. Assuming that the magistrate is bound to convict, is he bound to inflict a fine? The section says that the owner or occupier shall be liable to a fine. It is, however, not necessary to decide that question in this case.

WRIGHT, J.—I agree entirely, with one slight modification. I do not think that the magistrate is bound to proceed at once to conviction in all cases. I think he might adjourn the case in order to permit of an appeal to the county council. With regard to the extent of punishment the magistrate, in my opinion, has all the ordinary discretionary powers of a judge. The only questions for a magistrate to determine are whether the notice has been served, whether the person on whom it has been served is the owner or occupier, whether the time allowed for doing the work is reasonable, and whether the notice has been complied with.

Appeal allowed; case remitted to magistrate.

Solicitor for the vestry, *Tiddeman.*

Solicitors for the respondent, *Stones, Marcus, & Stone.*

Q. B. Div. (Hawkins, J.) } May 16; Aug. 12, 1896.

THOMAS v. JENNINGS AND OTHERS. (a.)

Landlord and tenant—Mortgage—Tenant's fixtures—Removability — Rights of mortgagee in possession against owner of the fixtures.

A landlord demised certain premises to the plaintiff, who during his tenancy erected certain tenant's fixtures thereon. Prior to the determination of the tenancy the landlord agreed to give the tenant, on the expiration of his tenancy, permission to leave his fixtures on the premises, with a view to their being purchased by the incoming tenant, or, in the event of their not being purchased, to enter and remove them. Subsequent to the erection of the fixtures by the plaintiff, but prior to the said agreement, the landlord mortgaged the premises to the defendants, who, after the termination of the plaintiff's tenancy, became mortgagees in possession. The defendants, who were not parties to the said agreement, and had no knowledge of it, refused to permit the plaintiff, after he had quitted the premises on the termination of his tenancy, to remove the fixtures, claiming that they were entitled to them under the mortgage deed. In an action for the delivery up of the fixtures, and for damages for their wrongful detention,

Held, that, as the defendants were mortgagees in possession under a deed subsequent to the erection of the fixtures, the agreement between the landlord and the defendant could not affect their rights to the fixtures under their mortgage deed.

Further consideration.

In this action, which came on for trial before Hawkins, J., and a special jury on the 12th of March, 1896, the plaintiff claimed damages against the defendants for wrongfully preventing the plaintiff from removing certain fixtures and chattels from "The Manor House," Southall, and for wrongfully depriving the plaintiff of the same.

On the 12th of April, 1872, Alfred Welch demised the Manor-house to Edward Weston for twenty-one years from the 25th of March, 1872.

On the 17th of September, 1879, Edward Weston assigned the residue of his term to the plaintiff, who paid rent to Welch.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In paragraph 3 of the statement of claim it was pleaded that before the expiration of the term the plaintiff alleged that Alfred Welch consented and agreed to the plaintiff leaving certain tenant's fixtures and chattels on the premises after the expiration of the said term with a view to their being purchased, and, failing such purchase, that the plaintiff should be entitled to remove them.

The fixtures were not purchased, and thereupon the plaintiff sought to remove them but was prevented by Ellis, one of the defendants, on behalf of Jennings and Finch, who claimed to be entitled to the fixtures as mortgagees.

The defendants denied the said agreement between the plaintiff and Welch; and further pleaded that Welch had no right to enter into such an agreement, and that, if such agreement existed, it would not be binding on them; and they also pleaded that section 4 of the Statute of Frauds had not been complied with, and that the fixtures were part of the freehold, and could not be severed without damage to the latter.

During the trial it was agreed that the question which the jury should be asked to deal with should be whether such a contract was made as stated in the third paragraph of the statement of claim, and that the jury when they had found their verdict on that issue should be discharged, and the rest of the case tried by the learned judge alone on further consideration, and this was accordingly done, the jury having found as a fact that such a contract had been entered into.

The full facts of the case and the arguments of counsel are set out in the following judgment.

Channell, Q.C., and *Plumptree*, for the plaintiff.

Crump, Q.C., and *Rolland*, for the defendants.

Cur. ad. vult.

Aug. 12.—HAWKINS, J., read the following judgment.—On the 12nd of April, 1872, one Alfred Welch, being the owner in fee simple of "the Manor-house," gardens, &c., situate at Southall, Middlesex, demised the same to Edward Weston for a term of twenty-one years from the 25th of March, 1872. In the said lease is contained a covenant on the part of the lessee on the termination of the demise "peaceably and quietly to leave, surrender, and deliver up unto the said Alfred Welch" the demised premises, "together with all landlord's fixtures and all erections and buildings to be erected and built on the said demised premises or any part thereof."

On the 17th of September, 1879, Weston assigned the residue of his term to the plaintiff Thomas, who thereupon entered upon the premises and paid rent and became tenant to Welch. During the said term, after the said assignment and before the execution of the mortgage hereinafter mentioned, the said Thomas erected and built upon the demised premises a vinery, with shed adjoining, a peach house, and a forcing house, four top-lights to a pit, and a sundial. These, it is not disputed, were tenant's fixtures, which in the ordinary course and in the absence of express stipulation to the contrary might have been removed by the tenant during the term of the tenancy.

In the month of September, 1890, a correspondence went on between Mr. Thomas and Mr. Welch with reference to these fixtures. In the first letter, dated the 4th of September, after stating that he had only two years and a half to run before the expiration of his lease, Mr. Thomas continued: "I should also wish to ask you whether at the expiration of my lease, and presuming the property to be unlet, you would allow the greenhouses, &c., which belong to me, to remain, so that they could be taken by an incoming tenant, or that I should be at liberty to remove them if he did not take them." In reply to this Mr. Welch requested to know what fixtures Mr. Thomas proposed to remove, but no arrangement was then come to.

So matters remained until the beginning of March, 1893, when Mr. Thomas, having had a list and a valuation made of the fixtures, sent a copy to Mr. Welch. By the letter which contained the list Mr. Thomas requested to be informed if Mr. Welch would take away any of the items, as time was running short—in fact, the lease was about to expire on the 25th of that month. In reply to this letter Mr. Welch on the 11th of March wrote to Mr. Thomas a note containing this paragraph: "Meanwhile, allow me to say that you need not tie yourself to the 25th in removing anything belonging to you, as you are quite welcome to send your workmen on the premises of the Manor-house at any time whilst it is in my possession and unlet." Interviews were had during that month, and before the lease expired, by Mr. Thomas and his valuer with Mr. Welch. Mr. Thomas's memory was very imperfect as to them; he only remembered that Mr. Welch said the fixtures might be taken by an incoming tenant, but he did not remember anything being said about leaving the fixtures on the premises at the end of the term. Mr. Newall, the valuer for Mr. Thomas, however, said that Mr. Welch told him the things could be removed (this must mean after the expiration of the lease), though nothing was said about the time when the removal was to be, and that there would be no difficulty in the houses being taken away as soon as it suited the plaintiff's convenience. Mr. Welch did not deny this, and added, "I very likely said what I wrote." The jury upon this correspondence and evidence found that an agreement was come to between the parties as alleged in the statement of of claim—namely, that Mr. Alfred Welch consented and agreed to permit the plaintiff to leave the said fixtures and chattels on the premises after the expiration of the said term, with the view of their being purchased by the said Alfred Welch or by an incoming tenant, and, failing such purchase, that the plaintiff should be entitled to remove the same. It will be observed that no time within which such removal should take place is named in the statement of the contract as set out in the pleadings. The letter, however, of the 11th of March, refers to "any time whilst it" (*i.e.*, the Manor-house) "is in my possession and unlet."

It seems to me obvious that would be the limit of reasonable time, and that, I have no doubt was the intention of both parties, who probably never thought of or contemplated any interference by the mortgagees hereafter mentioned. Relying upon the said agreement, Mr. Thomas quitted the premises at the expiration of the lease, leaving behind him the fixtures in dispute still annexed to the freehold, and so they have remained down to the present time.

I must now state the case as it was presented for and against the defendants. On the 24th of June, 1890, Welch mortgaged the demised premises, subject to prior encumbrances, to the defendants Jennings and Finch, to secure a sum of £697 2s. 11d. and interest, and they on the 8th of February, 1894, duly appointed the defendant Ellis to be the receiver of the rents, &c., of the mortgaged property under the provisions of the Conveyancing and Law of Property Act, 1881, section 24 and he entered into possession of the premises on their behalf, and has held such possession for them ever since. No reletting of the premises took place between the time of the plaintiff's quitting and the month of March, 1895. In that month a proposed new tenant opened negotiations with Mr. Ellis on

behalf of the mortgagees for taking the house, but he was not willing to purchase the fixtures at the price put upon them by Mr. Thomas's valuer. Mr. Thomas then determined to remove them, and on the 12th of March, 1895, through his solicitor, by letter of that date, requested Mr. Ellis to inform him when it would be convenient for him to do so. Mr. Ellis, acting for the other defendants, declined to give his permission to such removal, except under the conditions that £30 should be deposited to make good damage which would be occasioned by the removal, and that the removal should be under his control, and that all should be cleared away within a week. These conditions were not assented to by the plaintiff, and, under those circumstances, the defendants refused to permit the plaintiff to remove any of the fixtures, denying his right to do so, or to enter on the premises for that purpose.

It was agreed that I should finally and absolutely and without appeal settle the principle upon which the damages shall be assessed if the defendants are liable in this action. This I do by stating that the amount of damages should be arrived at by ascertaining, first of all, what would be the value of the materials of the fixtures on the premises when and as severed from the freehold, for the purpose of re-erecting them elsewhere, having regard to their age and condition *minus* the cost of severing them (if severed by the mortgagees), and taking also the amount of the reasonable cost of making good as far as possible the damages and cost occasioned to the premises in severing the fixtures, storing the materials, and any damage occasioned in carrying them away, and any permanent damage, if any, occasioned to the premises which cannot be made good. Had this been an action against Mr. Welch for non-fulfilment of his agreement to allow the plaintiff to remove his fixtures after the expiration of his time, and while Welch had possession of the premises, I should have been of opinion that a binding contract, such as stated in paragraph 3 of the claim, might be established between them without any writing at all. For such a contract cannot be properly described as a contract for the sale of goods or chattels under section 17 of the Statute of Frauds, nor could it be correctly described as a contract or sale of an interest concerning lands within the meaning of section 4 of that statute. For tenants removable fixtures while annexed to the freehold are not goods and chattels, and the right to sever and remove them from the freehold to which they are attached, does not give the tenant an interest in the freehold itself. This has been conclusively established by the cases of *Hallen* v. *Runder*, 1 C. M. & R., 266, and *Lee* v. *Gaskill*, 24 W. R. 824, 1 Q. B. D. 700. It is only when severed from the freehold that they become goods and chattels, and it is only when the tenant has no longer a right so to sever them that they become permanently parts of the freehold itself. I am strongly disposed to agree in the argument of the defendants that if the contract found by the jury was sought to be treated as a grant of a licence to enter upon the premises at a future time and to sever the fixtures from the freehold, it would be invalid, as not being in writing and under seal, *Wood* v. *Leadbitter*, 13 M. & W. 838, *Roffey* v. *Henderson*, 17 Q. B. 574. But I need not discuss that point further, for the agreement does not purport to be such a grant. It does not in its terms amount to more than a promise on the part of Mr. Welch to give the required permission to leave the fixtures on the premises after the expiration of the term, and in the particular event that the plaintiff should be entitled to remove them.

But, assuming the agreement purported in its terms to amount to a right and licence to make entry upon the land and to sever the materials from the freehold and was in law invalid as a grant, because not in writing and under seal, I see no reason why it should not operate as a contract, and as a contract such as I have suggested; and, as a contract, it would clearly have been operative against Welch so long as he was in possession or the premises unlet. As between landlord and tenant, and those claiming under them respectively, as a general rule the tenant's right to sever his fixtures from the freehold exists only during the continuance of his tenancy, unless by special contract between the parties they otherwise agree, *Lyde* v. *Russell*, 1 B. & Ad. 394. The landlord's right to claim the fixtures commences when his tenant ceases to occupy as tenant under the term during which the fixtures are attached to the freehold. See per North, J., in *In re Maryport Hematite Iron and Steel Company*, 40 W. R. 280, [1892] 1 Ch. 415. A mortgagee with a right to enter and take possession may as a general rule enter at any time after default. In this case we have to consider the rights of landlord, tenant, and mortgagee. As between the tenant Thomas the plaintiff, and Welch, his landlord, the verbal agreement to which they alone were parties was to give to the former an extended time, so far as the latter had the power to grant it, within which to remove his fixtures, and during such time the landlord was bound to forego his ordinary right to treat the fixtures as part of his freehold; and if the matter had rested solely between Welch and Thomas it would have been simple enough, and in one shape or another Thomas would have had either the fixtures or their value in the shape of damages for breach of contract. This, however, is an action, not between the tenant and his lessor, but between the tenant and the mortgagees of the premises, who, when the fixtures were claimed from them, were and still are rightfully in possession under a mortgage executed in June, 1890, after the making of the lease and the erection of the fixtures and prior to the making of the agreement. This mortgage entitled them to the benefit of all the stipulations in the lease affecting the mortgaged premises and to take possession in default. In the lease there is a covenant on the part of Weston, the original lessee, to leave, surrender, and deliver up to the landlord at the end of the tenancy all erections and buildings to be erected and built on the demised premises or any part thereof. In the teeth of this covenant it is difficult to see what legal rights the plaintiff, who was Weston's assignee, had to insist upon removing at all, or at any time, the buildings and erections constituting fixtures now claimed. It is true Mr. Welch, the landlord and mortgagor, on the expiration of the lease seems to have waived his right to insist on that covenant. Whether he could have insisted upon it after the agreement he had made it is not necessary for me to discuss; but, be that as it may, his waiver could not bind or affect the rights of his mortgagees, who are not shown to have acquiesced in it, or even to have had any knowledge of it, until the differences which led to this action arose. *Porter* v. *Drew*, 28 W. R. 672, 5 C. P. D. 143. There may be defects in the statement in the pleadings of a defence based on this covenant, but they are amendable. I find nothing in the conduct of the defendants to satisfy me that they ever waived their right to have that covenant performed, though undoubtedly the correspondence shows a willingness to be conciliatory and to allow the fixtures to be removed on not very hard conditions. The construction of the agreement between Welch and the plaintiff requires some discussion. In the verbal agreement spoken to by Mr. Newall no time was mentioned in which the fixtures

might be removed. I take it therefore to mean within a reasonable time, having regard to the circumstances. Now, what was such a reasonable time? The letter of Mr. Welch of the 11th of March, 1893, points to what was passing in his mind—namely, "at any time whilst it" (*i e.*, the Manor-house) "is in my possession and unlet." If it is my duty to decide the question what was a reasonable time, I adopt the time named in that letter. For, after Welch was out of possession and the premises let to a new tenant, his control over the premises was at an end. If this is the true construction of the contract, then, as the plaintiff did not seek to remove the fixtures till after Welch was out of possession and the defendants, the mortgagees, had entered, it was too late. But, whatever be the true meaning of the contract, I see no ground for saying that the defendants were legally bound by it. They were neither parties nor privy to it. The concession, which they were clearly willing to make upon not unreasonable conditions, was not, in my opinion, legally enforceable upon them; and upon the plaintiff's refusing to accept such conditions they were clearly entitled to stand upon their legal right. The case of *Sanders* v. *Davis*, 33 W. R. 655. 15 Q. B. D. 218, carefully considered, is not opposed to the view I have taken, nor is the case of *Moreland* v. *Richardson*, 5 W. R. 672, 24 Beav. 33; nor do either of those cases assist in the solution of the present. The facts in each are widely different. As to the case of *Torrey* v. *Burnett*, 20 American Reports 421, it differs in its material facts from that with which I am now dealing. There the plaintiff was landlord of the premises from which the fixture in question, which was attached to the premises, was removed by some of his creditors by legal process. Before the removal, the tenant being about to leave, had entrusted to the landlord the fixture, and he had agreed to sell it for his tenant. The tenant quitted the premises before the fixture could be sold, and before any sale the creditors seized, severed, and removed it. The landlord sued for injury to the premises and for the value of the fixture, treating it as part of his freehold. It was held that under the circumstances the tenant was entitled to a reasonable time to remove it, and his creditors had the same right by attachment. I agree in all that was said by Beasley, C.J., in that case, but it does not assist the plaintiff in this, for there the landlord who sued had himself agreed to hold the fixture for sale on account of the tenant. Here the defendants, as mortgagees, claim the fixtures under their mortgage after both landlord and tenant were out of possession, and they are not, in my opinion, bound by the agreement of the landlord as he would have been had he remained in possession. The case of *Gough* v. *Wood & Co.*, 42 W. R. 469, [1894] 1 Q. B. 713, was cited as an authority supporting the case of the plaintiff, and I should not be sorry if I could come to the conclusion that it was so. This, however, I am unable to do, for, on a very careful perusal of it, it appears to me that there are material distinctions between that case and the present There the plaintiff was mortgagee of a piece of land of which the mortgagor, one Edmonds, was tenant for a term of years, and on it he carried on the business of a nurseryman. In November, 1889, he entered into an agreement with the defendants, engineers, to supply him, for the purposes of his trade with a boiler and fittings to be erected on that land upon the terms that the price should be paid by instalments, and that until payment of the whole of the instalments the boiler, &c., should remain the exclusive property of the defendants, and be treated as on hire only; that in case of default in any payment the defendants should be entitled to resume possession of it, and Edmonds granted permission to the defendants to enter on the premises, and in case of breach of the agreement to resume possession of and remove the same. The lessor of Edmonds joined in this grant of permission. After the making of this agreement Edmonds mortgaged his leasehold interest to the plaintiff but gave him no notice of the agreement. The plaintiff allowed Edmonds to remain in possession of the premises, and in December and January, 1889-90, the boiler was delivered under the agreement and fixed to them. Edmonds remained in possession and paid some, but made default in payment of other of the instalments, thereupon in October, 1892, the defendants (the vendors of the boiler), the tenants, the mortgagees, being still in possession, entered on the land, unfixed the boiler, and took it away. Thereupon and therefore the action was brought by the mortgagees against the defendants. The Court of Appeal, upholding a judgment of Wright, J., held that the defendants were justified in removing the boiler as they did. In the present case the fixtures were actually the property of the tenant, and they were attached to the freehold before the mortgage was executed. They were left upon the premises, after the tenant had quitted possession, by an agreement with the mortgagor only, made after the mortgagees' reversionary interests, subject to the leases, had become vested in them. Under ordinary circumstances they would have become absolutely irremovable after the tenant had quitted possession leaving them still affixed. And the claim of the plaintiff rests only upon an agreement made by the landlord with him for their mutual convenience—an agreement valid so long as the lessor was in possession, but inoperative as against the mortgagees when they took possession. I do not think it necessary to comment at length on the judgments of the Court of Appeal in *Gough* v. *Wood & Co.*, but I would call especial attention to the expressions of Lindley, L.J., at page 718 of the report, all of which are applied to the circumstances of the particular case before the court. I do not refer to the details of *Sanders* v. *Davis* because it is discussed and its legal effect fully stated in *Gough* v. *Wood & Co.*

As the result of my consideration of this case I have come to the conclusion that the mortgagees, the defendants, are entitled to my judgment. I may add that no amendment of the pleadings was asked for.

Judgment for defendants.

Solicitor for the plaintiff, *A. Lawrence Houlder.*

Solicitors for the defendants, *Jennings & Finch.*

IN BANKRUPTCY.

Q. B. Div.
Vaughan Williams, J. } Aug. 11, 1896.

In re YOUNG.
Ex parte JONES. (*a.*)

Bankruptcy—Proof—Partnership—Loan to trader—Fixed weekly payment out of profits—Partnership Act 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-section* 3 (d) *s.* 3.

J. advanced £500 to the bankrupt under an agreemen which gave J. the sum of £3 per week out of the profit of the bankrupt's business, if any, and £3 per week a payment for his services. Further, he was to have fo seven months from the date of the loan a large contr

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

over the business, and the option of entering into partnership with the bankrupt. He never exercised this option, and proved in the bankruptcy for the £500.

Held, that, by the terms of the agreement, he was not a partner of the bankrupt, but that the loan was a loan to a trader within section 2, sub-section 3 (d), of the Partnership Act, 1890, and must be postponed until all other creditors of the bankrupt were paid in full.

Appeal by a creditor of the bankrupt against the rejection of his proof by the trustee in bankruptcy.

Jones, the creditor, had lent the bankrupt £500 subject to the terms of an agreement dated the 21st of September, 1895, whereby it was agreed, *inter alia*, that Jones should, during a period of seven months from the 28th of September, 1895, take charge of the office work of the business carried on by the bankrupt, and control the financial arrangements and affairs thereof, and should be entitled to draw and be paid out of the profits of the business for such services the sum of £3 per week, and should have a right at any time during the term of seven months to declare his option to enter into partnership with the bankrupt; and that Jones should, on signing the agreement, pay into a banking account to be opened in his name at a specified bank the sum of £500, which was to be used under the sole superintendence and control of Jones in defraying the trade debts and in discharging the current business liabilities from time to time during the continuance of the agreement; and that there was to be paid to Jones out of the profits of the business during the continuance of the agreement, for the use of the £500, the sum of £3 per week; but if there were no profits Jones was to get nothing for his services or by way of interest on the £500.

Jones never exercised his option to enter into partnership with the bankrupt, and proved in the bankruptcy for the £500 he had advanced.

The trustee rejected his proof, upon the grounds that he was a partner of the bankrupt's, or, alternatively, that he was a person coming within section 2, sub-section 3 (*d*), and section 3 of the Partnership Act, 1890, the material portions of which are as follows:—

Section 2, sub-section 3 (*d*).—"The advance of money by way of loan to a person engaged . . . in any business on a contract with that person that the lender shall receive a rate of interest varying with the rate of profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such."

Section 3.—"In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . being adjudged a bankrupt . . . the lender of the loan shall not be entitled to recover anything in respect of the loan . . . until the claims of the other creditors of the borrower . . . for valuable consideration in money or money's worth have been satisfied."

Jones appealed.

Ashton Cross, for the appellant.

E. W. Hansell, for the trustee in bankruptcy.

VAUGHAN WILLIAMS, J.—The question in this case is whether the trustee was right in rejecting the appellant's proof, and entirely depends upon the Partnership Act, 1890. There was an agreement entered into by the appellant and the bankrupt upon the 21st of September, 1895, as to which the trustee says, firstly, that it was an agreement of partnership; secondly, that it was a contract for a loan of money within section 3 of the Partnership Act, 1890. I will deal first with the question whether it was an agreement of partnership. Section 2, sub-section 3, of the Partnership Act, 1890, says: "The receipt by a person of the share of the profits in a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on, or varying with, the profits of a business does not of itself make him a partner in the business." Now, it is common ground that the agreement in this case provides for payment to the appellant contingent on the profits of the business, and I shall therefore deal with the document on the basis that the payments therein agreed to be made are *primâ facie* evidence of partnership. This being so, it is urged for the appellant that I ought to look at the agreement as a whole, and that if I so do it will appear that it negatives partnership, and merely refers to a contemplated partnership at the option of the appellant. The respondent, on the other hand, contends that the agreement as a whole gives the appellant such a large control over the business as is only consistent with the rights of a partner.

On this point I think that the appellant is right, that although there is *primâ facie* evidence of partnership, on the whole I ought not to hold that the large powers given to the appellant constituted him a partner, and I conclude that it was not the intention of the parties that there should be a partnership unless and until the appellant exercised the option given him by the terms of the agreement.

Now I have to consider whether this sum of £500 was a loan within section 2, sub-section 3, of the Partnership Act, 1890, and ought to be postponed until all the other creditors of the bankrupt have been paid in full, and I conclude that it was a loan to the bankrupt under a contract by which the lender was to receive a share of the profits. The fund is distinctly fixed out of which the £3 per week were to be paid—namely, the profits. I am, therefore, of opinion that the trustee was right in not admitting this proof.

Appeal dismissed.

Solicitors for the appellant, *Wynne Baxter & Keeble.*

Solicitor for the respondent, *Leslie Williams.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 18.

SIMS *v.* TROLLOPE & SONS. (*a.*)

Bill of sale — Attestation — Description of witness — Statutory form—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

A bill of sale which does not contain the description of the attesting witness is void for non-compliance with the statutory form, even though the witness has no business or occupation.

Parsons *v.* Brand *and* Coulson *v.* Dickson, 38 *W. R.* 388, 25 *Q. B. D.* 110, *followed.*

Appeal from a judgment of Grantham, J.

This was an interpleader issue between the holder of a bill of sale and an execution creditor of the grantor. The question was whether the bill of sal, was void, under section 9 of the Bills of Sale Act.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-at-Law.

1882, for non-compliance with the statutory forme The bill of sale was expressed to have been signed and sealed by the grantor "in the presence of me, John Henry Crawford, 5, Victoria-street, Westminster." No description of the attesting witness was added. The statutory form directs that the witness's name, address, and description shall be given.

The attesting witness had no business or occupation, and the learned judge so found, but he thought that he ought to have been described as a gentleman, and he held that the failure to give any description rendered the bill of sale void.

The plaintiff, the holder of the bill of sale, appealed.

Jelf, Q.C., and *Clavell Salter*, for the plaintiff.—"Description" in the statutory form means description of occupation; it cannot mean personal or physical description. This witness had no occupation, therefore he had no description. In the cases of *Parsons* v. *Brand* and *Coulson* v. *Dickson*, 38 W. R. 388, 25 Q. B. D. 110, it was held fatal not to give a description of the witness where he had one; and it was clear from the affidavit that he had a description. But if there is no description it cannot be given. No doubt this witness, who lived on his father's means and was what is ordinarily called a gentleman, might have been stated to be a "gentleman," or "of no occupation," but either of these expressions would have been exactly equivalent to giving no description at all. The object of the Act must be considered, which is merely to enable the witness to be identified and traced. In *Ex parte Young, In re Symonds*, 28 W. R. 924, 42 L. T. N. S. 744, under the Bills of Sale Act, 1854, it was held that where the attesting witness to a bill of sale was a person of no occupation, his description in the affidavit of execution might be left blank.

Marchant, for the defendants.

Lord ESHER, M.R.—It seems to me a dreadful thing to have to come to the conclusion that the objection which has been taken to this bill of sale must prevail. But the Act says that a bill of sale shall be void unless made in accordance with the form in the schedule. And in *Parsons* v. *Brand* and *Coulson* v. *Dickson* this court appears to have held that the exact form must be followed, and that if a single word is left out the bill of sale is void. The statutory form contains a direction to "add witness's name, address, and description." This bill of sale gives the name and address, but it leaves the description blank. The Act of 1854 required that the verifying affidavit shall contain a description of the occupation of the witness. This Act speaks of "description" simply. We cannot hold that "description" here is synonymous with description of occupation. Therefore the appellant cannot rely on *Ex parte Young, In re Symonds*. But if description meant occupation and nothing else, I should be disposed to follow that case. The form has a blank space for the rate of interest; I am not inclined to say that, if no interest was payable, that blank space must necessarily be filled up. Description no doubt includes occupation, but it includes something else. It is not necessary to decide what that something else is, but I suppose it embraces what is known as a man's addition in the legal sense of that term. It is not shown that this witness has no addition; and, as far as I understand, every one may have an addition. This case comes within the decision of this court in *Parsons* v. *Brand* and *Coulson* v. *Dickson*, and we cannot depart from it.

LOPES, L.J.—We are bound to obey this Act of Parliament, which says that a bill of sale shall be void unless it is in the form in the schedule. The form requires that the witness's name, address, and description shall be given. This bill of sale gives the witness's name and address, but there is a total omission of any description. I do not see how it can be said that a blank in the form with a direction that it shall be filled up, need not be filled up. In my opinion "description" means profession, trade, or occupation, or, if there is no occupation, style. If the matter were *res integra*, I should have come to the same conclusion on the Act of Parliament. But the point was really determined in our decision in *Parsons* v. *Brand* and *Coulson* v. *Dickson*. The appeal must be dismissed.

RIGBY, L.J.—We are asked to consider the Bills of Sale Act, and to have regard to what must have been the intention of the Legislature. All that I can find as to the policy of the Act is this—that bills of sale appear to be looked upon by the Legislature with particular disfavour; in some cases they are absolutely prohibited, in other cases difficulties are thrown in the way of persons lending money on this class of security.

In *Parsons* v. *Brand* and *Coulson* v. *Dickson* this court held that, where the blank space left for the description of the attesting witness was not filled up, the bill of sale was void. That is the present case. It is argued that there the witness had a description as appeared from the affidavit, and that that distinguishes the case from the present. But that was not the ground of the decision; it was the leaving the blank which the court held to be fatal. That case governs us here; I cannot get out of it, neither do I wish to do so.

Appeal dismissed.

Solicitor for the plaintiff, *Alfred Slater*.

Solicitors for the defendants, *Trollope & Winckworth*.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 6.

In re BETTS.
Ex parte BETTS. (*a.*)

Bankruptcy—Receiving order—Debtor an undischarged bankrupt—No assets—Discretion of court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 5, 7, *sub-section* 3.

A debtor, against whom a bankruptcy petition was presented, was an undischarged bankrupt, and the court came to the conclusion that there were no assets, and no probability of any assets, available for distribution in a second bankruptcy.

Held, that, as the only effect of making a receiving order would be a waste of money in costs, the court would, in the exercise of its discretion, refuse to make a receiving order.

Appeal from a receiving order made by Mr. Registrar Giffard.

The petitioning creditor, in May, 1893, recovered judgment against the debtor for a sum of money, and presented a bankruptcy petition in respect thereof.

In 1882 the annual income of certain property, which was vested in trustees, was settled upon the debtor for life, with a proviso for forfeiture in the event of his bankruptcy, the trustees having power in that event in their discretion to make him an allow-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ance in respect thereof. In May, 1892, the debtor was adjudicated bankrupt, and had not obtained his discharge, only a small dividend having been paid. The present petitioning creditor had proved in that bankruptcy in respect of another debt. The debtor in an affidavit stated that he had no assets.

S. G. Lushington, for the debtor.—The debtor is an undischarged bankrupt, and the income to which he was entitled under the settlement became forfeited on the previous bankruptcy. There can be no assets available in a second bankruptcy, as any possible assets will belong to the trustee in the first bankruptcy. It would therefore be useless to make a receiving order against him now.

Muir Mackenzie, for the petitioning creditor.—This is not the time to enquire whether there are any assets. The court cannot now tell whether there will be assets, and ought not to refuse make a receiving order: *In re Murrieta*, 3 Manson Bank. Rep. 35; *In re Leonard, Ex parte Leonard*, 44 W. R. 438, [1896] 1 Q. B. 473; *In re Hecquard, Ex parte Hecquard*, 38 W. R. 148, 24 Q. B. D. 71. There is always a possibility of assets coming in, and the court will not refuse to make a receiving order.

Lord ESHER, M.R.—In this case there is a proposal to make the debtor bankrupt. He has made an affidavit to the effect that it is no use to make a receiving order, as he has no assets and no prospect of having any assets. It is clear that his affidavit to that effect is not enough to induce the court to refuse to make a receiving order. If that were all, I should repeat what has been said in former cases, that the court is not in a position to accept the affidavit as accurate, and therefore the court would make a receiving order. But if the court, from the circumstances of the case, and not relying merely upon the affidavit of the debtor, is convinced that there are no assets and no likelihood of any assets, and that it would be a mere waste of money in costs to make a receiving order, it will be justified in the exercise of its discretion in refusing to make a receiving order. Is the court justified in this case in so acting? More than four years ago the debtor was adjudicated bankrupt. Certain income had been settled upon him upon the terms that if he became bankrupt his right to it would be lost. It is true that the trustees of the settlement might in their discretion make him an allowance. But that would not be an asset in the bankruptcy, because they might withdraw it at any moment. That bankruptcy is still standing. The present petitioning creditor proved as a creditor in that bankruptcy in respect of another debt, and if he thought that there were any assets now he would put the trustee in that bankruptcy in motion to get hold of those assets. He does not do that. Why does he propose to make the debtor a bankrupt now? It seems clear to me that he also knows that there are no assets, and no probability of any assets. It is said that there is a possibility of assets. There is no possibility in the business sense of any assets which will pay off the first bankruptcy and be available for distribution among the creditors in a second bankruptcy. Under these circumstances it would be a mere waste of money to make a receiving order, and in the exercise of its discretion the court will decline to do so. The receiving order will therefore be rescinded.

LOPES, L.J.—I am of the some opinion. I agree that the law is that if the court is convinced that there are no assets and no reasonable probability of any assets in the future, it ought not to make a receiving order. The only effect of making a receiving order would be a useless heaping up of costs. In so stating the law we are not in conflict with any of the decided cases. The annuity here was forfeited on the previous bankruptcy, and there is now no asset nor any probability of any. I agree that the affidavit of the debtor is not enough upon that point. But there is a great deal more in this case. The debtor is an undischarged bankrupt, and any asset would go to the trustee in that bankruptcy; and this petitioning creditor is a creditor under that bankruptcy, and if there were anything to be got he would try to get it under that bankruptcy. In my opinion he is only trying to make the debtor bankrupt with a view to extract money from his relations. It would, in my opinion, be a wanton piling up of costs if we were to make a receiving order. I may add that this case depends upon its own special facts, and cannot be a precedent except in a similar state of facts.

RIGBY, L.J.—There is no doubt about the law as laid down by the Master of the Rolls. The court has a discretion as to making a receiving order, and the question always must be whether on the particular facts of the case that discretion should be exercised by making or refusing to make a receiving order. I say that this case cannot be a precedent for any other except perhaps in an exactly similar state of facts. The question before us is, Is it not made reasonably clear on the facts in this case that the receiving order should not be made? There is a former bankruptcy which has swept away the annuity. This petitioning creditor proved in the former bankruptcy in respect of another debt. Only a small dividend appears to to have been paid in that bankruptcy, and there is apparently nothing more to be obtained under it. Under these circumstances I do not dissent from the conclusion arrived at by the rest of the court as to the exercise of our discretion in the matter.

Appeal allowed.

Solicitor for the debtor, *J. Laidman.*

Solicitors for the petitioning creditor, *Hicks, Arnold*, and *Mozley.*

From Chan. Div. (Lord Halsbury, C., and A. L. Smith & Rigby, L.JJ.) — Nov. 4, 1895; Aug. 3, 1896.

CUNNACK v. EDWARDS. (a.)

Friendly society—Failure of objects—Unexpended fund—Bona vacantia.

In 1810 *a society consisting of honorary and ordinary members was formed for the purpose of providing annuities for the widows of deceased members. All the members and members' widows having died, and there being in the hands of the trustees unexpended funds of the society,*

Held, that, upon the construction of its rules, the society was not a charity; that there was no resulting trust in favour of the representatives of deceased members; but that the Crown was entitled to the unexpended funds as bona vacantia.

Decision of Chitty, J., 43 *W. R.* 325, [1895] 1 *Ch.* 489, *reversed.*

Appeal from the decision of Chitty, J., 43 W. R. 325, [1895] 1 Ch. 489.

This case raised a question as to the destination of the undistributed funds of a voluntary society where the objects of the society had all been exhausted, but the society had not been dissolved.

The Helston Equitable Annuitant Society was

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

founded in March, 1810, for the purpose of raising by subscriptions, fines, and forfeitures a fund for the relief of the widows of its deceased members.

In 1830 the rules were revised, and the society subsequently conformed to the provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56).

The society consisted of ordinary and honorary members. The last surviving ordinary member, one T. H. Edwards, through whom the defendant claimed, died a widower in 1878, and the last known honorary member, Sir Richard R. Vyvian, died in 1879.

On joining the society an honorary member signed a declaration that his object in joining the society was not that any widow of his should derive any benefit therefrom (to which he altogether relinquished his right), but merely for the encouragement of the society.

The last annuitant died in 1892, and there remained in the hands of the trustees of the society a sum of about £1,250, being undistributed funds of the society.

The action was instituted by the trustees of the society to have it determined how these funds were to be applied by them.

The representatives of Sir R. R. Vyvian disclaimed any interest in the funds.

At the trial it was held by Chitty, J., that the funds were subject to a resulting trust in favour of the ordinary members of the society from time to time, or their respective legal personal representatives, in shares proportional to the amounts contributed by each such ordinary member to the funds of the society.

Against that decision the Attorney-General appealed, claiming either that the society was a charity, or that the Crown was entitled to the funds as *bona vacantia*.

The rules of the society are fully stated in the judgments of the Lords Justices.

Ingle Joyce, for the appellant.—There is here no resulting trust. In none of the books is there any statement of the doctrine of resulting trusts which would cover this case. Lewin on Trusts, 9th ed., p. 150. Here each member paid his money out and out, and as between a member and the society no trust was constituted or intended. This was a mere club, the members interests in which only continued during the lives (*In re St. James's Club*, 2 De G. M. & G. 383). I submit that these funds are *bona vacantia*. Where you have funds in the hands of trustees and no existing trust then the funds are *bona vacantia*, and belong to the Crown (*Barclay* v. *Russell*, 3 Ves. 424). In the alternative I submit that this society was a charity, and the funds must be dealt with *cy-près*: *Spiller* v. *Maude*, 32 Ch. D. 158*n*; *Collinson* v. *Pater*, 2 Russ. & My. 344.

Robertson Macdonald, for the trustees, took no part in the argument.

Farwell, Q.C., and *W. D. Rawlins*, for the ordinary members, supported the decision of Chitty, J. This is not a charity, it was a mere matter of contract between the members: *In re Clark's Trusts*, 24 W. R. 233, 1 Ch. D. 497. [Lord HALSBURY, C., referred to *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, 40 W. R. Dig. 217.] *Attorney-General* v. *Duke of Northumberland*, 26 W. R. 586, 7 Ch. D. 745. We submit that to hold that these funds are *bona vacantia* will be to extend the doctrine in a novel manner.

Ingle Joyce replied.

In addition to the case above cited the following cases were referred to:—*Pease* v. *Pattinson*, 34 W. R 361, 32 Ch. D. 154, and *Smith* v. *Cooke*, 40 W. R. 67, [1891] A. C. 297.

Lord HALSBURY, C.—In the year 1810 a certain number of persons associated themselves together for the purpose of providing for their widows. They were not incorporated, and though they obtained some of the advantages which are involved in incorporation—inasmuch as they came under the protection of the Friendly Societies Acts—I do not think for the purpose of this inquiry those facts are important. The question which the court has to determine would, I think, have remained the same if they had been simply an associated body of persons for the purpose which I have described. The society has lasted to a very recent period, but is now extinct. All the members are dead, but a remnant of the common fund, amounting to something over £1,200, now remains. Chitty, J., has held that there is a resulting trust in favour of the personal representatives of those who contributed to the fund. I think we are all of opinion that that view cannot be maintained. The entire beneficial interest has been exhausted in respect of each contributor. It was, as I shall have to repeat in another view of the case, a perfectly businesslike arrangement; each man contributed a certain sum of money to a common fund upon the bargain that his widow was to receive, upon terms definitely settled, a certain annuity proportionate to the time during which the husband had contributed to the common fund. There never was and never could be any interest remaining in the contributor other than the right that his wife, if she survived him, should become entitled to a widow's portion thus provided. This was the final and exhaustive destination of all the sums contributed to the common fund. Under these circumstances I am at a loss to see what room there is for the contention that there is any resulting trust.

It is contended, however, that this association may be regarded as a charity. Wide as has been the meaning given to the word "charity" in the Court of Chancery, and, indeed, in one case by the House of Lords, a width of interpretation which I confess has seemed to me in some cases extravagant, I do not think that a perfectly business-like arrangement like this, in which a number of persons associate together and contribute funds to provide for their own widows, has ever been regarded as charity. I think the observations of Hall, V.C., in the case of *Clark's Trust* are entitled to great weight. His observations were directed to a society whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. In *Pease* v. *Pattinson* and *Spiller* v. *Maude* it was assumed by the judges in those cases, whether rightly or wrongly it is immaterial to consider, that the relief of poverty and suffering formed one of the elements of the associations therein discussed. Here no such question can possibly arise; it cannot be pretended that a wealthy widow would not be entitled to claim her annuity equally with a poor one. If this be a charitable institution it would be difficult to contend that every life insurance company did not fall under the same category. I am therefore of opinion that this was not a charitable institution. The only other alternative remaining is that which I adopt—viz., that these funds are *bona vacantia*, and belong to the Crown in that character.

A. L. SMITH, L.J.—Chitty, J., has decided that in this case there existed no gift expressing a general intent of charity so that the fund in question could be applied *cy-près* for charitable purposes; also that the Crown did not take the fund as *bona vacantia*;

and he held that there existed a resulting trust in favour of the personal representatives of all those who had been subscribers to the fund, and he directed inquiries accordingly. The fund was started in 1810. The last surviving ordinary member died in 1878, the last honorary member in 1879, and the last widow in 1892, at which time the trustees of the society had £1,200 in hand undisposed of. The question is, What is to become of this fund? In order to determine if there be a resulting trust it is necessary to ascertain what were the conditions under which each subscriber subscribed to the fund. In the year 1810 certain persons in the town of Helston formed themselves into a society called the Helston Equitable Annuitant Society, and agreed *inter se* that they would subscribe to a common fund, out of which each member's widow should be provided for to the maximum extent of £25 per annum during her widowhood. Each subscriber to this common fund (I am not now dealing with honorary members) did so upon the terms that if he left a widow the trustees of the society should, out of that fund, provide for her in the prescribed manner during her widowhood. If a member died leaving no widow, there was no resulting trust in favour of his personal representatives upon his death; his subscriptions were not to be returned to them, but were to remain with the society and form part of its common fund. If a member left a widow she was to be provided for during her widowhood, and although the amount of subscriptions the member had paid might possibly not have been exhausted by making the contemplated provision for his widow, nevertheless the surplus was not to be returned to his personal representatives when the widow died, but the whole beneficial interest in what was left also formed part of the common fund of the society. In neither case was there any resulting trust in favour of the representatives of the deceased member.

But it was argued that the proper implication is that when the society itself came to an end, as it has done, there was then a resulting trust of what might happen to be in the coffers of the society in favour of all the personal representatives of those who had been members since the year 1810, and Chitty, J., has so held.

Now, it was never contemplated that the society would come to an end, but, on the contrary, provision was made for the introduction of new members for its perpetual existence, and the existing members had power to alter and revise the rules, so that if it was found that the society was too affluent, provision might be made as to what was to be done with what money might not be wanted. As the member paid his money to the society so he divested himself of all interest in this money for ever, with this one reservation, that if the member left a widow she was to be provided for during her widowhood. Except as to this, he abandoned and gave up the money for ever. The case of *Smith* v. *Cooke*, it which it was held there was no resulting trust, shows the principle applicable to such a point. In my opinion this case cannot be likened to that of a man providing a fund by way of trust for the payment of an annuity to his widow during her life, and making no provision for the fund when the widow died and her interest therein ceased, in which case there would be a resulting trust, because the implication in such a case would be that the settlor intended that when the trust came to an end the fund should revert to his representatives, he not having provided to whom it should then go. In such a case there would be no abandonment of the fund as in the present case. In my opinion there was no resulting trust in favour of all those members who had ever subscribed to the fund.

The question then arises, To whom does the £1,200 belong? It is admitted it does not belong to the society, for its objects have come to an end; nor to the trustees of the society, nor to the representatives of the last surviving subscriber; and as for the reasons above it does not belong to the representatives of the members who have subscribed since 1810, all possible claimants being exhausted, it belongs to the Crown as *bona vacantia*, unless the doctrine of *cy-près* is to be applied, as where there is a trust which manifests a general intention to devote a fund to charity. The question is, Do the facts of this case show such a trust? The society, it will be noticed, was not a corporation. It had no entity different from that of each of its members. Take the society as it originally existed in 1810 down to 1830, before it adopted the Friendly Societies Act of 1829. During that period, what was the object and intention of each member joining and becoming a member of the society? Was his object to aid the widows of the other members or only to aid his own particular widow? I cannot doubt that his sole and real object was that by becoming a member he might thus be enabled to provide for his widow more efficiently than he otherwise would have been able to do. Some of the members appear to have been of position and importance in Helston, one having been, it was stated, twice mayor, one a solicitor, and others tradesmen of the town. His object and intention in becoming a member was not to provide for the widows of the other members, that was not his object at all. It was simply and solely to make a provision for his own widow, not only by means of his own subscriptions, but also by means of the subscriptions of those members who might happen to die leaving no widows or whose widows might die shortly after becoming widows, augmenting the common fund, together with what might be obtained by means of the subscriptions of such honorary members as could be induced to subscribe. What each man did in becoming a member was to set up and keep going a sort of mutual insurance whereby to insure a better provision for his own widow after his death than he otherwise would have been able to make.

Now, has such an act as this ever been held to manifest a general intention to devote a fund to charity, or indeed to constitute charity at all? I am aware that there are many objects besides those enumerated as charitable objects in the preamble to the Statute of Elizabeth (43 Eliz. c. 4) of which providing for one's own widow is not one, which the courts have held to be charitable and of a public nature, either as being analogous to the enumerated objects or by being within the spirit and intent of the Act, and the recent case in the House of Lords of *Commissioners of Income Tax* v. *Pemsel* shows that this is so, but nothing can be found in that case which gives countenance to the argument that a man, by providing a fund for the benefit of his own wife after his death, creates a charitable trust for a public purpose. There are, it is true, cases in which a gift to widows and orphans of a parish, to widows of seamen of a particular port, to twenty aged widows and spinsters, to the widows of respectable tradesmen, to poor relations generally, have been held to show a general intention of charity; but these are gifts to a class, and very different from a gift to a man's own wife to take effect after his death. No case has been cited, nor can I find one, in which such a gift has been held to be charitable, to which *cy-près* applies. It has been pointed out that the members of the Helston Society altered its rules in 1830 so as to conform with the provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56), but I cannot see that by so doing they created a charitable trust for a public purpose if they

had not done so before. What the society was before the adoption of the Friendly Societies Act as regards being a charity for a public purpose so it remained, the provisions of that Act, as it appears to me, having been adopted, not for the purpose of altering the objects of its members, but for purposes of administration. To hold in this case that each member must be taken to have created a charitable trust for the public benefit of the place where his widow might happen to reside after his death, because his widow might otherwise have possibly gone upon the rates of that place, is to me, with all submission, so far-fetched that I cannot adopt it. It appears to me to be stretching beyond all bounds anything that has been held before, to hold that this is a charitable trust for a public purpose, and for the reasons I have endeavoured to give I agree with Chitty, J., and hold that it is not. In my judgment the Crown is entitled to the £1,200 as *bona vacantia*, and it should be so declared, and that the costs of all parties should come out of the fund.

RIGBY, L.J.—In this case we have to determine the ownership of a fund of about £1,250, the whole remaining property which formerly belonged to a friendly society called the Helston Equitable Annuitant Society. All claims on the society have been satisfied, and the society itself has ceased to exist by reason of the death of all its members. The learned judge from whose judgment this appeal has been brought, has held that there is a resulting trust in favour of all members of the society from its commencement, or their personal representatives in proportion to the respective contributions made by the members. The members of the society might be ordinary and honorary members, as afterwards explained. In the court below the personal representatives of T. H. Edwards, the last surviving ordinary member, who died in 1878, claimed that he, as survivor, was entitled to the whole fund, but on the appeal this claim was not urged, and the personal representative of Edwards joined in supporting the judgment of the learned judge in favour of members generally. The last surviving member was an honorary member, Sir R. Vyvian, who died in 1879. His personal representatives have disclaimed all interest in the fund.

On behalf of the Attorney-General the fund was claimed for the Crown as *bona vacantia* and as an alternative case — though this, I think, was not before us argued as the main point—argued that the fund is a charitable fund, and ought to be applied under the sign manual for charitable purposes. I do not feel sure that if the case had come before me for the first time sitting alone I should not have held the society a charity. This conclusion, however, would have been founded upon a number of reasons, no one of which could have been conclusive in itself, derived from the special rules of the society and indications contained in the statutes regulating friendly societies during the existence of the society and since repealed. And I do not think I ought in such a case to differ from the learned judge in the court below and my colleagues in this court, and I say nothing more on the point.

The society was first established in 1810, but in April, 1830, its rules were revised so as to conform with the provisions of the Act of 1829 (10 Geo. 4, c. 56) for the encouragement of friendly societies. And thereby it obtained the benefit of that Act. We had not before us the original rules of the society but only the revised rules of April, 1830, from which we find that the society is formed for the purpose of raising by the subscriptions and also by fines and forfeitures a stock or fund for the relief of widows of deceased members in manner provided by the rules. Among other rules it is provided to the effect following:—Each member on admittance is to pay down eight guineas and one years' contribution as set forth in a table of annual payments. Every person on being admitted is to sign a declaration in writing, which declaration is to be the basis of the contract between the society and the person becoming a member, and if any false or fraudulent representation is used in the declaration the sums paid are to be forfeited to the use of the society, and all claims on that behalf are to cease and be void to all intents and purposes subject to a provision in favour of a widow not privy to the fraud. Fines are imposed on officers and members for not attending meetings and for neglecting to pay contributions, and if contributions and fines remain unpaid for twelve months the defaulter is to be excluded from the society subject to a provision in certain cases in favour of a widow. Other fines are imposed for breach of rules. A person may discontinue being a member on written notice to the secretary. Elaborate provisions are made for payment of different annuities to widows of members and for the forfeiture of annuities, including a provision that no annuitant shall sell or dispose of her annuity, and if it appears that she has done so the annuity is to cease and the purchaser is to lose all benefit and advantage therefrom. The annual contributions of members are to vary according to a table from £2 8s. on a scale increasing to £3 8s., having regard to the length of time during which they have been members. The annuities payable to widows are to vary from £12 to £25 according to the number of years that their husbands have been members. Honorary members are provided for whose widows are to have no benefit. There was at least one honorary member, the said Sir R. Vyvian, and there may have been others.

The provisions of the Act of 1829, which appear material for consideration whether there is a resulting trust, may be summarized as follows: Section 3 makes it obligatory on every society established under the Act before confirmation of the rules to declare by one or more of the rules to be confirmed, all and every the intents and purposes for which the society is intended to be established, and by such rules to direct all and every the uses and purposes to which the money which shall from time to time be subscribed, paid, or given to, or for the use or benefit of such society, or which shall arise therefrom, or in anywise shall belong to the society, shall be appropriated and applied, and in what circumstances any member of the society or other person shall become entitled to any part thereof. Section 8 provides for the rules, when confirmed, becoming binding on the members and officers of the society and the several contributories thereto. Section 26 provides for the dissolution of the society, and among other things that it shall not be lawful for the society by any rule made on the dissolution or determination to direct the division or distribution of any part of the stock or fund to or amongst the members, other than for carrying into effect the general intents and purposes of the society declared by them and confirmed by the justices. Section 39 provides that the Act is to extend to all friendly societies thereafter to be established and also to societies already established, as soon as they should think fit to conform to it. The Act of 1829 appears to have remained in force until repealed with other Acts by 13 & 14 Vict. c. 115, but the repealed Acts remained in force subject to immaterial exceptions with reference to societies under them.

In my judgment there is no resulting trust on the following grounds. All the contributions of

ordinary and honorary members and all fines and forfeitures are to go into one common fund. Probably, even if all the accounts of the society from the year 1810 were in existence, it would be impossible to follow the destination of the particular contributions made by each member, or to separate them from the voluntary contributions and funds arising from fines and forfeitures. All the books of the society up to 1850 have, however, been lost, and there is nothing to show how far the £1,250 remaining has been made up of contributions of honorary members, or of fines or forfeitures, or what contributions of ordinary members form part of it.

Probably the only safe inference is that the contributions of members for many years after the establishment of the society have long ago been entirely expended in payments to widows of former members, or for other purposes or the society, and that the £1,250 contains no part of such earlier contributions. The members were not *cestuis que trustent* of the funds, or of any part thereof, but persons who under contracts or quasi contracts with the society secured for valuable consideration certain contingent benefits for their widows in manner provided by the Acts. Any surplus would, according to the scheme of the rules, be properly used up (under appropriate amendments of the rules) either in payment of large annuities or in reduction of contributions. It is true that no such alterations were made, and it is now too late so to distribute the funds, but I do not think that such omission can give to the contracting parties any benefit which they did not bargain for. The rules, which according to the Act are to state all the uses of the stock, contain no provisions in favour of members, and completely dispose of the contributions in another manner. It is difficult to see why the personal representatives of deceased members should be entitled to any money produced by voluntary contributions, fines, or forfeitures, but no doctrine of resulting trust would entitle them. On the whole I conclude that there is no resulting trust.

Solicitors, *Hare & Co.*; *Robbins, Billings, & Co.*, for *Marrack, Nalder, & Hockin*, Truro.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 23, 25; July 22, 1896.

HOW v. EARL WINTERTON. (a.)

Trustee—Breach of trust—Neglect to provide fund for payment of annuity—Account—Statutes of Limitation—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

Where a trustee has committed a breach of trust by neglecting to accumulate a fund to secure the payment of an annuity, section 8 *of the Trustee Act*, 1888, *protects him from any claim for an account of moneys received by him more than six years before action brought.*

Appeal from Kekewich, J.

Mrs. Mary Rabett by her will directed that the rents and profits of her real estate should be accumulated for fourteen years, and bequeathed to the plaintiff an annuity to commence at the end of the period of accumulation. The will, as construed by Kekewich, J., and by the Court of Appeal, charged the annuity on the accumulations of rents and profits, as well as on the real estate itself. The testatrix died in 1875. The annuity was paid from 1889 till 1894, after which date it fell into arrear.

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

In August, 1895, the plaintiff commenced an action against the defendant the trustee of the will, claiming an account of the rents and profits which he ought to have accumulated as a fund to meet the annuity, and also claiming to have any deficiency in the fund made good by the defendant. The defendant admitted that he had within six years before action brought, received rents and profits which he ought to have accumulated. Kekewich, J., directed an account of all such rents and profits. Against this order, and also against his lordship's decision (already mentioned) on the construction of the will, the defendant appealed. His appeal was dismissed; and the only matter requiring a report is the plaintiff's cross-appeal, by which she sought to have the account taken as from the death of the testatrix.

Micklem, for the cross-appeal.—Even if the Trustee Act, 1888, applies to a claim for an account, this action is not within section 8, for we seek to recover funds still retained by the trustee. [LINDLEY, L.J., referred to *Thorne* v. *Heard*, 44 W. R. 155, [1895] A. C. 495, 503.] An annuitant could not have brought an action unless and until his annuity was in arrear. Even then, only the arrears can be barred, for each year the annuity begins to run anew. In *In re Hyatt, Bowles* v. *Hyatt*, 38 Ch. D. 609, 37 W. R. Dig. 79, it was held that an executor could not set up as a defence that he had wrongfully parted with the trust fund.

He also cited *In re Bowden, Andrew* v. *Cooper*, 39 W. R. 219, 45 Ch. D. 444.

Bramwell Davis, Q.C., and *Godefroi*, for the defendant trustee.—Either clause (*a*) or clause (*b*) of sub-section 1 of section 8 of the Act of 1888 applies to actions for an account, and such an action must now be brought against a trustee within six years. The plaintiff might have brought an action for administration at any time. This is really an action to recover damages for a breach of trust in not investing the trust funds in a proper way.

They cited *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368.

Micklem replied.

Cur. adv. vult.

July 22.—LINDLEY, L.J., stated the facts, and continued:—It appears that the defendant has acted perfectly honestly throughout; he did not understand that the annuity was a charge on the rents directed to be accumulated, and instead of accumulating the surplus rents he applied what ought to have been accumulated in keeping down interest on incumbrances and in necessary repairs. The defendant relies on section 8 of the Trustee Act, 1888, as an answer to the plaintiff's present demand. There is no fraud or fraudulent breach of trust to which the trustee is party or privy. The defendant had no trust-money in his hands or under his control at the time of the commencement of the action, nor is it suggested that the defendant has converted to his own use trust-money previously received by him. This action, therefore, is not one of those which are excepted from the operation of clauses (*a*) and (*b*) of sub-section 1 of section 8.

Before considering the application of those clauses to the case, it is necessary to ascertain the true nature of the plaintiff's cause of action, and when that cause of action accrued. The breaches of trust of which the plaintiff complains are a series of omissions on the part of the trustee, during fourteen years prior to the 20th of May, 1889, to form a fund for the payment, in case of need, of her annuity. It has been decided that his duty in this respect did not terminate

at the end of the term on the 20th of May, 1889, so as to exonerate him from all liability in respect of rents which became payable to him before that date, although they were not in fact paid to him until afterwards. He was bound to accumulate those rents as if he had received them when they became due. They were as much subject to the trusts of the term as the rents which were paid to him during its continuance. Each time the defendant failed to invest what he ought to have invested he committed a breach of trust, in respect of which the plaintiff might have sued him. A series of separate causes of action thus arose, each breach of trust giving her a fresh cause of action. But her annuity did not begin until the end of the term—namely, on the 20th of May, 1889. Until that day she was rather in the position of a person entitled in remainder than in the position of a person entitled in possesion. Although she might have sued the trustee before her interest accrued in possession, she was not bound to do so. For the purposes of the Statutes of Limitation, therefore, her causes of action cannot be regarded as having first accrued before the 20th of May, 1889. Even then she could not have sued for her annuity. Her annuity commenced to run from that time, but no payment in respect of it became due to her until six months afterwards—namely, the 20th of November, 1889. She could not have sued for payment of any arrears of her annuity until that date. Her right, however, to sue for arrears is one thing; her right to sue her trustee for prior breaches of trust is another thing; and, although her right to sue for arrears did not accrue till November, 1889, her right to sue for the previous breaches of trust accrued six months earlier. In this particular case nothing really turns on this point, for the defendant has admitted that within six years next before the issuing of the writ in this action he had rents in his hands which he ought to have invested and accumulated, and there is reason to suppose that he has received some more since. *Thorne* v. *Heard* shows that he cannot be treated as if he still retained these moneys so as to deprive him of the benefit of section 8 of the Trustee Act, 1888; but neither that nor any other statute protects him from liability to account for breaches of trust committed by him within the six years next before the commencement of this action. The writ was issued on the 9th of August, 1895, and the account which has been directed is confined to that period.

With these preliminary observations, I pass to clauses (*a*) and (*b*) of sub-section 1 of section 8 of the Trustee Act, 1888, on which the question to be decided ultimately depends. It was strenuously contended on behalf of the plaintiff that this case falls within clause (*a*), and not within clause (*b*); and further, that if it fell within clause (*a*) the account must be carried back to the death of the testatrix. I am not able to adopt either of these views, and even if the first is right, the second is, in my opinion, quite untenable. Clause (*a*) requires an answer to the question, What action or proceeding, if any, could the plaintiff have brought against the defendant in respect of the accounts complained of if he had not been her trustee? In *In re Bowden, Andrew* v. *Cooper*, Fry, L.J., said, with reference to this clause: "It is obvious that, if a person had not been a trustee, he could not be sued for a breach of trust; and further, that there is no right or privilege that I am aware of conferred by any Statute of Limitations in respect of a breach of trust. Therefore I should have great difficulty in applying that sub-section to the present case." The case before the Lord Justice was an action by a new trustee against an old trustee to compel him to make good trust funds which he had misapplied. The Lord Justice was right in saying that no action or other proceeding could be taken by such a plaintiff against such a defendant if there had been no trust. But although I share with Fry, L.J., the difficulty presented by clause (*a*), I cannot avoid the conclusion that to exclude the operation of clause (*a*) in all cases, on the short ground stated by him would be really to deprive it of all meaning whatever. I cannot think that Fry, L.J., intended to go so far as that. The Legislature appears to have assumed that there might be cases in which, if there were no trust, some action or proceeding might be taken by the plaintiff against the defendant to which some Statute of Limitations would be a defence. It is necessary, therefore, to proceed to inquire what action or proceeding, if any, could have been taken in such a case as this if there had been no trust. First, I will take actions at law. An action on an implied promise, or an action on the case, for a breach of duty, is the only action or proceeding which occurs to me as capable of being maintained under the circumstances supposed. But six years are a bar to any such actions as those. A common law action of account only lay to recover a balance claimed by the plaintiff, and which on taking the account he said would be found payable by the defendant to him. (See Comyns' Digest, "Accompt," which shows how limited the scope of such an action was.) A common law action clearly would not be applicable to such a case as this. I will now turn to equity. An account in equity, excluding all trust, would have no equitable element in it. It would be based on legal and not equitable rights; it would afford better machinery than an action at law, because of the discovery which could be enforced in it, but that is all. To any such action the Statute of Limitations would be as much a bar in equity as at law. (See *Foley* v. *Hill*, 1 Ph. 399, and *Knox* v. *Gye*, L. R. 5 H. L. 656.) But, assuming that the plaintiff could have sued the defendant in equity for an account if there had been no trust, to what claims could such an account extend? Clause (*a*) of section 8 of the Trustee Act, 1888, if it applies to trustees' accounts at all, assumes that some Statute of Limitations would be applicable and put trustees' accounts on the same footing as other accounts to which the Statutes of Limitations apply. Under the Statute of James I., as amended first by Lord Tenterden's Act (9 Geo. 4, c. 14), and afterwards by section 9 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), no claim could be made in respect of matters more than six years old. This is plain from the language of the last enactment, and was one of the points decided in *Knox* v. *Gye*. As Lord Westbury in that case said, the Statute forbids any claim in respect of a matter more than six years before action. This I take to be the law applicable to all cases which can be brought within clause (*a*) of section 8 of the Trustee Act, 1888.

In the present case the action is maintainable in respect of the defendant's receipts since the 9th of August, 1889, and in respect of rents then in his hands which he ought to have accumulated. It is said that the amount of what he then had cannot be ascertained without taking an account from the death of the testatrix. This, however, is not so. What the defendant had in his hands in 1889 can be ascertained by an inquiry. It is a mere question of fact to be ascertained by evidence, and in particular by the examination of the defendant on oath, and the production of his earlier accounts, which of course are evidence against him. An account of his receipts and payments from 1875 is quite another matter. That involves the disallowance of every payment which the defendant cannot now prove that he is entitled to have allowed as against the plaintiff.

Such an account is necessary to ascertain what the defendant ought to have had on the 9th of August, 1889, but it is not necessary to ascertain what in fact he then had. I see nothing in the nature of the accounts which renders it necessary in this case to go further back than six years, even if clause (*a*) does apply; and to do so would, in my opinion, be inconsistent with that clause. If clause (*a*) does not apply, clause (*b*) clearly does, and by introducing the analogy of an action of debt for money had and received, clause (*b*) protects the defendant from all liability to account for more than six years before action. Whichever clause applies, the defendant is protected from demands more than six years old. Section 8 is cumbrously worded, and it is difficult to grasp the idea which underlies it, but the short effect of section 8 appears to me to be that, except in three specified cases (namely—fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitations as if actions and suits for breaches of trust were enumerated in them. For the above reasons I am of opinion that the plaintiff's cross-notice must be dismissed with costs.

Lopes, L.J.—I have had an opportunity of reading the judgment which has been delivered by Lindley, L.J., and I entirely agree with it.

Rigby, L.J.—I am of the same opinion, but I feel it my duty to say a few words about the construction of section 8. I have nothing to add about the earlier part. That seems plain enough, having regard to the decisions. With regard to clause (*a*), that, of course, assumes there is a right of action against the trustee. That must be founded on some act or some omission of his, which act or omission would be, from the fact of his being a trustee, a breach of trust. [The lord justice read clause (*a*) of section 8, and continued:—] It think it is quite obvious that this clause (*a*), which has to do with remedies only, and not with causes of action, is not intended to suppose a case in which the cause of action, or the corresponding obligation, had gone. That was supposed to continue; and if in such a case there had been any Statute of Limitations applicable as against a person who was not a trustee, I understand clause (*a*) to provide that that particular right or privilege is to be given to a trustee, as though he had not been a trustee. I am not saying as though he had not committed any breach of duty, or been guilty of any negligence—not that at all—but as though, the breach of duty being the same as it was, he had not been a trustee. That I conceive to be the meaning of clause (*a*). You must suppose the right of action to exist, and generally one may say that a trustee who undertakes a trust agrees to perform that trust. Throw away the idea of breach of trust, and of the equitable position in which he is placed by the fact that he is a trustee, he is still guilty of a breach of duty, and he is to be treated as though the breach of trust were nothing more or less than a breach of duty by reason of some act or omission of his. I very much incline to the opinion—in fact, I entertain it with some confidence—that this case may be brought within clause (*a*), and that here it was the trustee's duty yearly to set apart the balance he had in his hands of the rents and profits towards providing a fund on which the annuitant in case of necessity would have a charge. It was a clear breach of duty on the defendant's part not to do that. It was also a breach of trust; but as I read clause (*a*) it is now to be treated as though it were simply a breach of duty. It is not to be treated as harmless, but it is to be treated as would be the case with any person who was placed under such circumstances under a duty. Of course it may happen that a duty is thrown on him by virtue of his obligation to undertake the trust, or it may be by reason of a covenant to perform a certain duty where the duty is thrown on him by a deed. Then you must look to the appropriate Act of Limitations, that which would have been applicable if the duty had arisen otherwise than by reason of a trust. Throwing aside the question whether it was a breach of trust or not, and for the reasons given, I agree that in this case the appropriate Statute would be the one applicable to an action on an implied promise, or an action on the case, and that the period of limitation would be six years. In other cases the appropriate Statute might be a different one, and the length of period for the running of the Statute might be different. I do not think it necessary that I should say anything about clause (*b*), because if the true view is that this case does not fall within clause (*a*), then I think on a proper interpretation of clause (*b*) it ought to be held to fall within clause (*b*). The only thing is, you might say this is not an action to recover money. But I do not think that means money belonging to the person suing. It is in substance an action to make the trustee pay money, and to make him pay money into a fund as against which the applicant has a claim. Whether it falls within clause (*a*) or clause (*b*), I feel reasonably satisfied it falls within one or the other. Preferably I should say clause (*a*), but, whether one or the other, the period in each case is six years, and therefore the cross-appeal fails.

Appeal dismissed.

Solicitors, *Crowders & Vizard*, for *R. H. Mellersh*, Godalming; *Bramall, White, & Sanders*, for *Harvey & Harvey*, Southsea.

High Court of Justice.

Chan. Div. } Nov. 19.
Chitty, J. }

In re The Streatham and General Estates Co. (Limited). (*a*.)

Company—Debentures—Charge on uncalled capital—Property—Liquidation.

Where a company having power to charge its uncalled capital, by a debenture charges "the undertaking and all the property of the company whatsoever and wheresoever, both present and future," such a charge does not include uncalled capital got in during liquidation.

Summons.

By the memorandum and articles of the company it was specifically provided that the company might borrow money on debentures charged upon any of the company's property both present and future, including its uncalled capital.

Debentures were issued by which the company charged as security for the money due on such debentures "its undertaking and all its property whatsoever and wheresoever, present and future."

Shortly after the issue of these debentures the company went into liquidation. The only assets in the hands of the liquidator were unpaid calls got in during the liquidation.

(*a*.) Reported by Ralegh B. Phillpotts, Esq., Barrister-at-Law.

The question was whether the words of the charge were sufficient to include in the security such uncalled capital.

Robert E. Moore, for the liquidator.

A. F. Peterson, for a debenture-holder.

A. W. Rowden, for the debenture trustees.

CHITTY, J.—The company had power to charge its uncalled capital, and the question is whether the company has exercised that power to its fullest extent. [His lordship read the charge in the debentures.] The term "property" in similar cases has been much discussed. The leading case on the question is that of *Ex parte Stanley*, 12 W. R. 894, 4 De G. J. & S. 407, afterwards approved by the Privy Council in *The Bank of South Australia* v. *Abrahams*, 23 W. R. 668, L. R. 6 P. C. 265, where the judgment was delivered by James, L.J., and the same case was recently approved in *Newton* v. *Anglo-Australian Investment, &c., Co.*, 43 W. R. 401, [1895] A. C. 244. In *Ex parte Stanley* there was power to charge "the property or funds" of the company, and there seemed to be no doubt that the property charged was not confined to the property existing at the time when the charge was created. James, L.J., said, in a passage often quoted, that unpaid calls "are property, not of the society immediately, but which may be called up by the directors of the society at their discretion." Of course the addition of other words, such as "properties and rights," or any other apt and proper words, or the context, may be sufficient to enlarge the power of the company or extend the meaning of a term.

The question in the present case is whether there are sufficient words to extend the meaning of the word "property." When it is borne in mind that, according to the decision of Jessel, M.R., in *In re Colonial Trusts Corporation*, 15 Ch. D. 465, the word "property" in the debentures would include all that existed as property of the company down to the commencement of the winding up, it would be a strange thing to hold that the meaning of the word "property" should be further extended merely because the words of the instrument were "present and future property." To do so would be altering the meaning of the word "property." To use the word "future" does not add anything to the meaning of the word "property."

The debentures, therefore, at the date of their issue, did not include the uncalled capital got in by the liquidator.

Solicitors, *C. H. T. Wharton; J. D. Arthur; H. C. Godfray.*

Chan. Div. }
Kekewich, J. } Aug. 4, 5, 1896.

In re BUCK.
BRUTY *v.* MACKEY. (*a.*)

*Charity—Friendly society—Poverty—Failure of objects—Lapse—*Cy-près.

A testator who died in 1893 *bequeathed a legacy of* £500 *to a friendly society. This society was formed in* 1800 *for the relief of sick and distressed members, their widows and children. It was supported by subscriptions of members and outside donations, and was not maintained on strictly actuarial principles. Poverty was a necessary qualification to obtain relief. At the testator's death only one member and three annuitants were alive, and two of the latter had since died. The annuity of the last annuitant was fully covered by funds of the society in court.*

Held, that the society was a charity, and was in existence at the date of the testator's death; that the legacy had not lapsed, and was applicable cy-près *for charitable purposes.*

Cunnack *v.* Edwards, *ante*, p. 99, [1896] 2 *Ch.* 679, *distinguished.*

Thomas Buck, who died on the 8th of January, 1893, by his will dated the 28th of June, 1884, bequeathed a sum of £500 to the Commercial Travellers' Society free from legacy duty, and directed the legacy and the duty thereon to be paid out of his pure personal estate. The testator devised and bequeathed his residuary estate upon trusts in favour of his children as therein set out.

The Commercial Travellers' Society was established in 1800 as a friendly society at 17, Philpot-lane, City of London. Its rules set out that the object of the society was to provide a fund for the relief of sick and distressed members their widows and children, that its affairs should be managed by a committee, and that its members should pay certain fixed sums as subscriptions. The rules also contemplated outside contributions, and the funds of the society were in fact so assisted.

Rule 14 was as follows: "In case a member shall be afflicted with sickness, so as to render him incapable of employment, and in distressed circumstances, or shall become infirm, or meet with any other infirmity which may, in the opinion of the committee, render him an object deserving the assistance of the society, he shall be entitled, at the discretion of the committee, to a sum not exceeding one guinea per week during the time he shall so remain sick and distressed, or such fit object as aforesaid . . . "; and rule 15 provided that, "In case a member shall die and shall leave a widow . . . and one or more child or children in distressed circumstances, the said widow . . . shall receive a sum not exceeding £20 per annum for herself at the discretion of the committee, and in like manner a further sum not exceeding £5 per annum for each child . . . and if such member shall die leaving a child or children in distressed circumstances, and no widow surviving him . . . each such child shall be entitled to a sum not exceeding £10 pounds per annum at the discretion of the committee. . . ."

At the date of the testator's death in 1893 J. B. Mackey was the sole surviving member of the society. He was also trustee and member of the committee, and there were only three annuitants living, of whom two died before 1896, leaving only one, Harriet L. Cage, who was in receipt of an annuity of £32 per annum. This annuity was fully covered by the existing funds of the society, amounting to £4,836 Indian Three per Cent. Stock and £300 in cash, which had been paid into court in 1888 by the then surviving trustees, on the grounds that there were then only five members and six annuitants alive, that no new members had been admitted since 1850, no general meeting held since 1871, and no subscription received since 1874, and that it was impossible to hold meetings and dissolve the society under the Friendly Society Act, 1875.

This was a summons taken out by the executors and trustees of the testator, who had retained the legacy of £500 by which it was asked: (1) Whether the Commercial Travellers Society was so existing at the date of the testator's death as to have become entitled to the legacy of £500, or was not so existing? (2)

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law

whether if the society was so existing the legacy ought to be paid into court, or how otherwise it ought to be dealt with? (3) whether if the society was not so existing the legacy ought to be treated as lapsed and fallen into the residuary estate of the testator, or ought to be applied *cy-prés* for charitable purposes? To this summons J. B. Mackey, Harriet L. Cage, the residuary legatees of the testator, and the Attorney-General were made defendants.

D. G. Begg, for the plaintiffs.

Sheldon, for J. B. Mackey and Harriet L. Cage.—This society existed at the testator's death. It is a friendly society and not a charity, the *cy-prés* doctrine does not therefore apply, *In re Clark's Trust*, 24 W. R. 233, 1 Ch. D. 497. The money should be paid into court or to J. B. Mackey as trustee for the society.

Renshaw, Q.C., and *A. M. Begg*, for the residuary legatees.—This society was practically dead at the date of the testator's death. The legacy therefore lapsed. It fell into residue and is not applicable *cy-prés*—*In re Rymer, Rymer* v. *Stanfield*, 43 W. R. 87, [1895] 1 Ch. 19. It is doubtful whether this society is a charity or not—a friendly society is not a charity: *In re Clark's Trust*, and *Cunnack* v. *Edwards*, *ante*, p. 99, [1896] 2 Ch. 679.

Ingle Joyce, for the Attorney-General.—This society is a charity. Friendly societies may, in some cases, be charities. Here poverty is necessary for obtaining relief. This case is distinguishable from *Cunnack* v. *Edwards*. The legacy is applicable *cy-prés*: *In re Slevin, Slevin* v. *Hepburn*, 39 W. R. 578, [1891] 2 Ch. 236; *Spiller* v. *Maude*,, 13 W. R. 69, 32 Ch. D. 158n.

KEKEWICH, J.—There are here two questions to be decided quite independent of one another. The first question is whether the Commercial Travellers' Society, to which society through its treasurer the testator gives £500 for the purposes of the Society, is a charity within the ordinary doctrine of the court as expounded in the case of *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel*, [1891] A. C. 531, 40 W. R. Dig. 217. Until that first question is decided we cannot make any progress with the other. If I were uncontrolled by decision the tendency of my opinion would be to hold this society to be a charity. Am I, then, controlled by decision? I think not. The case of *Cunnack* v. *Edwards*, and all the other cases cited, dwell on the absence of the ingredient of povery in persons entitled to the benefit of the institution. Lord Halsbury, in giving judgment in that case of *Cunnack* v. *Edwards*, speaks of the society he there had to consider as "a perfectly business-like arrangement," and this society has been described in argument as a mutual insurance society. If this is a case of a perfectly business-like arrangement, if it is a mutual insurance society, then it seems to me that not only am I bound by authority, but that it is a case which would clearly, reasonably, and fairly fall outside the definition of a charity.

But it has been pointed out that this society has been maintained and has reached its present position, which is one at least of perfect solvency, not merely by subscriptions of members whether life or annual, whose subscriptions would be in certain fixed sums, but also by donations or voluntary subscriptions either given by living persons or by will. That is a matter, perhaps, of some importance though by no means conclusive, taking it into consideration in connection with other things. It is obvious, I think, on the face of those rules, that this is not a society formed and maintained on actuarial principles. That is true of a large number of societies either charitable or in the nature of mutual insurance societies. Some excellent institutions of that character could not have been maintained and kept solvent but for large donations; many of them, and certainly this society, were not founded on actuarial principles. It depended on adventitious aid, donations from those who did not themselves desire to have any benefit from the society. That is really why it is not of so much importance that there were donations at all. They are for a different purpose. They are to raise the level of the benefits which ought, in a perfectly business-like arrangement, to be arrived at by actuarial calculations. Now, the funds of the society, passing over members, are to be applied in payment of certain annuities. Widows are to take £20, children £10. There is no provision that those annuities are to vary according to the funds of the society. There is no calculation that the funds would provide those annuities. They depend, no doubt, on outside subscriptions. It is not, therefore, a mutual insurance society, it is not a perfectly business-like arrangement. It is, I think, partly business and partly charitable. But I find this, that as regards both widows and children the provision is strictly for those who are in what is called "distressed circumstances." I have before me the original rules of 1800, and since that time there appears to have been no substantial alteration. As regards members rule 14 provides that in case a member shall be afflicted with sickness so as to render him incapable of employment—that is a mere friendly society—and in distressed circumstances, or shall become infirm or meet with any other infirmity which may, in the opinion of the committee render him an object deserving the assistance of the society, he shall be entitled, "and so on." "Distressed circumstances," though capable of many interpretations grammatically, no doubt there means not only that a member is so sick that he cannot follow his ordinary employment, but that his position in life is such that he cannot live independently of that employment, that he is distressed in that state. I do not think there can be any doubt that that is the meaning of the words. Then as regards infirmity, it means some permanent disease, accident, or anything of that kind which may render him an object deserving of the assistance of the society. Although there is no further guide than the words themselves give, it is only reasonable to conclude that the committee would not be doing their duty in considering a man an object deserving the assistance of the society, if, however painful his physical state might be, he had ample means. I understand that that points distinctly to poverty. The same is true as regards the widows and children who are to be in distressed circumstances. So here I have every element of proverty, which Hall, V.C., in the case of *In re Clark's Trust*, thought was absent, and it has been pointed out in the case of *The Commissioners for Special Purposes of the Income Tax* v. *Pemsel* that although the decisions have gone far away from poverty as being the strict limit of charity, yet at the same time poverty is in itself an object of charity, and when you have it linked to the provisions of such a society as this, it is impossible to say that this is a business-like arrangement or a mutual insurance society. To my mind this society is a charity, and if I am not precluded, as I think I am not, from coming to such a decision, I think I am bound to say it is a charity.

Then, if it is a charity, comes the second question, Is there a lapse? I will assume that if this legacy of £500 is given to a charity which has ceased to exist at the date of the testator's death, which seems to be the critical point, then the law of lapse applies, at any rate to this extent, that the

testator fails to specify the legatee, and, therefore, as there is no legatee, the society being non-existent, just as a person might be non-existent, the money falls into residue. But it is agreed that not only at the testator's death, but up to the present time, there is at least one annuitant claiming against the funds of the society, so that it is alive to that extent, and must remain alive so long at least as that annuitant survives. The society cannot be dead, though it may still be moribund. But there is a great difference between being in a moribund condition and being dead. Test it in this way. Suppose that this annuitant, who is entitled to be paid according to the rules of the society, is not paid; could she not assert her rights against this fund which is in court against its administrators? It seems to me there is a duty to provide for this annuity still existing, and that consequently the charitable institution is still existing. It does not follow, however, that because it is still existing that it has not practically failed. It seems to me that it has failed, except so far as it is necessary to provide for this particular annuitant. That is a matter of consideration as regards the fund in court, with which I am not now dealing. It must be dealt with at another time. As regards this £500, it is clearly not wanted for this particular annuity, and I ought to at once take care that it is applied to congenial objects—that is to say, objects akin to those to which the testator devoted his legacy, to which it cannot be strictly applied because there are no means of applying it.

His lordship then made an order declaring that the society was a charitable society, and was existing at the date of the testator's death, and that the legacy of £500 had not lapsed, and directed the £500 to be brought into court after payment of costs, with liberty to the Attorney-General to apply for a scheme.

Solicitors, *Duffield & Bruty; Hare & Co.; West, King, Adams, & Co.*

Chan. Div.
Romer, J. } Oct. 28.

DOUGLASS v. PINTSCH'S PATENT LIGHTING CO. (LIMITED). (a.)

Patent law — Threats—Patents, Designs, and Trade-Marks Act, 1883, *s.* 32.

A letter containing a threat of legal proceedings, written with the intention of being understood to refer to patent claims of the defendants, and the natural effect of which, under the circumstances, was to be so understood, but which contained no express reference to any such patent rights,

Held, to be a threat under section 32 *of the Patents, &c., Act*, 1883.

Trial of action.

This was an action to restrain threats, under section 32 of the Patents, Designs, and Trade-Marks Act, 1883.

The plaintiff had been consulting engineer to the Corporation of the Trinity House up to December, 1895. The defendant company were owners of a patent for floating lights, granted to C. D. Abel in 1876, which expired in 1890. They were also owners of other patents for improvements thereon which are still subsisting. Prior to November, 1895, the defendants in the course of their business supplied gas-buoy lanterns to the Trinity House. They had lately tendered for the supply of lanterns to the Lancashire and Yorkshire and London and North-Western Joint Railways for use at Fleetwood Harbour. In November, 1895, they were informed by Captain Jackson, the harbour master, that the contract for the supply of lanterns had been placed in the hands of the plaintiff.

Mr. Rickman, the secretary of the defendant company, thereupon, on the 23rd of November, 1895, sent to Captain Jackson the following letter:—

"Pintsch's Patent Lighting Company (Limited),
"38, Leadenhall-street, London, E.C.
"Captain Jackson, Fleetwood.

"Dear Sir,—I am in receipt of your letter of yesterday's date, and am sorry to hear what has happened. I think at any rate you might have asked me a price for my gas-buoy lanterns. I am very much afraid that the matter will lead to a great deal of difficulty and some unpleasantness and ill-feeling, and you must not be surprised if the company applies for an injunction against Mr. Douglass to restrain him from selling his gas-buoy lanterns.—Yours truly, "W. B. RICKMAN."

On the same day Rickman wrote a similar letter to the secretary of the joint railways, which also contained no mention of, or express reference to, any patent rights of the defendants.

The plaintiff claimed an injunction restraining the defendants from alleging that the gas-buoy lanterns sold by the plaintiff were an infringement of the patents of the defendants, and from threatening to take legal proceedings thereon.

The defendants stated that the letters in question were not written with reference to their rights as patentees, but under the *bonâ fide* belief that the plaintiff had obtained the design for the gas-buoys manufactured by him whilst at work at Trinity House, and that, such being the case, he had no right to make use of such knowledge in supplying goods in competition with them, and might be restrained from doing so. They gave evidence tending to show that such was their real belief.

The plaintiff denied these allegations.

Moulton, Q.C., and *A. J. Walter*, for the plaintiff.

Neville, Q.C., and *Kirby*, for the defendants.

ROMER, J.—The plaintiff is entitled to the relief sought. It is true that the letter of the 23rd of November, 1895, did not specify in terms the patents of the defendants or refer to any patents in particular, and was not written on behalf of the defendants expressly claiming as patentees. But the natural effect of such a letter upon the mind of an ordinary person would be that the threat of legal proceedings contained in it concerned the rights of the defendants as patentees. It is true that Rickman says he had not the patents of the company in his mind when he wrote that letter, but I distrust his memory, and I think that he had the patent rights in his mind, and knew that the person receiving the letter would probably think that the company, through Mr. Rickman, was claiming to be patentees of the gas-buoy lanterns. I also think that he doubted whether, in a court of law, the existing patents of the company would enable them to restrain the plaintiff selling the lanterns, and that he was not ready to act up to his threats. It occurred to him that there was another ground, though an absurd one in law, for restraining the plaintiff selling the lanterns—namely, his connection with Trinity House. But though that idea occurred to him when he wrote the letters, he also had the patents of the company in his mind, and intended them to operate upon the minds of the persons to whom he wrote.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Under the circumstances the case comes within section 32 of the Patents, &c., Act, 1883.

Judgment for the plaintiff.

Solicitors, *Bridger & Son; Blyth, Dutton, Hartley, & Blyth.*

Q. B. Div. (Grantham and Wright, JJ.) Nov. 6.

REG. v. MAYOR, &c., OF HASTINGS. (a.)

Local government—Public health—Drain or sewer—Single drain draining several houses—Liability of corporation to repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 41—*Public Health Acts Amendment Act,* 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

The owner of several houses, each draining into a common drain at the rear of the houses and thence at one end into the public sewer in the road, applied for a mandamus *to the corporation to repair and maintain the said drain as being a sewer. No application had previously been made to them under section* 41 *of the Public Health Act,* 1875, *on complaint of the existence of a nuisance.*

Held, that the corporation was liable to repair and maintain the drain, and that their general liability under section 15 *of the Public Health Act,* 1875, *to keep in repair all sewers belonging to them was not taken away by section* 19 *of the Amendment Act of* 1890, *which extends section* 41 *of the Act of* 1875, *and which was adopted by the corporation in their local Acts.*

Held, further, that, as a general rule, in such cases as this, a mandamus *was not the proper remedy, but that complaint should be made to the Local Government Board under section* 299 *of the Public Health Act,* 1875.

In this case a rule *nisi* had been obtained by one W. R. Young, calling upon the Corporation of Hastings to show cause why a writ of *mandamus* should not issue directed to them to maintain and repair a certain sewer.

Young was the owner of twenty-nine houses in Athelston-road, Hastings.

In 1879 application was made on behalf of the then owner of the land on which these houses are situate to the urban sanitary authority for their approval of certain plans for these houses. These plans showed that each of these houses was to be drained into a common drain or sewer at their rear, which drain or sewer was to be conveyed at one end into to the sewer in Athelston-road. The authorities approved of these plans subject to the condition that each of the houses should be drained separately into the sewer in Athelston-road.

The original plans, however, were carried out, and the houses when completed were certified by the borough surveyor as being fit for human habitation.

Certain wells at the rear of these houses, and which supplied water to them, became polluted owing to defects in the common drain at the rear, which drained all these house. Young thereupon called upon the local authorities to put this drain into proper repair as being a sewer vested in and under their control within section 13 of the Public Health Act, 1875. The local authority refused to do this on the ground that the drain was not a sewer vested in them, but was a "single private drain," and was repairable by the owner of the houses. Thereupon the owner obtained the said rule.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Section 148 of the Hastings Improvement Act, 1885, provides that "in cases where two or more houses are connected with a single private drain which conveys their drainage into a public sewer, the corporation shall have all the powers conferred by section 41 of Public Health Act, 1875 (38 & 39 Vict. c. 55)."

Section 41 of that Act provides that "on the written application of any person to a local authority, stating that any drain . . . is a nuisance or injurious to health, . . . the local authority may, by writing, empower their surveyor or inspector of nuisances . . . to enter such premises . . . and cause the ground to be opened and examine such drain. . . . If the drain . . . on examination appears to be in bad condition or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him . . . to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty, . . . and the local authority may . . . execute such works and may recover . . . from the owner the expenses incurred bythem in so doing."

Section 19 (1) of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), provides that "where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875," and subsection 3 says that "for the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." Part III. of this Act, which contains the above section, was adopted by defendant corporation. By section 15 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it is, however, provided that "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Bosanquet, Q.C. (*Boxall* and *Trevor* with him) showed cause. The whole question is whether the corporation or the owner is liable, and the cases decided show that the liability is on the private owner: *Self* v. *Hove Commissioners,* 43 W. R. 300, [1895] 1 Q. B. 685; *Hill* v. *Hair,* 43 W. R. 651, [1895] 1 Q. B. 906, is distinguishable from that case. *Self* v. *Hove Commissioners* was followed and approved of in *Bradford* v. *Mayor, &c., of Eastbourne, ante,* p. 31, [1896] 2 Q. B. 205, and *Hill* v. *Hair* disapproved. [WRIGHT, J.—These cases differ from the present one because here no application has been made to the corporation under section 41 of the Act of 1875, nor has the corporation taken any steps under that section.]

Macmorran, Q.C. (*S. G. Lushington* with him), in support of the rule, was not called upon, but in reply to a question by Wright, J., as to whether a *mandamus* could be granted in this case, cited *Reg.* v. *Vestry of St. Matthew, Bethnal Green,* 44 W. R. 697, [1896] 2 Q. B. 319.

GRANTHAM, J.—In this case the *mandamus* must go. The decision of Lord Russell of Killowen, C.J., and Wills, J., in *Bradford* v. *The Mayor, &c., of Eastbourne* does not apply to this case, as here the owner applied to the local authorities to do what was necessary with regard to this sewer, and sought to enforce the general obligation imposed upon them by section 15 of the Public Health Act, 1875. They refused to comply on the ground that it was a drain which the owner was liable to repair. I do not think they had any right to do that. The owner was exercising his un-

doubted right in applying to them to put this sewer in proper order. The language of section 15 is quite clear; and I do not think that section 41, which is relied upon by the local authorities, was intended to apply to such a case as this where no application has been made to them by anybody complaining of a nuisance. It simply comes to this, that the local authorities, to save themselves expense, are endeavouring to put in force a section which was intended for entirely different purposes.

WRIGHT, J.—Before I come to the case itself I will say a few words on the form in which it comes before us. A rule *nisi* for a *mandamus* has been obtained here, but I do not think it is an example which ought to be followed as a rule. In the case of the Bethnal Green Vestry it was allowed to save expense, but I do not think that applications for a prerogative *mandamus* should be made in small matters of this kind. That point was not argued at all in the Bethnal Green case. I think the proper remedy is by complaint to the Local Government Board under section 299 of the Public Health Act, 1875. [GRANTHAM, J.—I quite agree in what my learned brother has said that this should not have been in the form of an application for a *mandamus*.] The proper remedy is under section 299 of the Act which calls upon the local authorities to remedy what is complained of.

Now, coming to the case itself it seems to me the bulk of the argument has been entirely beside the general question in the case. First of all there is the general liability of the Urban Sanitary Authority under section 15 of the Public Health Act, 1875, to repair and maintain all sewers. There are many decisions that it does not matter by whom the sewers have been constructed so long as they are sewers within the meaning of the Act. The general liability has not been changed, and these drains when they drain two or more houses are just as much drains or sewers as in other cases. If it had been intended by section 19 of the Act of 1890 or by the local Act to repeal the general liability imposed upon local authorities to repair sewers of this kind, totally different language would have been used. It would have been very easy to have altered the language of the Public Health Act of 1875 so that a drain or sewer draining two or more houses should no longer be considered a sewer within the meaning of the Act of 1875, but nothing of the sort has been done. What has been done is this: the general liability to repair these sewers being left untouched, a section is enacted giving a very large measure of relief in certain cases to the local authorities, namely, section 19 of the Act of 1890 which applies to these sort of sewers, the powers as to drains contained in section 41 of the Act of 1875. What that section 41 does is this: it enables the local authority, when complaint is made to them of the existence of a nuisance of a drain, and not merely of a drain but all kinds of sanitary matters, to enter upon the premises and examine the drains, and if they find them not in good condition they may put them right again. That arises only where the thing has gone so far as that it is an actual nuisance and injurious to health. It is quite just that if an occupier or owner allows his sanitary arrangements to get into such a state as that they have become a nuisance to health he should be liable for the expense of pulling them up and putting them in repair. And that is what the Legislature has enacted by section 19 of the Act of 1890, and in the case of *Bradford* v. *The Mayor, &c., of Eastbourne*, it seems to me that the Lord Chief Justice and Wills, J., were dealing with the powers of the authorities under these sections, and were not holding that they took away the general liability for repairing any sewers under section 15. Certainly in the case of *Self* v. *The Hove Commissioners* there was no such intention of so holding. In *Hill* v. *Hair* Cave, J., drew an inference which has been disapproved by other judges.

It follows that section 41 is not applicable in such a case and the *mandamus* must therefore go.

Rule absolute.

Solicitors for the prosecutor, *C. H. W. Osborne*, for *Young, Son, & Coles*, Hastings.

Solicitors for the defendants, *J. H. Lydall*, for *B. F. Meadows*, Town Clerk, Hastings.

Q. B. Div.
(Grantham and Wright, JJ.) Nov. 5.

VESTRY OF THE PARISH OF ST. MARY, BATTERSEA (*Appellants*) *v.* PALMER AND ANOTHER (*Respondents*). (*a.*)

Metropolis management—Street—"New street"—Paving expenses—Apportionment—Road partially built along—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.

The respondents were the owners of two plots of land in and abutting that part of a road lying within the district of the appellant vestry, the road having been formed or laid out after 1862. *So much of the road as was within the district of the appellant vestry was* 200 *yards long, and the present proceedings related to such portion only; on one side of such portion of the road was only one house, and on the other, one house, a church, and a hall. The rest of such portion of the road was unbuilt upon. The vestry, having paved such portion of the road, summoned the respondents before the magistrate for the payment of the sums apportioned by order of the vestry in respect of the land of which the respondents were owners towards the paving expenses. The magistrate dismissed the summons on the ground that such portion of the road was not a new street within the meaning of section* 77 *of the Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102).

Held, that such portion of the road was not a "new street." The Legislature appeared to contemplate that in order that a road should be a street within the Metropolis Management Acts of 1855 *and* 1862 *it must be composed wholly or partially of houses.*

Special case.

This was a case stated by R. O. B. Lane, Esq., one of the metropolitan police court magistrates under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

The respondents were summoned in respect of a claim for £105 5s. 6d., being the sum apportioned by the order of the appellants, dated the 11th of December, 1895, in respect of certain premises of which the respondents were the owners, and being the proportion alleged to be payable in respect of such premises towards the expenses of paving a new street known as Ramsden-road.

The magistrate dismissed the summons.

The facts as set out in the case stated are as follows:—

1. The vestry are a vestry within the meaning of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), and the various statutes amending the same.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

2. The road known as Ramsden-road is considerably over half a mile in length, is partly within the district of the appellants, and partly within the district of the Wandsworth Board of Works. The portion of Ramsden-road involved in the present proceedings is the portion lying within the district of the appellants—that is to say, the portion lying between Thurleigh-road and Nightingale-lane, and it is hereinafter referred to as the Battersea portion. The remainder of the road is referred to as the Wandsworth portion. The whole road is a highway, and was formed or laid out as a road or roads in or after the year 1866. The Wandsworth portion, or some parts thereof, have been considerably built upon, but the precise extent of such building did not appear.

3. The respondents are the owners and occupiers of two plots of land in and abutting on the Battersea portion.

4. On the 14th of November, 1894, the appellants deemed it necessary and expedient, and resolved that so much of Ramsden-road as is within their district should be paved, and the appellants accordingly did well and sufficiently pave that part of the said road. The costs and expenses of such paving having at a subsequent date—viz., the 11th of December, 1895—been ascertained, the appellants apportioned such costs and expenses on the owners of the houses and land bounding and abutting on the said road. The proportion and amount of such costs and expenses so charged and apportioned by the appellants to the respondents was £105 0s. 6d.

The appellants had in the year 1893 executed certain temporary repairs in the Battersea portion under the powers of section 3 of the Metropolis Management (Amendment) Act, 1890, and their object in paving the Battersea portion in the year 1894, was to obviate the necessity of making repeated applications to the adjoining owners under that section for the cost of current repairs.

The Battersea portion of Ramsden-road is about 200 yards long. On the west side there is only one building—namely, a house called "Courtlands"—which fronts towards Ramsden-road." On the east of the southern end there is a house named "Shetlands," which fronts towards Nightingale-lane and at the northern end are St. Luke's Church and hall, having an entrance in Thurleigh-road and another in Ramsden-road. These are the only buildings on the Battersea portion. No new buildings have been erected in the Battersea portion for the last twenty years.

6. On the part of the appellants it was contended that the Battersea portion of Ramsden-road was a street within the meaning of 18 & 19 Vict. c. 120, s. 250, and that it had been laid out and formed since the passing of the Act 25 & 26 Vict. c. 102, and was therefore in law a new street within the meaning of 25 & 26 Vict. c. 102, s. 112, and that the appellants were therefore entitled to pave it when they deemed it necessary or expedient to do so, and to recover the cost and expenses of doing so from the owners of the houses and land abutting on or bounding the said road.

7. On the part of the respondents it was contended that in the absence of any unusual features or circumstances before any road became a new street within the meaning of section 105 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and section 77 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), a substantial part of at any rate one side of the road must be occupied by buildings, and the following cases were referred to: *St. George's Local Board* v. *Ballard*, 43 W. R. 709, [1895] 1 Q. B. 702; *Gozzett* v. *Malden Urban Sanitary Authority*, [1894] 1 Q. B. 327; and *The Greenwich Local Board* v. *Davis*, 64 L. J. M. C. 257.

The learned magistrate found as a fact that the Battersea portion of Ramsden-road had not been built upon to such an extent as to have become a street in the popular sense of the term, and he dismissed the summons on the ground that the Battersea portion of Ramsden-road was not a new street within the meaning of the sections above referred to, and that the appellants had acted prematurely in paving it as such.

The question for the court was whether on the facts and findings above stated such decision was right in law.

Channell, Q.C., and *Earle*, for the appellants.—The magistrate was wrong in dismissing the summons. Section 250 of the Act of 1855 gives a definition of a "street," but section 112 of the Act of 1862 defines a "new street." This street was a street laid out subsequent to 1862, and therefore it comes within the terms of section 112. It is quite immaterial whether it has or has not a single house upon it According to the definition in section 112 the expression "new street" shall apply to and include "all streets hereafter to be formed or laid out." There are no authorities cutting down that definition, but several that extend it.

Freeman, Q.C., and *Daldy*, for the respondents.—The finding of the magistrate is in accordance with all the cases. In *Pound* v. *Plumstead Board of Works*, 20 W. R. 177, L. R. 7 Q. B. 183, Blackburn, J., says: "I think that it is plain the Legislature are here using the word "street" in its ordinary popular and natural sense, and mean a place with continuous houses on each side." In *Davis* v. *Board of Works for Greenwich*, [1895] 2 Q. B. 219, Lord Esher, M.R., speaking of a road, says, at p. 226: "It did not become a street in the ordinary sense of the term until a sufficient number of houses had been built alongside of it to make it a street in that sense. [WRIGHT, J.—I do not think there is any direct authority on the point before us.]

Earle, in reply.—Lord Esher, M.R., in the case just cited, says at p. 226: "It has been held by this court that if a street is a new street in the ordinary sense of the term, independently of the definition in section 112, it may be dealt with as such; and that the effect of the definition is to bring within the category of new streets things which would not in the ordinary sense of the term be called new streets, not to exclude things which come within the ordinary sense of the term." There is no case to show that the expression "new street" is to be taken in any sense but its full meaning.

GRANTHAM, J.—In this case we think that the learned magistrate was right in refusing to make the order for payment, although it may be that he was not quite right in some of the reasons that he gave. We think that although the learned counsel who appears for the appellants was right in saying that section 105 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), was undoubtedly extended by the 77th section of the Act of 1862 as far as its powers to recover money spent was concerned—because by the 77th section of the Act of 1862 they are enabled to recover it from the owners of land as well as from the owners of houses—yet his argument was obliged to be based on the fact that they were justified in acting purely on the 77th section, without saying that they were remitted back to the powers of the 105th section of the Act of 1855. The 77th section of the Act of 1862 says distinctly: "Where any vestry or district board shall, under the powers

given by the 105th section of the firstly-recited Act" (that is the Act of 1855) "have paved, or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein." All that section 77 seems to have done is to have extended the powers of the authorities so as to enable them to bring in the owners of land as well as the owners of houses, but it was not intended to give them powers to make the owners of land exclusively pay. When I say exclusively, I mean practically exclusively, because the evidence is that there are only two houses in this street, both old houses, and that there are no other houses at all and no prospect of any being built within twenty years. That is how I understand the case and the findings of the learned magistrate. Then we have to refer back to section 105 of the Act of 1855 to see what the power is. There it says: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board," &c., "be desirous of having the same paved, or if such vestry or district board deem it necessary or expedient that the same should be so paved, then in either of such cases such vestry or board shall well and sufficiently pave the same." That is where there are houses upon either side or one side of the street. That does not seem to give them power to pave a street where there are none of those houses, in the way it is suggested here. Under those circumstances, although I do not think we are justified in deciding it on the mere question of whether it is, in the popular meaning, a new street or not, we think that the definition clause of the Act of 1862 (see section 112) is not wide enough to cover it, and that on the principle of law, the magistrate was right in refusing to make the order for the payment in this case; and therefore this appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. I think Mr. Earle has said everything that possibly can be said on the point, and I entirely agree with him that this street is or may be for some purposes a new street; but the question is whether it is a new street for the purpose of section 105 of the Metropolis Management Act, 1855, or section 77 of the Act of 1862. I really cannot feel any doubt, looking at the language of the section, although the question is a very important one; important because, as the learned counsel has pointed out, this road is only a section in the middle of a long road, and it may be very inconvenient that a portion of a long road should be imperfectly paved while the rest is properly paved. we cannot help that. If you look at section 105 it not merely begins by treating "houses" as the essence of what is a street for the purposes of the section, but you find that later on it uses this expression: "And the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses." Clearly, when that section was passed, the Legislature was thinking of a street composed wholly or partially of houses, and I should say that, whether there were a sufficient number of houses or not to make a street according to that test, would be a question for the magistrate.

Then we come to section 77 of the Act of 1862, which provides that, under section 105 of the Act of 1855, the vestry or district board may charge persons whose land has no houses upon it as well as the owners of houses. I do not think that widens the scope of section 105. The question is a very important one from every point of view, but I do not think myself that there is any real doubt about it.

Appeal dismissed.

Solicitors for the appellants, *W. W. Young & Son.*

Solicitors for the respondents, *Simpson, Palmer, & Winder.*

Q. B. Div. (Lord Russell of Killowen, C.J.) June 27; Aug. 5, 1896.

JONES *v.* GERMAN. (*a.*)

Justices—Jurisdiction—Search warrant—Information—Validity of warrant—Liability of magistrate.

The information on which a search warrant to search for stolen goods is granted by a magistrate need not allege the actual commission of a felony. To justify the magistrate, it is sufficient if the information allege reasonable grounds of suspicion; and the warrant need not specify the particular goods for which search is desired.

Further consideration.

The action was tried before Lord Russell of Killowen, C.J., with a special jury, and upon the findings of the jury the case was reserved for further consideration.

The facts and the substance of the arguments appear in the judgment, and in addition to the cases referred to in the judgment, the following were cited: *Caudle* v. *Seymour*, 1 Q. B. 889; *Cave* v. *Mountain*, 1 Man. & G. 257; *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177; *McDonald* v. *Bulwer*, 13 Ir. C. L. R. 549; *Wilkes* v. *Wood*, 19 Howell's State Trials, 1153; and also section 2 of 22 Geo. 3, c. 58; section 103 of the Larceny Act, 1861, 24 & 25 Vict. c. 96; and section 2 of the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, upon which the defendant relied.

Lawson Walton, Q.C., and *A. E. Gill*, for the plaintiff.

Carson, Q.C., and *Hohler*, for the defendant.

Cur. adv. vult.

Aug. 5.—Lord RUSSELL of Killowen, C.J., read the following judgment:—The action was an action for illegal arrest, false imprisonment, and trespass to goods. The plantiff was, at the times material in the action, employed as butler and bailiff to one Thomas Wood, at Brasted in Kent, and the defendant is a justice of the peace for the county of Kent. On the 8th of June, 1895, Thomas Wood swore an information before the defendant that "he hath just and reasonable cause to suspect, and doth suspect, that William Jones, of Brasted, has in his possession certain property belonging to the said Thomas Wood who upon his oath does depose and say that the said William Jones has been in his employ for five years and is now under notice to quit and that he has requested the said William Jones to allow him to search several boxes which the said William Jones has had packed ready to be taken away but which he refused to be looked through." On the same day the defendant granted a search warrant for the said goods authorizing the constable of the parish of Sevenoak in the following terms: "With proper assistance to enter the said premises occupied by the said William Jones, in the day-time, and there diligently search for the said goods, and if the same, or any part thereof shall be found upon such search, that you

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

bring the goods so found, and also the body of the said William Jones, before me or some other of her Majesty's justices of the peace in and for the said county of Kent to be disposed of and dealt with according to law."

In pursuance of the warrant a search for the property of Thomas Wood was made in the presence of the plaintiff and Thomas Wood, and Thomas Wood then identified and claimed as his property certain articles, all of which articles were found packed in the boxes of the plaintiff, and the plaintiff was thereupon charged by Thomas Wood with stealing them, and was taken into custody. Subsequently the plaintiff was in due course of law charged before the defendant with stealing the said goods, and was committed for trial at the quarter sessions, and the grand jury returned a true bill. Subsequently it was agreed between the plaintiff and Thomas Wood that in consideration of Thomas Wood not offering any evidence against the plaintiff, certain of the articles should be given up to Thomas Wood, and that the plaintiff would take no proceedings for false imprisonment, or malicious prosecution against Thomas Wood. In pursuance of the terms of this agreement no evidence was offered on the part of the prosecution, and a verdict of not guilty was returned. The plaintiff then brought the present action against the defendant, alleging that the warrant was granted illegally and without jurisdiction because the information did not charge the commission of any criminal offence, and did not specify the goods for which search was desired. The jury assessed the plaintiff's damages at £15 if the defendant was liable only in respect of the search, and at £75 if he was liable for the arrest and imprisonment until committal for trial, subject, however, to the question which was subsequently argued before me, whether the defendant was liable at all. I will deal with these two objections in the above-mentioned order.

Now it seems clear that at common law a justice has the general power to issue a search warrant for stolen goods (See 2 Hale's Pleas of the Crown, 113, 149, 150; *Entick* v. *Carrington*, 19 Howell's State Trials, at p. 1067; Burn's Justice of the Peace, vol. 5, p. 1180), and although the earlier authorities are not clear on the subject, it was expressly decided by a strong court in *Elsee* v. *Smith*, 1 Dow. & R. 97, that an allegation of the actual commission of a felony is not necessary to justify a magistrate in granting a search warrant. Abbott, C.J., in giving judgment in this case, said: "It need not be a positive and direct averment upon oath that the good are stolen, in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search warrant. Suppose the case of a horse which has been lost by its owner, and it is found in the possession of any person, the owner in that case might not like to take upon himself to swear that the horse had been stolen; for it may have strayed. But when he finds that his horse is concealed in the stable of another person, he may very naturally conclude that it must be stolen, from the circumstance of the concealment, and therefore he may very conscientiously swear that he suspects it to have been stolen. If, under such circumstances, the magistrate is not authorized in issuing his search warrant, it might happen in many cases that felonies would go undetected." It seems to me therefore that on this part of the case the question is whether the information can be fairly understood as alleging reasonable grounds for suspecting that the goods were being feloniously dealt with by the defendant. I think it can. Supposing (to take the illustration put by the defendant's learned counsel) the same language to be the subject of an action of libel, with the *innuendo* suggested, it would be, in my judgment, wrong to rule that the words complained of were not capable of bearing that *innuendo*.

But it is said that this warrant is granted under section 103 of 24 & 25 Vict. c. 96, which says: "If any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence punishable either upon indictment or upon summary conviction by virtue of this Act shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods." I greatly doubt whether this section applies to stolen goods, and, at any rate, I do not think it was meant to alter the law in respect of search warrants for goods supposed to be stolen. The language of the section suggests to my mind that its object is to apply the practice as regards search warrants for stolen goods, to goods in respect to which some offence under the Act (other than larceny) has been committed.

The conclusion, therefore, that I have come to on this point is that, on the authority of the case of *Elsee* v. *Smith*, the information was good at common law, and was sufficient to justify the warrant.

The second objection taken is that the information should have specified the goods for which search was desired, and that the warrant was a general warrant because it did not specify the goods, and that it was therefore bad. As to this, I cannot find it anywhere laid down that a search warrant must specify the goods; and indeed it is easy to suggest many cases where it might be impossible for the person laying the information to do so. Probably in most cases there is no difficulty in the matter, and for that reason the usual forms for the information and the warrant are drawn up in that way. I think, therefore, both objections fail, and my judgment is for the defendant.

Judgment for defendant.

Solicitor for the plaintiff, *Charles Everett.*

Solicitors for the defendant, *Routh, Stacey, & Castle*, for *Knocker, Knocker, & Holcroft*, Sevenoaks.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 18.

WILMOT v. ALTON. (a.)

*Bankruptcy—Assets—Property of bankrupt—*Choses in action*—Assignment of interest in contract—Validity of assignment as against trustee.*

A theatrical costumier entered into a contract to supply a theatre with dresses and keep them in repair during a certain period in consideration of certain weekly payments. She assigned all her interest in the contract to the plaintiff by way of mortgage, and she subsequently became bankrupt.

Held, that the assignment did not transfer to the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

plaintiff, as against the trustee in bankruptcy, any of the payments becoming due under the contract after the bankruptcy.

Decision of Lord Russell of Killowen, C.J., *ante, p.* 12, *affirmed.*

Appeal from the judgment of Lord Russell of Killowen, C.J., on the trial of an interpleader issue without a jury; reported *ante*, p. 12.

In June, 1895, a Mrs. May, who carried on business as a theatrical costumier, entered into a contract with the Blackpool Winter Gardens and Pavilion Co., by which she was to supply for hire and keep in repair during the hiring certain dresses and wigs. The terms of the contract were stated in the following letter addressed to Mrs. May by the manager of the company:—"Mrs. May,—I beg to acknowledge receipt of your contract to supply designs for the forthcoming ballets—viz., 'Eldorado, The Land of Gold,' and 'Sons of the Sea,' according to sketch. The terms to be £40 per week for twelve weeks commencing July 8, 1895, and wigs as may be required for the sum of £3 per week for the same period. You to find all materials and to keep in repair during the run. W. Holland (Manager)." The dresses were duly supplied by Mrs. May under the contract.

On the 4th of July, 1895, by an indenture of mortgage made between Mrs. May and the plaintiff, reciting the above contract and that the plaintiff had at her request accepted bills of exchange drawn by her to the amount of £330, she charged all her beneficial right, title, and interest in the said contract for securing to the plaintiff the said sum of £330. On the 13th of July a receiving order was made against Mrs. May on her own petition, and on the 26th of July she was adjudicated a bankrupt. On the 6th of August notice of the indenture of the 4th of July was, for the first time, given to the company.

Subsequently to the 13th of July there became due from the company in respect of the hire of the dresses a sum of £318 18s. This sum was claimed by the plaintiff and also by the defendants, who were the trustees in Mrs. May's bankruptcy. The company thereupon paid the amount into court, and this interpleader issue was directed to be tried.

Lord Russell of Killowen, C.J., gave judgment for the defendants (see *ante*, p. 12).

The plaintiff appealed.

Cooper Willis, Q.C., and *Hawtin*, for the plaintiff.

Herbert Reed, Q.C., and *Scarlett*, for the defendants.

Lord ESHER, M.R.—This is a contract between a costumier, and the manager of a theatre, and the terms of it are before us. If Mrs. May had not become bankrupt, and if she had desired to claim any payment under this contract, she would have been bound to show that she had made designs and supplied dresses, and that she was ready and willing to repair them when necessary, and that, if any wigs had been required, she had supplied them, and was ready and willing to continue to supply them. Her right to payment would depend on her proving that. The contract was onerous on her to this extent, that under it things had to be done by her requiring talent on her part with regard to her business. But on her becoming bankrupt she could not any longer fulfil the contract. How, then, was it to be fulfilled? Her trustee in bankruptcy might, if he thought proper, carry on her business and carry out the contract. But he was not obliged to do so, he could not be bound to repair the dresses, he might say that he would have nothing more to do with the contract. And, unless the trustee determined to go on with it, the manager would not be bound to make any further payments. Under these circumstances I am of opinion that the Chief Justice was right in holding that future payments under this contract were not debts due payable *in futuro*, but that they were only payable on the fulfilment of certain conditions. When the conditions were fulfilled, it would be by the trustee for the benefit of the estate, and the money would become due from the manager to him. I think that the case of *Ex parte Nichols, In re Jones*, 31 W. R. 661, 22 Ch. D. 782, shows that payments due under a contract which requires the fulfilment of certain conditions cannot be transferred so as to deprive the trustee in bankruptcy of his claim under the contract. The decision is therefore right, and the appeal must be dismissed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *H. Reid.*

Solicitor for the defendant, *J. C. Button.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 17.

BENSAUDE v. THAMES AND MERSEY MARINE INSURANCE CO. (*a.*)

Insurance — Marine — Policy on freight—Exception—Claim consequent on loss of time—Delay caused by peril of the sea—Frustration of adventure.

A policy of marine insurance against total loss of freight contained the following exception: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise."

While the ship was proceeding on a voyage under a charter, her main shaft broke by perils of the sea, and in consequence thereof she was delayed for so long a time as to frustrate the objects of the adventure, and the owners thereby lost their chartered freight. In an action by the owners against the underwriters,

Held, that the claim was within the warranty, and that the defendants were not liable.

Appeal by the defendants from the judgment of Collins, J., at the trial of the action without a jury.

The action was brought against underwriters upon a policy of marine insurance for £1,500 upon freight valued at £2,500, covering total or constructive total loss and general average only, on the steamship *Peninsular* for and during twelve calendar months.

The plaintiffs' claim was for a total loss by perils of the sea.

On the 3rd of April, 1895, the Portuguese Government contracted with the Empreya Nacional and others for the transport of troops and stores from Lisbon to Lourenço Marques.

In pursuance of that contract a subsidiary contract was entered into on the 5th of April, 1895, between the Empreya Nacional and the plaintiffs by which it was provided that *The Peninsular* should transport certain of the troops and should also load and carry a cargo of Government stores from Lisbon to Lourenço Marques, and that the Empreya Nacional, in addition to the sum to be paid for the transport of the troops, should pay to the plaintiffs eight days after the arrival of *The Peninsular* at Lourenço Marques, and after having received the same from the Portuguese Government, the sum of 15,000,000 reis freight for the said cargo.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law

The Peninsular loaded the cargo at Lisbon and sailed for Lourenço Marques on the 15th of April.

On the following day her main shaft broke by perils of the sea, and she had to be towed back to Lisbon, where she arrived on the 19th of April.

On the 20th of April she was surveyed, and it was found that the damage which she had sustained could not be repaired at Lisbon, and that she would require to be taken to Cadiz to be repaired. All her cargo was thereupon discharged at Lisbon. The delay necessary for the purpose of taking *The Peninsular* to Cadiz and repairing the damage was such as to frustrate the objects of the adventure, and the Portuguese Government and the Empreya Nacional claimed that they were discharged from carrying out the agreement with the plaintiffs, and the plaintiffs thereby, by the aforesaid perils of the sea, totally lost the said freight.

Upon a claim being made upon the underwriters, they resisted payment, relying upon an exception in the policy as follows: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise."

Collins, J., held that there had been a total loss of freight by perils of the sea, that the claim was not consequent on loss of time, and therefore not within the warranty, and that the plaintiffs were entitled to judgment.

The defendants appealed.

Joseph Walton, Q.C. (*T. E. Scrutton* with him), for the defendants.—This is a claim consequent on loss of time arising from a peril of the sea; and the underwriters are therefore freed from liability by the warranty. This warranty is only applicable to insurances on freight, and in a policy against total loss only, the warranty only applies to a case exactly like the present. For where a loss of freight has not been brought about by a peril of the sea, it does not fall within the policy at all: *Inman Steamship Co.* v. *Bischoff*, 31 W. R. 141, 7 App. Cas. 670. This warranty was introduced after the case of *Jackson* v. *Union Marine Insurance Co.*, 23 W. R. 169, L. R. 10 C. P. 125. It excludes the liability of the underwriter in such a case, to which the present case is exactly similar.

Leck (*Bigham, Q.C.*, and *Bucknill, Q.C.*, with him), for the plaintiffs.—This is not a claim consequent on loss of time. Loss of time did not cause the loss of freight here, it simply afforded a measure of the damage caused by perils of the sea. The burden is on the other side to show that the words of the warranty are apt and sufficient to exclude the underwriter's liability.

He cited *In re Jamieson and The Newcastle Steamship Freight Insurance Association*, 43 W. R. 530, [1895] 2 Q. B. 90.

Lord ESHER, M.R.—I am of opinion that this appeal must be allowed. The case depends on the true construction of this warranty in a policy of marine insurance: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The policy is against total loss of freight, and total loss only. If there had been a partial loss of freight, that would not have been insured against. The freight in question was chartered freight, the charter being for the carriage of troops and cargo from Lisbon to South America. Freight would be payable on arrival and delivery of the troops and cargo. If any part of the troops or cargo arrived, freight would be payable; but if none arrived, no freight would be payable. The ship sailed with the troops and cargo on board, and on the course of the voyage her main shaft broke by perils of the sea. It is clear that the mere breaking of the shaft did not by itself cause a total loss of freight. If the ship had been thereby delayed for twenty-four hours, she would have arrived at her destination though somewhat delayed, and freight would have been payable notwithstanding the delay; that is to say, there would have been no loss of freight. It is equally clear that the breaking of the shaft determined the loss in this sense, that at the moment when the shaft broke it might have been calculated that there would be a delay so long as to render the voyage nugatory and frustrate the object of the adventure. What brought about a total loss of freight by perils of the sea was the breaking of the shaft and the loss of time caused thereby. In my opinion therefore this claim cannot be said not to be a claim consequent on loss of time. With deference to the learned judge, I think that the case is within the warranty, and that the appeal must be allowed, and judgment entered for the defendants.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Lowless & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 3.

WESTERN v. BAILEY. (*a*.)

Copyhold—Heriot—Heriot custom—Power to seize beast off manor.

The lord of a manor has the right to seize a heriot, due by heriot custom, wherever it may be found, as well off as on the manor.

Appeal from the judgment of Wills, J., in favour of the plaintiff at the trial of the action without a jury: reported [1896] 2 Q. B. 234, 44 W. R. Dig. 44.

The action was by the lord of the manor of Mundon Hall, Essex, against the executors of George Christy, a copyhold tenant of the manor, to recover the value of two beasts which formed part of the estate of the said George Christy, and to which the plaintiff claimed to be entitled as heriots. Christy was admitted tenant of certain copyhold tenements of the manor, including two called Scotts and Langmead, and he died seised of these in 1894. Christy at the time of his death did not possess any beast which had ever been within the manor, but he died possessed of certain beasts on an estate outside the manor. These beasts were sold by Christy's executors, and the plaintiff claimed the value of the two best of these beasts, upon the ground that Scotts and Langmead were heriotable tenements, and that he was entitled to the best beast as a heriot in respect of each tenement. Wills, J., came to the conclusion upon the evidence that Langmead was a heriotable tenement, but that Scotts was not, and he held that a heriot was due by heriot service, and that the plaintiff was entitled to maintain the action in respect of one beast.

The defendants appealed.

Elton, Q.C., and *J. C. Earle*, for the defendants, contended that heriot service was in the nature of a rent service, and depended upon a reservation in a grant of lands, and was not applicable to a copyhold

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

tenement; and that heriot custom, which was proved to exist in this manor, only applied to a beast within the manor, or to a beast driven away to avoid seizure.

Bosanquet, Q.C., and *A. Lyttelton*, for the plaintiff, contended that a heriot, whether due by heriot service or heriot custom, could be seized outside the manor.

Lord ESHER, M.R.—This is a claim, so far as the appeal is concerned, by the lord of the manor for wrongfully selling a beast to which the defendant is entitled. The question is whether upon the death of the tenant the lord was entitled to seize the beast which was not at that time within the manor. Wills, J., put his judgment upon the ground that the grant showed that the tenant and his successors held the tenement by heriot service, and that the lord could seize the beast wherever he found it. It was argued that the heriot was not and could not be due by heriot service, but that it was due as a customary heriot, and that such a custom is only applicable to beasts within the manor at the time of the death of the tenant. The plaintiff, without giving up his contention that this was a heriot service, contended that on the assumption that it was due by heriot custom, the lord could seize the beast outside the manor, and, therefore, even though the point decided by Wills, J., might be wrong, his conclusion was right. I myself, though it is not necessary to decide the point, have great difficulty in seeing how, if the claim to the heriot does not arise from heriot custom, it can be proved at all. If there be evidence that the heriot has been rendered for such a length of time that the true inference is that it was payable from time immemorial, it became a part of the custom of the manor and therefore a customary heriot. Hence, when Wills, J., held, and rightly held, that the heriot had been paid for so long that it was paid from time immemorial, the proper inference was that it was part of the custom of the manor, and therefore a customary heriot. I do not agree with the learned judge when he says that it is not a customary heriot, but a heriot service. The proper inference is that it is a customary heriot. Therefore, I take it that this is a customary heriot. The authorities show that, whether it be a customary heriot or a heriot service, upon the happening of the event which gives the right to the succession, the property in the beast vests in the lord of the manor. It is not necessary that he should actually seize it. If he has marked it beforehand or fixed upon it by description, in either case he would have identified it and it would become his beast. If the property in the beast passed to the lord then he can maintain an action in respect of it at common law. He can seize it wherever it is, and if it has been disposed of he can maintain trover. It is a mere question of authority. *Parker* v. *Gage*, 1 Show. 81; *Austin* v. *Bennet*, 1 Salk. 356; Notes to Saunders' Reports, vol. 2, pp. 487, 488; 2 Watkins on Copyholds, 4th ed., p. 125, all lay it down that a heriot due by heriot custom can be seized wherever it may be found. We cannot fly in the face of those authorities when there are no authorities the other way. The learned judge was therefore right in the conclusion at which he arrived, that the plaintiff had a right to seize the beast.

LOPES, L.J.—The question is whether the plaintiff has a right to seize a heriot outside the manor. There are two sorts of heriots. A heriot service is due upon a reservation in a grant or lease of lands. A heriot custom depends upon the custom of the manor. The question has been raised whether heriot service can attach to copyhold tenure. It is not necessary to determine that question. Speaking for myself I do not see why it should not. I cannot see why the lord of the manor, when he originally granted out the land to his villeins, should not have reserved it, and thus it became crystallized into a custom. But it is unnecessary to determine that point because we have to deal with a heriot custom. There is abundance of authority for holding that the lord of the manor can seize the best beast outside the manor. I need not go through all the authorities. I need only refer to Com. Dig. Tit. Copyhold, K. 25; Notes to Saunders' Reports, vol. 2, pp. 487, 488. Therefore the lord was justified in seizing outside the manor. I have looked into the old pleas justifying a seizure, and I cannot find that any of them contain an allegation that the seizure took place within the manor.

RIGBY, L.J.—The real question is whether the lord became entitled to the heriot on the death of the tenant of a copyhold tenement. The tenant died possessed of a beast which had never been within the manor. The question first raised was whether a heriot service could attach to copyhold tenements within the manor. If I had to decide that question, I should say that in such a case there was no way to account for it legally. It is based on a reservation in a grant. I cannot see how such an origin can be presumed in the case of a copyhold tenement. The custom of the manor determines all the rights of the copyhold tenants. That custom is ascertained by showing that it has existed continuously from time immemorial. I cannot see how it is possible to go behind legal memory. When one gets to that point one finds a custom existing, and because it is a custom of the manor it regulates the rights of the lord and the tenants. What right has a court to go behind legal memory and say that there was prior to that time a grant and a reservation? Nor do I think it consistent with the relation of landlord and tenant at will, which a copyhold tenant originally was. But that question does not arise in this case, because it is admitted that there is a custom of the manor which entitles the lord to a heriot in respect of this tenement. The custom extended to all the tenements in the manor, though in some it has been compounded for. It is admitted that a customary heriot is due in respect of this particular tenement.

It has been argued that, as it is a custom of a particular manor, the custom as regards all its incidents and effects must be confined within the manor, and therefore the lord cannot go outside the manor to get the best beast. That, no doubt, might be the custom of a particular manor. There is authority upon authority to show that as a general rule the custom vests the property in the beast in the lord on the death of the tenant. If there is more than one beast, the lord must do something to show which beast he elects to be his. But if there is only one beast, it would vest in the lord at once. There is nothing illegal in a custom which vests the best beast, wherever it may be found, in the lord of the manor. Therefore the plaintiff was entitled to this beast, and the judgment of the learned judge must be affirmed, though on different grounds.

Appeal dismissed.

Solicitors for the plaintiff, *Western & Sons.*

Solicitors for the defendant, *Baileys, Shaw, & Gillett.*

From Chan. Div.
(Lord Russell of Killowen, C.J., and Lindley and A. L. Smith, L.JJ.) Nov. 13.

In re COSH'S CONTRACT. (a.)

Landlord and tenant—Assignment by tenant—Landlord's licence to assign—Landlord requiring consideration for licence—Deposit of money to secure performance of a contract between landlord and tenant—"Fine, or sum of money in the nature of a fine, payable for or in respect of such licence"—Conveyancing and Law of Property Act, 1892 (55 & 56 *Vict.* c. 13), *s.* 3.

Where by a lease the lessee is forbidden to assign the premises without the licence of the lessor, the lessor is, notwithstanding section 3 *of the Conveyancing Act*, 1892, *entitled to require, as a condition of granting such licence, that the lessee shall deposit in his hands a sum of money by way of security for the completion of improvements which the lessee has agreed to make upon the premises; such a deposit not being a "fine or sum of money in the nature of a fine payable for or in respect of such licence" within the meaning of that section.*

Decision of Stirling, J., *affirmed.*

Appeal from Stirling, J.

The respondents had in 1894 granted to R. L. Cosh a lease of certain freehold property of which they were trustees, the lessee contracting to pull down certain buildings which were upon the premises, and to erect in their place other buildings in accordance with an agreed specification. By clause 8 of the agreement it was provided that the contractor should give such security for the due performance of the contract as the trustees should require. Under this clause the trustees required that Cosh and one Finch, who was a mortgagee under him and was financing him, or one of them, should deposit as security the sum of £1,000, and that Finch should guarantee the performance of the rest of the contract. This was done; and both Stirling, J., and the Court of Appeal were of opinion that clause 8 did not entitle the trustees to require any further security. Afterwards Cosh and Finch entered into an advantageous agreement to sell their interest for twenty-nine years in a public-house, part of the demised premises. The lease to Cosh, however, contained a proviso against assignment by the lessee of any part of the premises without the licence in writing of the lessors. Cosh's rent was then in arrear to the extent of over £3,000; and the trustees, on being applied to for a licence to assign, required as a condition of granting it that Finch or Cosh should deposit with them a further sum of £2,000 as security for the performance of the rest of the contract between Cosh and his lessors. The deposit was made under protest, and the licence was granted. The question whether section 3 of the Conveyancing and Law of Property Act, 1892, did not forbid the lessors to demand such a deposit was brought before Stirling, J., on a vendor and purchaser summons; but by consent of the parties the case was treated as if it had been an action for money had and received. The learned judge held that section 3 did not apply to the case; and Cosh appealed.

Warrington, Q.C., and *Dibdin*, for the appellant.—Section 3 of the Conveyancing Act, 1892, forbids the trustees to demand this deposit. That section, as appears from the provisions of section 5, is wide enough to prohibit even a reasonable charge for legal expenses. This deposit is money paid, though it may have to be paid back; for the trustees have the use of the money, and as stakeholders are entitled to keep any interest it produces: *Strachan* v. *Universal Stock Exchange*, 43 W. R. 611, [1895] 2 Q. B. 329; *Harington* v. *Hoggart*, 1 B. & Ad. 577. "Sum of money in the nature of a fine," in section 3, means anything which gives to the lessor a pecuniary benefit, and imposes on the lessee a pecuniary disadvantage, such as would not arise from the contract. The legality of such a requirement does not depend on its reasonableness. [They referred to Woodfall on Landlord and Tenant, 15th ed., p. 695.]

Buckley, Q.C., and *John Henderson*, for the respondents, the trustees, were not called upon.

Lord RUSSELL OF KILLOWEN, C.J., stated the material facts, and continued: I think, taking a fair view of the whole correspondence, it is clear that the trustees were demanding this money as a condition of granting the licence, but that they were asking it only with a view to putting themselves in a position of more security as to the performance of the rest of the agreement. There is no doubt that some of the language used is a little inconsistent with that view; but, on the whole, I arrive at the conclusion, as the fair result of the correspondence, that this deposit was demanded as a condition of the trustees giving their assent to the assignment of the lease to a purchaser, and as security for the performance of the contract, but not as the security the trustees had a legal right under clause 8 to require. Then, if I am right in that view, the main question is, Was that demand illegal and contrary to section 3 of the Conveyancing and Law of Property Act, 1892? That is the simple remaining point. It is a point which depends entirely on the construction of the section, and which, I think, does not leave open to us any of those rather equitable considerations to which counsel for the appellant referred. That section quite clearly provides that where in a lease there is a stipulation that there shall not be any assignment of the demised premises without the licence or consent of the lessor, then, unless the lease contains an express provision to the contrary, no fine or sum of money in the nature of a fine, shall be payable for or in respect of such licence or consent. Was this, then, a fine or sum of money in the nature of a fine within that enactment? I think it was not. The language points to a fine or sum of money in the nature of a fine which is to go into the pocket of the person who is requiring the payment as a condition. But here the money was required as a deposit only. Now, when money is said to be paid—whether a fine or a sum not within that denomination—"paid" means that the payer is passing and intending to pass the right of property to somebody else, so that the money shall become that other person's property. Here, if the contract is properly carried out, and if the stipulations entered into are observed by Cosh, he will have the right to demand repayment of that sum of £2,000. I think there has not in this case been any contravention of section 3 of the Conveyancing Act, 1892, and I think the judgment of Stirling, J., is right.

LINDLEY, L.J.—I agree, and have nothing to add.

A. L. SMITH, L.J.—I also agree.

Appeal dismissed.

Solicitors, *A. A. Timbrell; Baylis & Pearce.*

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Oct. 30.

In re FLOWERS & CO.
Ex parte WARE & SONS (LIMITED). (a.)

Bankruptcy—Bankruptcy notice—Service—Partnership—Receiver and manager appointed by the court—Service of notice on receiver—Construction of rule 260 *of General Rules of* 1886, 1890.

A bankruptcy notice in respect of a judgment debt against a partnership cannot be served under rule 260 *of the Bankruptcy General Rules of* 1886, 1890, *upon a person who has been appointed receiver and manager of the partnership business by order of the court in an action for dissolution of the partnership. The words "person having the control or management of the partnership business" mean a person having such control or management by the authority of the partners, and acting as their servant or agent.*

This was an appeal by the petitioning creditors against an order of Mr. Registrar Hope, dated the 7th of August, 1896, dismissing a bankruptcy petition presented by them against the firm of Flowers & Co. This firm consisted of five members.

On the 26th of March, 1896, a writ in the Chancery Division was taken out by three of the members against the other two for the dissolution and winding up of the partnership, and for the appointment of a manager and receiver.

On the 1st of May a receiver was appointed by the court, and he took possession of the business.

On the 6th of May a writ was issued in the Queen's Bench Division by Ware & Sons, the petitioning creditors, against Flowers & Co. for the sum of £46 18s. 2d., for goods sold and delivered, and on the 14th of May they obtained final judgment for £50 18s. 2d.

A bankruptcy notice in respect of this sum was served upon four out of the five members of the firm; the fifth member was not able to be served personally, and consequently Ware & Sons caused the receiver, who was managing the business, to be served at the principal place of business in London of Flowers & Co.

Rule 260 of the Bankruptcy General Rules, 1886, 1890, provides that "any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in England, on any one of the partners, or upon any person having at the time of service the control or management of the partnership business there."

On the 24th of June Ware & Sons presented a petition in bankruptcy against the several five members of the said firm of Flowers & Co., the alleged act of bankruptcy being non-compliance with the notice.

On the 7th of August the registrar dismissed the summons on the ground that the bankruptcy notice had not been properly served.

The petitioning creditors now appealed.

F. Cooper Willis, for the appellants.—The notice was properly served in accordance with rule 260 of the General Bankruptcy Rules, 1886, 1890. It was served upon the receiver, who was "the person having at the time of service the control or management of the partnership business." The receiver was the proper person to receive the notice and he would communicate the fact to the members of the firm, and it would be his duty to pay the judgment debt. [LOPES, L.J. referred to the case of *Burt, Bolton, and Hayward* v. *Bull and Another*, 43 W. R. 180, [1895] 1 Q. B. 276.] That case only decided that a receiver and manager of a business appointed by the court is personally liable for the price of goods which he orders.

Muir Mackenzie, for the respondents.—Rule 260 does not apply to a receiver who is appointed by order of the court, but only to one who is appointed as manager by the partners of the business, and who is appointed as their agent and servant. A receiver appointed by the court is not a servant or agent of the partners, and he is not bound to inform them of the fact that he has been served with a notice: *In re Jameson & Sandys, Ex parte Cresswell & Jameson*, 8 Morrell 278.

LORD ESHER, M.R.—I am of opinion that on the consideration of rule 260 as applied to the facts of this case this appeal must be dismissed. The receiver here was appointed by order of the court, and that being so, he is the servant or agent of the court, and is not in any legal sense the servant of the firm. I say this for the same reason that I gave in the case of *Burt and Others* v. *Bull*. Then I come to rule 260. [The learned judge then read that rule.] In my opinion that rule clearly implies that the person having the control or management of the partnership business is a person having such control or management by the authority of the partners, and is acting as their agent or servant. Such a receiver as we find in this case does not come within the terms of rule 260, and I am therefore of opinion that the decision of the registrar was right, and this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The material words of rule 260 are "if it is served at the principal place of business of the firm in England upon any person having at the time of service the control or management of the partnership business there." I think that means, if it is served upon any person having the control or management of the partnership for the partners. I do not think the rule applies to a receiver who is appointed by the court, as is this case, and who is not, in my opinion, an agent or servant of the partners. The registrar was right, and this appeal must be dismissed.

RIGBY, L.J.—A receiver appointed by the court is most certainly not the servant or agent of the firm, although he manages the business of that firm. I am not prepared to differ from the judgments that my learned brothers have delivered, although I think there is a good deal in the appellants' contention. This appeal must be therefore dismissed.

Appeal dismissed.

Solicitors for the appellants, *Kingsbury & Turner*.

Solicitor for the respondents, *George Coote*.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

App. Bankruptcy.
(Lindley, Lopes, and Rigby, L.JJ.) Aug. 7, 1896.

In re CLARK.
Ex parte BEYER, PEACOCK, & CO. (a.)

Bankruptcy — Bankruptcy notice — Issue of notice — Foreign debtor out of jurisdiction at date of issue — Subsequent return—Service in England—Bankruptcy

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (*g*); *s.* 6, *sub-section* 1 (*d*).

A bankruptcy notice was issued under section 4, *sub-section* 1 (*g*), *of the Bankruptcy Act*, 1883, *against a debtor who was a foreign subject and out of the jurisdiction, and who, at the date of the issue of the notice, had not "ordinarily resided or had a dwelling-house or place of business in England" within the preceding year. He subsequently returned within the jurisdiction, and whilst there was served with the bankruptcy notice.*

Held, that the issue of the bankruptcy notice was good, and could not be set aside.

This was an appeal by Beyer, Peacock, & Co. from an order of Mr. Registrar Giffard, setting aside a bankruptcy notice.

The appellants were creditors of the respondent Mateo Clark, and on the 13th of June, 1896, obtained judgment against him for £4,137.

On the 23rd of June, on the application of the appellants, a bankruptcy notice was issued against the debtor under section 4, sub-section 1 (*g*) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The debtor, a foreign subject, at the date of the issue of this notice, had been residing abroad for more than twelve months, but on his return to England for a day or two the notice was served upon him.

On the 14th of July the registrar, on the application of the debtor, set aside the notice on the ground that the debtor was a foreign subject and was not domiciled in England at the time when the notice was issued, and had not ordinarily resided or had a dwelling-house or place of business in England within the preceding year, and therefore the bankruptcy notice ought not to have been issued.

From this order the judgment creditors appealed.

T. Willes Chitty (*Herbert Chitty* with him), for the appellants.—The order of the registrar was wrong. A bankruptcy notice cannot be set aside for the reasons set out in section 6, sub-section 1 (*d*) of the Act of 1883, although a bankruptcy petition may be, therefore it is no objection to the validity of the notice that the debtor was not "domiciled in England, or within a year before the date of the presentation of the petition," or had not "ordinarily resided or had a dwelling-house or place of business in England." A bankruptcy notice can only be set aside for the reasons specified in section 4, sub-section 1 (*g*)—namely, that the debtor "has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained": *In re Easton, Ex parte Dixon*, 10 Morrell 111. The notice was served on the debtor on his returning within the jurisdiction when he became subject to the bankruptcy law of England.

Muir Mackenzie, for the respondent.—The notice was bad, and should be set aside, because at the time it was issued the debtor was a foreign subject, and was out of the jurisdiction, and was therefore not amenable to the bankruptcy law of England: *Ex parte Moore, In re Faithfull*, 33 W. R. 438, 14 Q. B. D. 627; *In re Lynes, Ex parte Lester*, 41 W. R. 488, [1893] 2 Q. B. 113. The respondent here was not properly speaking a debtor. "The word 'debtor' must be construed to mean a debtor properly subject to the laws of England, and thus, it seems, should be taken to include not only English subjects and denizens, but also foreigners, provided that in accordance with section 6 (1) (*d*) they are domiciled in England, or have within a year before the presentation of the petition ordinarily resided, or had a dwelling-house or place of business in England": see Williams on Bankruptcy, 6th ed., p. 2; *Ex parte Blain, In re Sawers*, 28 W. R. 334, 12 Ch. D. 522. This case was followed by *In re Pearson, Ex parte Pearson*, 40 W. R. 532, [1892] 2 Q. B. 263. The respondent could not commit an act of bankruptcy by not complying with the notice, as at the time it was issued he was a foreigner and out of the jurisdiction.

Herbert Chitty replied.

LINDLEY, L.J.—In this case I think the point taken by Mr. Chitty is a good one. The question here arises on the construction of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. Final judgment was here obtained by the creditors for £4,137 against Clark, and therefore he was clearly a "debtor." A bankruptcy notice was then issued. On the 23rd of June Clark came back to this country and then became liable to be proceeded against under the English bankruptcy laws, and in fact on that same day was served with a bankruptcy notice in respect of the judgment debt.

It is now said that Clark was not a "debtor" within the meaning of section 4 when the notice was issued because he was then a foreigner out of the jurisdiction, and therefore the notice ought not to have been issued, and the question we have to decide is whether such notice was in any way wrongly issued. I do not think the cases cited quite touch this point. It is contended that the notice is bad because it was issued whilst the debtor was not in this country, but I think if we were to hold it bad on that ground we should be putting a very narrow interpretation on the Act. I think the notice was a good one, and that it is immaterial whether the debtor was subject to the English bankruptcy law when it was issued, for he was clearly subject to it when the notice was served upon him. Therefore, it appears to me that the notice is valid and that the point taken on behalf of the appellants is a good one, and the appeal should be allowed.

LOPES, L.J.—I think section 4 should be looked at apart from and independently of the provisions contained in section 6, sub-section 1 (*d*). In my opinion this case clearly comes within the terms and meaning of section 4. The respondent is clearly a debtor, for a judgment was obtained against him. He comes to this country and thus becomes a debtor subject to the English bankruptcy laws. He then had a notice served upon him, and I am of opinion that this was a good service. But the point is taken that the notice was issued before he returned to this country, and that it is therefore not valid. I do not think that important. This seems analogous to the ordinary case of a writ of summons, which is often issued whilst the defendant is out of the jurisdiction, and is afterwards served when he comes within the jurisdiction.

I think this bankruptcy notice was a good one, and ought not to have been set aside.

RIGBY, L.J.—I am of the same opinion. A debtor is not affected merely by the issuing of a bankruptcy notice; it is the service of such notice on him that affects him, and for that reason in section 4, sub-section 1 (*g*), nothing is said about the issue, but only the service of the notice is provided for. The important fact that brings a man within the provisions of the bankruptcy law is the service of the bankruptcy notice.

The respondent was served with the notice while he was in England and subject to the English law, and therefore it seems to me that both the issue and the service of the notice were good, and the appeal must therefore be allowed.

Appeal allowed.

Solicitors for the appellants, *Pritchard, Englefield, & Co.*, for *J. Leigh*, Manchester.

Solicitors for the respondent, *Harwood & Stephenson.*

High Court of Justice.

Chan. Div. } Chitty, J. } Nov. 26.

In re MEYRICK.
MEYRICK *v.* HARGREAVES. (*a.*)

Inland revenue—Estate duty—Settlement—Apportionment—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 6-9, 14.

A settlor by a voluntary settlement in 1881 *directed the trustees in certain events to set aside various sums out of the trust funds in their hands for the benefit of the settlor's daughters, to be held on trusts subsequently declared. On the respective marriages of his daughters these sums were settled upon them. The plaintiff was the trustee of the voluntary settlement, and was also the residuary legatee and executor of the settlor. On the settlor's death he had paid the estate duty on the whole of the funds comprised in the voluntary settlement.*

Held, that he was entitled to recover from the persons taking the benefit of the various settled sums a proportionate amount of the duty paid.

Summons.

By a voluntary settlement dated the 4th of April, 1881, made between the settlor, Sir George Meyrick, and his wife, Lady Fanny T. G. Meyrick, the settlor, after reciting that certain securities had been assigned into his wife's name as trustee of the said settlement, assigned to her also as trustee the moneys recoverable on certain policies of assurance and a sum of bank annuities to be held on the trusts declared therein, which, *inter alia*, were as follow: To pay the income to the settlor for life, and after his death to raise £2,000 and pay that sum clear of all deductions except succession duty to the trustees of the marriage settlement of his eldest daughter, Mrs. Spencer, and subject thereto to pay the income of the trust funds to Lady Meyrick for her life. The settlement also contained the following directions: "And it is hereby agreed and declared that from and after the occurrence of whichever of the three events next hereinafter mentioned shall first happen, that is to say: First, the death of the said Sir George Meyrick if the said Clara Tapps Gervis Meyrick shall have married in his lifetime; second, the marriage of the said Clara Tapps Gervis Meyrick after the death of the said Sir G. Meyrick; third, the death of the survivor of the said Sir G. Meyrick and the said Dame Fanny T. G. Meyrick, the said trustees or trustee shall appropriate a part of the trust premises amounting at the time of appropriation to the value of £27,000, which said part so appropriated and the investments representing the same are hereinafter called the first trust fund, and shall hold the first trust fund in the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same; and it is hereby agreed and declared that from and after the occurrence of whichever of the three events next hereinafter mentioned shall first happen, that is to say: First the death of the said Sir George Meyrick if the said Fanny T. G. Meyrick shall have married in his lifetime; second, the marriage of the said Fanny T. G. Meyrick after the death of the said Sir G. Meyrick; third, the death of the survivor of the said Sir G. Meyrick and Dame Fanny T. G. Meyrick, the said trustees or trustee shall appropriate another part of the said trust premises amounting in value at the time of appropriation to the sum of £27,000, which said part so appropriated and the investments representing the same are hereinafter called the second trust fund, on the trusts and with a subject to the powers and provisions hereinafter declared and contained concerning the same."

The settlor reserved a power of revocation and new appointment. Under these powers various sums were appointed from time to time, about £15,000 to the settlor himself and £2,000 to the defendant Julia Fulford. On the intended marriage of his daughter Fanny, Mrs. Douglas, in 1891, the settlor irrevocably appointed that from and after his death, if the intended marriage should take place in his lifetime (which happened), the trustees of the voluntary settlement should hold the second trust fund of £27,000 in trust for Mrs. Douglas absolutely. On the marriage of Mrs. Nugent in 1895 the settlor confirmed the trust for appropriation of the first trust fund contained in the settlement and released his power of revocation, but made no fresh appointment as in the case of Mrs. Douglas. In consequence of other directions given by the settlor this first trust fund had been reduced to a sum of £24,127 7s. By a deed of appointment dated the 8th of August, 1895, the settlor irrevocably appointed to his daughter Mrs. Spencer out of the said trust funds for her separate use the sum of £3,000, and released his power of revocation so far as regards the said sum.

Lady Meyrick died in 1892, the settlor died in March, 1896. The plaintiff, the present baronet, Sir George Augustus Meyrick, was the sole executor of his mother, and, as such, trustee of the voluntary settlement of 1881. He was also one of the trustees of the respective marriage settlements of each of his three sisters; he was also executor and residuary legatee under the will of the settlor.

The total amount of the trust funds in the voluntary settlement was £80,486 4s. 2d., and in the events which happened a residue of about £21,700 fell into the estate of the settlor. The estate duty in respect of the £80,486 4s. 2d., amounting to £6,054 13s. 6d., was paid by the plaintiff.

The defendants were the other trustees of the respective marriage settlements of the settlor's daughters—Miss Fulford, an appointee, and the eldest daughter, Mrs. Spencer.

The chief question raised by the plaintiff in his summons was whether the estate duty, which became payable under the Finance Act, 1894, upon the death of Sir George Meyrick on the 7th of March, 1896, in respect of funds held upon the trusts of the settlement of the 4th of April, 1881, ought to be paid entirely out of the residue of such funds, or divided rateably between the sum of £2,000, payable to the plaintiff and others as trustees of Mrs. Spencer's settlement; the sum of £24,427 7s., payable to the trustees of Mrs. Nugent's settlement; the sum of £27,000, payable to the trustees of Mrs. Douglas's settlement; the sum of £2,000, payable to the defendant, Miss Fulford; and the sum of £3,000, payable to the defendant, Mrs. Spencer, respectively.

Byrne, Q.C., and *Jason Smith*, for the plaintiff.—Under section 8 of the Finance Act, sub-section 4, the plaintiff is required to pay duty as trustee of the voluntary settlement, because the executor is not accountable in respect of such property. Then under section 14, sub-section 1, he may deduct from the whole fund a sum sufficient to make a rateable proportion between the various funds. If different persons had been trustee of the settlement and executor of the late Sir George Meyrick this question would not have arisen. By section 14 the duty would have been charged rateably. Or if under section 6, sub-section 2, the plaintiff as executor had paid the estate duty,

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

then he could have recovered the amount under section 9, sub-section 4, or have raised the sum in the manner indicated by section 9, sub-section 5.

They referred to *In re Countess Orford*, 44 W. R. 383, [1896] 1 Ch. 257.

Farwell, Q.C., and *J. Austen-Cartmell*, for the defendants, the other trustees of Mrs. Nugent's settlement.—The intention of the settlor was to settle a definite sum clear of deductions on each daughter. The sums mentioned are in the nature of charges on the property. The executor, under sections 1 and 2, is accountable for the whole duty, and these charges being voluntary incumbrances are not within the exceptions of section 7, sub-section 1, but, according to the decision in *In re Gray*, 44 W. R. 406, [1896] 1 Ch. 620, must be borne by the executor, and he cannot recover under section 14, sub-section 1.

Farwell, Q.C., and *F. L. Wright*, for other defendants.

CHITTY, J.—The late Sir George Meyrick executed in 1881 a settlement. His death took place in 1896. Speaking of the property comprised in the settlement, in round numbers it was £80,000 odd. He reserved power of revocation, which he from time to time exercised and to a certain extent also released. At the time of his death the power of revocation had been altogether extinguished, and was at an end. There are two settlements to be found in this document of sums of £27,000 in favour of two daughters. One sum, however, was reduced, and properly reduced, under the powers to which I have shortly referred, by Sir George himself, to a sum of £24,427. The Commissioners of Inland Revenue have received from Sir George's executor the estate duty upon the property which Sir George himself was competent to dispose of, and also upon this settled fund of £80,000. The settlement, however, did not bind in favour of other persons the whole of the £80,000, but, again speaking in round numbers, there was a sum of about £20,000 which Sir George was competent to dispose of at the time of his death.

The question raised by the executor of Sir George is that he is entitled to receive from the persons interested under the settlement of that £20,000 and £24,000 odd and also from others—and there are subsidiary points of that which I will mention presently, I deal only now with those two sums—that he is entitled to receive from them a rateable proportion of what he has paid.

It is important at the outset, having regard to the arguments that I have listened to, to determine accurately what was the nature of the settlement in regard to the sums of £27,000 and £24,000 odd. I have only been speaking of that at the present moment in a general way. The property comprised in the settlement included policies which would be payable on the death of Sir George, and would be payable of course in money, and it comprised divers other stocks and securities which are mentioned. The declaration is this: that after the occurrence of whichever of three events mentioned first happens—that is to say, the death of Sir George, if a daughter shall be married, and married in his lifetime; secondly, the marriage of that daughter after his death; and thirdly, the death of the survivor of Sir George and his wife (I stay here to mention that his wife is the sole trustee in this settlement, and the event which did happen in which this became binding was the death of Sir George himself, who survived his wife), then the trustee or trustees of the settlement are to appropriate a part of the trust premises amounting at the time of the appropriation to the value of £27,000, which are set apart or appropriated and are called the trust fund, and to hold the trust fund on the trusts which are presently declared. That is a settlement in favour of one of the daughters, and the other is in substantially similar terms.

Now, I am told that there is by virtue of this clause and the subsequent trusts a clear charge of £27,000 upon the general trust fund. In my opinion that is not a correct description of this portion of the deed. Had the deed stated, as it might under the will, an appropriation on the face of it of £27,000, part of the investments to answer this settlement, it would have been a complete substantive settlement at the time. That was very properly admitted by Mr. Farwell, if not also by Mr. Cartmell. But it is said to be a charge or incumbrance upon the whole property, because the appropriation was not to be made, as I understand the argument, till after the death of Sir George in the events which have happened. Sir George had no power to pay off the £27,000, and Sir George had no voice in the appropriation. It was the duty of the trustee of the settlement to make the appropriation, and I am unable to find any distinction between this actual case and the supposed case of there being a schedule to the deed itself, showing what trust funds were settled to the trust of £27,000. To my mind it is just the same. The appropriation had to be made on the death of Sir George by the trustees for the time being. It was not a charge on any part of the trust estate in the proper sense of the term, nor an incumbrance. As I have said, there is no power to redeem, for Sir George could not have offered £27,000, nor could his executors have offered £27,000 to the trustee of this settlement. There may not be very much difference between receiving the sum in money, and money, of course, being part of the general settlement fund, could have been appropriated, but the trustee was to make the appropriation out of the property comprised in the settlement.

I hold therefore that this is not a charge or incumbrance, but in the event it was a substantive settlement. Consequently, it does not fall within the 7th section of the Act, though it was a voluntary instrument at the time it was made.

In regard to the surplus of the fund, or what is termed the residue, that was property which Sir George was competent to dispose of at the time of his death, and which he has disposed of by appointing an executor and otherwise by his will. Of course his estate will have to bear the rateable proportion of the estate duty attributable to the £20,000, or whatever the exact sum may be. There was some question raised whether this was property passing on the death of the deceased. Well, of course it was, I have not mentioned it before, but it has been in my mind. The whole of the property comprised in the settlement—that is to say, the settlement of the £80,000 was subject to the life interest of Sir George, which is determined at his death and without going into any particular parts of the Finance Act which I think it is quite unnecessary to do, it is plain that this was property passing on the death of Sir George. No question is raised as to its being—the whole of the £80,000—liable for duty.

Perhaps it is right in deference to the argument just to travel very shortly through some of the leading sections bearing on the point. Section 6, sub-section 2, says: "The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased, is under the control of the

executor; or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

Now it turned out that Sir George's executor, the present plaintiff, was executor of his mother, and also trustee of the settlement; but this section in the earlier part of it relates to the plaintiff in his character of executor of Sir George. It was argued that by virtue of the testamentary disposition of the deceased the whole of this £80,000 was under the control of the plaintiff as executor of Sir George. That in my opinion is an argument which cannot be sustained. It was under his control as trustee of the settlement, for being executor of the mother he had accepted the trusts, as he was entitled to do, of the settlement himself. Then, in the case of property not under his control, which plainly means under his control as executor of the deceased person, "if the persons accountable for the duty in respect thereof request him to make such payment." Now, as trustee, he was one of those persons, and he did pay the duty. I need hardly say that he paid the duty on the whole rightly, and as for the request it was the request which he impliedly made to himself in the one character of trustee to himself as executor of the deceased.

Then section 8, sub-sections 3 and 4, have a bearing. "The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death." That would include the balance of the £80,000, which has been termed in the argument the "sum of about £20,000"; but shall not be liable for any duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received. Then the 4th sub-section is: "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property"; that in my opinion applies to the £60,000, part of the £80,000; he was not accountable as executor for the estate duty in respect of that property. Then the section goes on, "Every person to whom any property so passes for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him, every trustee," and so forth, shall be accountable for the estate duty. He was accountable in his character of trustee of the settlement for at least the £60,000, if not for the whole £80,000. It is not necessary to say anything more about the £20,000, because there is no question between the parties about that sum.

Then section 9, sub-sections 4 and 5, were referred to: "If the rateable part of the estate duty in respect of any property is paid by the executor it shall, where occasion requires, be repaid to him by the trustees or owners of the property." That is to say, that section applies to the plaintiff in his character of trustee of the settlement. I need not read the rest of the sub-section, for it affects real estate. Then the 5th sub-section is: "A person authorized or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty."

The 14th section, sub-section 1, was also referred to: "In the case of property which does not pass to the executor as such"—that is here the £80,000, apart from any question about the £20,000—"an amount equal to the proper rateable part of the estate duty may be recovered by the person who, being authorized"—now, as executor he was authorized to pay—"or required to pay the estate duty in respect of any property, has paid such duty from the person entitled to any sum charged on such property?"

Those are the main sections relied upon. Out of deference to the argument I have travelled through them. There is one which I have to mention which was relied upon by the defendants in the action. That is section 7, sub-section 1, particularly the part under letter (*a*): "In determining the value of an estate for the purpose of estate duty, allowance shall be made for reasonable funeral expenses, and for debts and incumbrances, but an allowance shall not be made"—now, it was said for the defendants that the case falls within this part of the 7th section—"for debts incurred by the deceased"—there was no debt here by the deceased—"or incumbrances created by a disposition made by the deceased unless such debts or incumbrances were incurred or created *bonâ fide* for full consideration in money or money's worth." I need not read the rest. I have disposed of the argument on that point by the earlier part of this judgment, in which I have held that on the facts and on the true effect of the settlement the sums of £27,000 and £24,400 were not charges and were not incumbrances, but were actual substantive settlements, in the events which happened, of securities or investments equivalent in money to the two sums I have mentioned.

That disposes of the case, except that there are some two or three subordinate points. Mr. Byrne admits that, in regard to one, there are words in the settlement itself which show that the sum is to be a free sum and to be exempt from any such charge as the Legislature might, by any subsequent Act of Parliament, think fit to impose. There will be an exception to that. With regard to other smaller sums no counsel has appeared to argue it. They seem entirely to stand on the same footing as the two large sums of £27,000 and £24,400 odd. My answer to the question will be the same as with reference to the £27,000 and £24,000 odd.

Counsel for the defendants were good enough to argue that on reading the settlement I should find the intention, on the part of the settlor, that the £27,000 and £24,400 odd were given in priority and given in such a manner as to be exempt from the incidence of this tax. I need hardly observe that the settlor had no prophetic spirit. He did not foresee the passing of this Finance Act. There are no words pointing to this Act or any such Act, and there are no words whatever that would justify me in holding these sums to be exempt. The settlor did not foresee the coming of this great Act of Parliament; and the Act of Parliament applies of its own force for the reasons that I have mentioned to the various interests that were taken under the settlement.

The result therefore is that I answer the question in favour of the plaintiff with reference to the £27,000 and the £24,400 odd and the other two sums.

Solicitors, *Crawley, Arnold, & Co.; Pemberton, Garth, & Cope.*

Chan. Div. Stirling, J. } Nov. 12, 21.

PATTLE v. HORNIBROOK. (a.)

Contract—Delivery as escrow—Evidence to show no contract.

Where an agreement for a lease had been signed by the plaintiff, and was subsequently signed by the defendant, but not in the presence of the plaintiff, and the defendant subsequently never delivered the agreement to the plaintiff,

Held, that evidence might be admitted to show that there was no true animus contrahendi between the parties.

Pym v. Campbell, 4 *W. R.* 528, 6 *E. & B.* 370, *followed.*

Action.

The question in this case was whether an agreement for a lease, which had been signed by the defendant, but never delivered, should be treated as an escrow to be delivered upon a condition, or whether there was in reality no contract at all between the parties.

The facts were as follow: On the 21st of September, 1895, Brown, a clerk of a house agent in whose hands the defendant had placed a leasehold house to procure a tenant, wrote to the defendant that he had a *bonâ fide* offer for the house, and asked for information as to what he was to say in reply. The name of the tenant was not mentioned in this letter.

On the 23rd of September the defendant told his solicitors, Messrs. Nisbet & Co., of the offer, and said he would arrange a meeting between them and the proposed tenant.

He afterwards saw Brown, and directed him to arrange the meeting.

On the 24th the plaintiff, her brother, and Brown called at Messrs. Nisbet's. An agreement which had been prepared was shown to them, and signed by the plaintiff. The agreement was then handed to Mr. Nisbet, who stated in his evidence that it was his invariable custom to tell an intending tenant on such occasion that he must satisfy the landlord of his responsibility, though he could not recollect what happened at this particular interview. The signed document remained with Mr. Nisbet. Subsequently Brown asked leave to bring it to the defendant, and permission was given.

The defendant, according to his evidence, demurred when he saw that the tenant was to be a lady, and signed without intending to let the property. He kept the signed document in his own possession.

The next morning he went to the house agents, where he saw the plaintiff's brother. There was some discrepancy as to what took place at this interview. The defendant, however, in the course of it asked whether two directors of the Lighting Corporation, of which the defendant's brother was manager, would not join as security, and two names were written down on a piece of paper, which, however, was lost before the trial of the action. The defendant then went on and handed the agreement and piece of paper to Mr. Nisbet, telling him he was not to complete till he had the names joined as security. There was subsequently considerable correspondence, and ultimately the defendant broke off negotiations and granted a lease of the house to another person. The plaintiff then brought an action claiming specific performance or damages.

At the trial damages only were sought.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Brown had absconded before the trial, and could not be found.

Germaine, for the plaintiff, having opened the case,

Graham Hastings, Q.C., and *Younger*, for the defendant.—There is no contract at all. You can have no agreement till the contract has been signed and delivered up to the opposite side. They referred to: *Furness* v. *Meek*, 27 L. J. Ex. 34, 6 W. R. Dig. 44; *Pym* v. *Campbell*, 4 W. R. 528, 6 E. & B. 370; *Gudgen* v. *Bassett*, 5 W. R. 47, 6 E. & B. 986.

Germaine, in reply.—*Pym* v. *Campbell* and *Gudgen* v. *Bassett* are really in my favour. The defendant is endeavouring to import by parol evidence a condition which contradicts the whole document, *Wallis* v. *Littel*, 10 W. R. 192, 11 C. B. N. S. 368, is conclusive on this point. [STIRLING, J.—The question is, Was there a contract made?] I submit there was. *Doe d. Garnons* v. *Knight*, 5 B. & C. 671, applies. [STIRLING, J., referred to *Bowker* v. *Burdekin*, 11 M. & W. 128.] The defendant cannot say that it was a contract, but that he intended to suspend its operation by imposing a condition at variance with the contract. *In re Hoyle*, 41 W. R. 81, [1893] 1 Ch. 84. There is nothing in the evidence to show that the defendant did not mean to sign the contract in the form in which it then stood.

Cur. adv. vult.

Nov. 21.—STIRLING, J., stated the facts, and continued: With reference to the various questions of fact which arise, I think, in the first place, that Mr. Nisbet made the remark which he stated in his evidence that he usually did. This amounted in substance to an acceptance on behalf of the defendant of the offer by the plaintiff to take the house on the terms of the written agreement, subject only to the defendant being satisfied as to the plaintiff's responsibility. If, however, no such remark was made, then it seems to me that the document signed by the plaintiff must be treated merely as an offer, not accepted to any extent at the time when the plaintiff left Messrs. Nisbet's office.

Secondly, I think that as a matter of fact the defendant signed the document without intending finally to bind himself to accept the plaintiff as his tenant, or to abandon any right which he had to object to the plaintiff's responsibility. I come to this conclusion because the defendant appeared to me to be a truthful witness, and further, because his conduct on the 25th of September appears to me to be consistent with his account of what took place at the interview between Brown and himself on the 24th of September.

Thirdly, I think the effect of the plaintiff's instructions to his solicitor was this, that he was not satisfied of plaintiff's responsibility, and consequently declined to accept her alone as tenant; but was willing to accept her and two responsible persons as joint tenants on the terms in other respects of the written document.

Then arises the question whether the defendant, after signing the document, could in point of law take the course which he did. The general law is laid down thus by Erle, J., in *Pym* v. *Campbell*: "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if, in fact, he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence. . . . The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible." In the same case Crompton, J., says: "I

know of no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done. . . . The parties may not vary a written agreement; but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible." Other authorities for the same proposition are *Gudgen* v. *Bassett* and *Furness* v. *Meek*.

It is said, however, that though this may be so generally, the doctrine thus stated does not apply, because the defendant has pleaded that he delivered the paper as an escrow on a condition; and that this condition is inconsistent with the written document—viz., that the plaintiff and two other persons not named should be joint lessees, and not the plaintiff alone. It may be that the form of pleading is open to some criticism; but in substance the defence of no contract appears to me to be proved. In the first place the law as stated in *Pym* v. *Campbell* is that evidence may be given to show that there was no agreement between the plaintiff and defendant; and the defendant has satisfied me that he never intended to accept the plaintiff as sole tenant. Secondly, I think that the true effect of what the defendant and his solicitors did was to decline the plaintiff as sole tenant on the ground that the defendant was not satisfied of her responsibility, and at the same time to express willingness to accept her along with two other persons as joint tenants; or in other words the defendant refused to enter into an agreement on the terms of the written document, but at the same time made a counter offer, which was declined.

In my judgment there was no contract between the plaintiff and defendant, and the action must be dismissed.

Action dismissed.

Solicitors, *Rogers, Hartley, & Bastard; Nisbet, Daw, & Nisbet.*

Chan. Div. } Kekewich, J. } Nov. 10, 11, 12.

WALTHAMSTOW URBAN DISTRICT COUNCIL v. HENWOOD. (a.)

Local government—Service of notices by post—"Prepaid letter"—Evidence of service—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 257, 267.

In order to prove that notices have been duly served by post under section 267 *of the Public Health Act,* 1875, *it is not sufficient for the evidence adduced, to show that the letter containing the notice "was properly addressed and posted"; it must also show that the letter was prepaid.*

This was a summons taken out by the Walthamstow Urban District Council asking for (1) a declaration that they were entitled under section 257 of the Public Health Act, 1875, to a charge of £40 17s. 2d. upon certain land and premises of which the defendant was the owner, such sum being the amount apportioned by the plaintiff council's surveyor in respect of the said premises for certain expenses incurred by the plaintiffs under section 41 of the said Act and section 19 of the Public Health Acts Amendment Act, 1890; and (2) a sale to enforce the said charge.

Notice of the apportionment referred to in the summons had been served on the defendant on the 4th of July, 1895; and on the 31st of October, after the expiration of the three months allowed by section 257 of the Act for the service of a written notice disputing such apportionment, a further notice was sent to the defendant, demanding payment of the amount apportioned. The defendant made default in payment, and these proceedings were commenced.

The defendant then filed an affidavit stating that on the 5th of July, 1895, after receiving notice of the apportionment, he wrote to the chairman of the plaintiff council a letter disputing the amount settled by the plaintiff's surveyor to be due from him. The clerk of the council filed an affidavit in reply stating that he could find no trace whatever of the defendant's letter or of its receipt by the plaintiff council, or by the chairman or clerk. The defendant then filed a further affidavit alleging that the letter was addressed to the chairman of the plaintiff council at their offices, and that he put it into the post himself.

Fleetwood Pritchard, for the defendant, took the preliminary objection that as the defendant had served a written notice disputing the apportionment within the time allowed by the statute, the apportionment was not binding upon him, and could not therefore be dealt with on the present summons, for, in the circumstances, the proper tribunal to fix the amount was a court of summary jurisdiction.

Naldrett, for the plaintiffs.

KEKEWICH, J., after stating the facts and referring to the provisions of section 267 of the Public Health Act, 1875, continued: It is a question to me whether the notice to the chairman is strictly sufficient, but I will not deal with that point. I base my decision on the fact that the defendant does not swear that he posted the notice in a prepaid letter. By section 267 of the Act it is made a condition precedent that the letter should be prepaid, and unless it is prepaid the notice is not good. The result is, therefore, that the preliminary objection fails, and I must hear the application on its merits.

On the merits of the case his lordship subsequently made the declaration asked for by the summons.

Solicitor for the plaintiff, *G. Houghton.*

Solicitor for the defendant, *H. H. Wells.*

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

House of Lords.

From C. A. } (England). } July 31, 1896.

SCHOLFIELD v. EARL OF LONDESBOROUGH. (a.)

Bill of exchange—Acceptance with blank spaces—Alteration—Forgery—Negligence—Stamp—Liability of acceptor—Bill of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 64, *sub-section* 1.

The acceptor of a bill of exchange does not become liable to an indorsee for value for a sum beyond the amount of his acceptance because the form of the document and the stamp used admit of a forgery in the hands of a dishonest person.

Young v. Grote, 4 *Bing.* 253, *considered and commented upon.*

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Decision of the Court of Appeal (43 *W. R.* 331, [1895] 1 *Q. B.* 536) *affirmed.*

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and Rigby, L.J.; Lopes, L.J., dissenting), 43 W. R. 331, [1895] 1 Q. B. 536, affirming the judgment of Charles, J., in favour of Lord Londesborough.

The facts were shortly as follow:—The action was brought by the appellant against the respondent, the defendant in the action, as the alleged acceptor of a bill of exchange for £3,500. The bill had been drawn by one Sanders, and accepted by the defendant. The bill as originally drawn and accepted was for £500, and afterwards, before indorsement, was fraudulently altered by the drawer into a bill for £3,500. The bill was dated London, the 8th of September, 1890, and bore a £2 stamp sufficient to cover £4,000; sufficient spaces had been left for the alterations. The defendant, after accepting it, handed it back in the ordinary course to the drawer; and then Sanders, having altered it, indorsed it, and it subsequently came into the hands of the plaintiff, the present appellant, who took it *bonâ fide* and for value.

Charles, J., held that the defendant was not estopped by having accepted the bill in the form in which it was originally drawn from setting up the subsequent alteration as a defence to the action for the full amount, but was liable for the £500, and that as this sum had been paid into court he was entitled to judgment.

On appeal Lord Esher, M.R., and Rigby, L.J., held that the acceptor of a bill owes no duty to subsequent holders not to accept a bill drawn in such a form as to facilitate fraud, and if there was such a duty there had been no negligence in this case, and even assuming negligence it was not the proximate cause of the loss. Lopes, L.J., took a different view, but in the result the judgment of Charles, J., was affirmed.

Against this decision the plaintiff appealed.

Asquith, Q.C., and E. Morten, for the appellant.

Jelf, Q.C., and *A. T. Lawrence* (*C. K. Francis* with them), for the respondents.

The arguments used and cases referred to sufficiently appear in the judgments.

LORD HALSBURY, L.C.—In this case the plaintiff below (the appellant here) brought an action against the respondent on what purported to be a bill of exchange for £3,500. The respondent's name attached to the bill in question was genuine. He had, in fact, accepted a bill for £500, but by fraudulent alteration, amounting to forgery, the amount for which the respondent accepted was increased to the sum sued for.

It is not contended that the bill is not a forgery, and if nothing else appeared it would, of course, be a sufficient defence for the acceptor to plead and prove that he never accepted any such bill as that for which the plaintiff brought his action. But it is contended that the form of the bill was such that the respondent was negligent in accepting it.

The bill as originally accepted was so far in ordinary form and perfect that but for some criminal act it was, in its then form, a complete bill of exchange, having nothing to be added to or taken from it. It is said, indeed, that certain spaces were left which gave opportunity for the insertion of the added words and figures, and if by that is meant that the words and figures were not written so closely together as to prevent the insertion of other words and figures, the observation is true. But when it is said that certain spaces were left, it is to be remembered that there was nothing unusual or calculated to excite attention in the intervals between the written words and figures by which the bill was made. As a matter of fact, the person who drew the bill intended to draw it in such a way as to enable him to fill up the intervals between the letters and figures in question; but, to my mind, there was nothing suspicious in the appearance of the bill when tendered to the respondent for acceptance calculated to put him on his guard.

I cannot myself understand why the particular form of fraud adopted in this case should have any different operation in giving validity to a forged instrument rather than other forms of fraud to which instruments are subject. I am not aware of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime.

A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket-handkerchief to hang out of his pocket, but could recover against a *bonâ fide* purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt could be retained by a *bonâ fide* purchaser for value, notwithstanding that they had been previously stolen; but the same result would follow equally whether the owner had been careful or careless in the custody of his goods.

The truth is that the whole doctrine that facilitating forgery, or giving opportunity for forgery, or so acting that a forgery is a possible result, affects the validity of the instrument forged, may be traced, in English law at all events, to the case of *Young* v. *Grote*, 4 Bing. 253, and probably beyond, to certain doctrines of the Roman civil law, which, to my mind, form no part of the law merchant so far as it exists in English jurisprudence. That case has been pushed so far in argument that I think the time has come when it would be desirable to deal with it authoritatively by your lordships, and to examine how far it ought to be quoted as an authority for anything. It is to be observed that when one looks at the judgments delivered, there is an inextricable confusion, not only among the different judges, but in the judgment of each judge in turn. Best, C.J., says: "If Young, instead of leaving the cheque with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up." So that here the negligence is made to consist, so far as the drawer was concerned, in leaving a cheque, already signed in blank, with a female unacquainted with business, and in accordance with this view the learned judge goes on to distinguish *Hall* v. *Fuller*, 5 B. & C. 750, because, he says, the alteration in that case was not made by the drawer's clerk nor a person improperly trusted by him, but by an entire stranger who accidentally became possessed of the cheque. Park, J., again distinguishing *Hall* v. *Fuller*, says: "Can any one say that the cheque signed by Young is not a genuine order? I say it is. The cheques left by him to be filled up by his wife when filled up by her became his genuine orders." This is an intelligible ground; but the learned judge immediately adds that the arbitrator had found negligence on the part of the drawer, and he says he concurs, and then goes on: "He leaves blank cheques in the hands of his wife, who was ignorant of business, but having left them with her to be filled up as the exigency of the moment might require, they became upon her issuing them his genuine orders." It is manifest that the learned judge oscillates between the two views. In the perfectly sound view upon which

he decides in the defendant's favour he adds the absolutely irrelevant statement that the cheques were left in the hands of the wife, who was ignorant of business. Burrough, J., seems only to deal with the question of negligence, and says the blame is all on one side; while Gaselee, J., points out the circumstances negativing the general authority of the clerk, who was the actual forger, either to fill up cheques or to receive money from the bank; these circumstances, he says, might have strengthened the case. It is not very surpising that a variety of reasons have been given by various judges for not disagreeing with the case. The arbitrator had decided that there was negligence, and Park, J., as is apparent, puts forward, and justly puts forward, the argument that by the act of the drawer's wife that cheque became the husband's genuine order. Shortly put, the argument is that he attached his genuine signature, leaving it to be filled up by his wife, and, as the learned judge emphatically says, "When filled up by his wife they became his genuine orders." If that is a true view of the case—and that is the learned judge's reasoning—it could not be doubted but that it was the drawer's genuine order.

I am not concerned to discuss whether the particular mode in which a written order, which was given by the banker to his customers for the purpose being filled up in the usual way before signing it, may afford ground for saying that the banker was misled by his own customer. If, to use Lord Cranworth's phraseology, the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled.

I do not say that had I been the arbitrator I could have agreed that there was in the particular case any such neglect as would have come up to this proposition; but the principle, as Lord Cranworth says, is a familiar one, though it may not have been properly applied to the then state of facts. Your lordships have acted upon it in *Ireland* v. *Livingstone*, L. R. 5 H. L. 395, and in *Vagliano* v. *Bank of England*, 39 W. R. 657, [1891] A. C. 107, and the minuteness with which the arbitrator described the printed forms of drafts which were supplied by the bankers to their customers indicates what was in his mind as to what I will describe as an agreed or assumed course of business between banker and customer, and under those circumstances the finding of negligence which was conclusive upon the court, might have justified it in assuming that the facts brought it up to the proposition which Lord Cranworth suggests; but, unfortunately, I think Best, C.J., adopted the argument presented to him that Pothier might be quoted as an authority decisive of the case; and I think some of the confusion that has arisen upon the frequent occasions when the case has been quoted, has resulted from a misapplication of what Pothier in fact has said, and the more serious assumption that what he has said forms any part of the mercantile law of England.

Now Pothier, in his Treatise on Bills of Exchange, and commenting on Scacchia, a Roman lawyer of the seventeenth century, gives a variety of illustrations, sometimes adopting and sometimes modifying the rules which Scacchia lays down. [His lordship referred at length to Scaccise, Tract. de Commer., pp. 390, 391, and to Pothier, vol. iv., pp. 516-518.]

I do not myself think that either the original by Scacchia or the commentary by Pothier are relevant to the matter in hand. We are not dealing here with either "mandant" or "mandatory," and I do not think that it is part of the commercial law of England howsoever applied; and before accepting the modified doctrine of Pothier it is well to see what that doctrine is.

That learned author, who gives the case of the forger who has added a cipher to the sum written in figures, and gives it expressly as an example illustrative of his principle, proceeds to show that it is founded on certain pronouncements of the civil law, and proceeds accordingly to show that a slave sold with a knowledge that he was a thief makes his master responsible to the purchaser for any theft he may commit.

M. Buguet, the learned commentator, points out in the note that it is impossible to render the drawer responsible for an act to which he is no party, and it would be impossible to particularize all the precautions that it would be necessary to take. The language used, *la faute du tireur*, may be satisfied by a great many things which certainly the English law would not recognize as an answer, but which the language of Pothier would obviously include.

The careless keeping of a cheque-book, like the careless keeping of the seal in the *Bank of Ireland* v. *Trustees of Evans' Charities*, 3 W. R. 573; 5 H. L. Cas. 389, might well satisfy the words *faute du tireur*, and I confess I should regard with great apprehension a decision that anything that a jury should regard as *faute du tireur*, should render a forged instrument valid.

As M. Bugnet truly says, it is impossible to particularize all those things that might have to be considered—the sort of paper, the ink. There are well known precautions which, for greater security, some banks take to prevent the forgery of their notes. There is some colour which prevents, or at all events renders difficult, imitations by photography; and is it to be in each case a question for the jury whether this or that precaution was omitted in drawing a bill, or in accepting it when drawn?

It seems to me it would be a very serious proposition to lay down that such questions should be permitted to arise when dealing with such an instrument as a bill of exchange; and other questions would then arise, as, I think, was pointed out in the course of the argument—a minute examination of every bill tendered for acceptance, and a consideration of how far its form might give an opportunity to a forger to forge and escape detection.

This very case has in almost precisely similar circumstances been already decided in the *Adelphi Bank* v. *Edwards*, and I regret very much that that case has not been reported. I entirely concur with what Lindley, L.J., said in that case, that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of Bovill, J., in a former case, *Société Générale* v. *Metropolitan Bank*, 21 W. R. 335, that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land.

It appears to me that even the modified rule laid down by Pothier, considering the principles on which that learned author himself relies for its acceptance, is not and never has been the law of England. I think this appeal ought to be dismissed with costs.

Lord WATSON.—The appellant, who is the onerous holder of a bill of exchange purporting to be for £3,500, seeks in this suit to recover that sum from the respondent. [His lordship stated the facts.] The case was tried before Charles, J., upon the facts

already stated, with these further admissions made by the appellant: (1) That the respondent was ignorant of bill transactions; (2) that he knew nothing about the stamp laws; and (3) that he had good reason to place implicit confidence in the honesty of Scott Sanders. With regard to the first and second of these admissions, I must observe that, in my opinion, ignorance of bill transactions or of the stamp laws will not, in a question with an onerous and *bonâ fide* holder, absolve persons who, notwithstanding their ignorance, choose to engage in such transactions, from the fulfilment of any duty or obligation which the law imposes upon the parties to a bill of exchange. The reasonable belief of the respondent in the honesty of the person by whom the bill was drawn and presented to him for acceptance might, if he was under a legal duty to take precautions against its fraudulent alteration, be an element of importance in considering whether, as matter of fact, he acted negligently, as the appellant alleges.

The appellant did not maintain that the respondent either directly authorized, or meant to authorise, Scott Sanders to alter the amount of the bill. Nor did he maintain that the respondent had by his subsequent conduct homologated or adopted the alteration. He contended that the law merchant imposes upon every person who either draws or accepts a bill of exchange with a view to its circulation the duty of taking reasonable precautions, in order to prevent the possibility of its amount being fraudulently increased; that the respondent negligently failed to perform that duty, inasmuch as he accepted a bill written upon a stamp sufficient to cover the altered amount, and having spaces left blank in the writing which enabled the drawer to fill them up in such a manner as to effect and at the same time to conceal his fraud; and that, by reason of such negligence, the respondent is estopped from denying his liability for the full amount of £3,500 appearing on the face of the bill.

Charles, J., who appears to have relied upon the authority of *Young* v. *Grote*, held in point of law that, if the acceptor of a bill of exchange "signs it negligently in such a shape as to render alteration a likely result, he is responsible on the altered instrument." Upon the facts of the case the learned judge came to the conclusion that the respondent had not been guilty of negligence; but in respect that the alteration of the bill was not apparent, he found that the appellant was entitled to the money which had been paid into court, and entered judgment for the respondent. His decision was affirmed, but not upon the same grounds, by a majority of the Court of Appeal. The Master of the Rolls and Rigby, L.J., were of opinion that, although the rule contended for by the appellant might prevail as between a customer and his banker, it was not applicable according to English law as between the acceptor of a bill of exchange and subsequent holders. Their lordships were further of opinion that the rule, assuming it to have previously existed, was abolished by section 64 of the Bills of Exchange Act, 1882. Lopes, L.J., dissented, being of opinion that the principle of *Young* v. *Grote* applied as between the acceptor and an indorsee acquiring right to the bill after his acceptance; and his lordship also, differing from Charles, J., held that the respondent had been negligent, and that the appellant ought, therefore, to have judgment for the full amount of the bill as fraudulently altered.

In these circumstances it becomes necessary to examine the authorities which were noticed by the learned judges or were cited in the able argument addressed to us on behalf of the appellant. Such of these authorities as really bear upon the doctrine propounded by the appellant are few in number. Of the rest, some have a very distant relation to it; whilst others are irrelevant.

The basis of the appellant's argument is to be found in *Young* v. *Grote*. In that case the customer of a bank signed several blank cheques and gave them to his wife, to be filled up and negotiated by her as she required. In one of these the sum of £50 was inserted, in her presence and at her request, by a clerk, to whom she then gave the cheque in order that he might get the money for her. In writing the sum the clerk had left spaces with fraudulent intent, so as to enable him to increase the amount to £350, which was paid to him by the banker. Best, C.J., and three other learned judges of the King's Bench held, in these circumstances, that the banker was entitled to take credit, in account with his customer, for the full amount which he had paid upon the cheque.

The doctrine laid down by Pothier (*Traité du Contrat de change*, Chap. IV., Art. III., s. 99) was referred to with approval by some of the learned judges. In that passage the author deals with the mutual rights and obligations arising out of the contract of mandate which subsists between a banker and the mandant whose cheques or orders he has undertaken to pay. He notices the rule of the Roman law, which had been followed by Scacchia, to the effect that *mandator debet refundere mandatorio quicquid ei inculpabiliter abest ex causâ mandati.* According to that rule the customer would be liable for the amount of a fraudulently altered cheque in every case where the banker could not have detected the alteration by the exercise of reasonable care. Pothier qualifies the rule, and in so far favours the customer, by limiting his liability to those cases in which his own negligence in drawing the cheque has given the opportunity for its alteration.

The reported opinions of the learned judges leave it doubtful whether their decision in *Young* v. *Grote* went upon the doctrine of Pothier, or upon the ground that the customer by signing a blank cheque had undertaken liability for any sum which might be filled in before it was presented for payment. I think the Lord Chancellor (Cranworth) must have had the first of these grounds in view when he said, in *Bank of Ireland* v. *Trustees of Evans' Charities*: "Now, the case of *Young* v. *Grote* went upon that ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the cheque for £350; and if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that as between them is the same as if he had signed it." On the other hand, Lord Wensleydale (then Parke, B.), when delivering the opinion of seven judges of the Exchequer Chamber in *Robarts* v. *Tucker*, 16 Q. B. 560, indicates that *Young* v. *Grote* was decided upon the second ground. After referring to the facts of the case, he observed: "This was in truth considering that that customer had, by signing a blank cheque, given authority to the person in whose hands it was to fill up the cheque in any way the blank permitted."

Guardians of Halifax Union v. *Wheelwright*, 23 W. R. 704, L. R. 10 Ex. 183, appears to me to be a decision in entire conformity with the doctrine of Pothier. The guardians were in the habit of passing orders upon their treasurer, who was local agent of the bank in which their money was deposited. Some of these orders, written by their clerk, and thereafter signed by the guardians, were drawn by the clerk in such a way that he was enabled to increase

their amounts before he presented them for payment. The court held that the treasurer was in the same position as if he had been their banker; and that the guardians were estopped, by their negligent drawing of the orders, from maintaiaing that he had not their authority to pay the full amount of these orders, as fraudulently increased.

In my opinion *Young* v. *Grote* can have no bearing upon the present case, if it was decided upon the ground that the customer, by signing a blank cheque, had given implied authority to fill it up to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in *Young* v. *Grote* was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange.

The duty which the appellant's argument assigns to an acceptor is towards the public, or what is much the same thing, toward those members of the public who may happen to acquire right to the bill after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on any sound legal principle. In many if not most cases which occur in the course of business, the bill is written out by the drawer, and sent by him to the acceptor, who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very serious complications in commercial transactions. Besides, it is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate; although there may be an exception in the case where one of the parties to the instrument has, either by express agreement or by implication established in the law, become bound to use such precautions. I am therefore unwilling, in the case of an acceptor to affirm the doctrine upon which the appellant relies, unless it can be shown to be established by authority as part of the English law merchant.

I shall briefly refer to four decisions, because they are either cited in argument, or have been discussed, in this or similar cases by the court below. All of these cases related to bills of exchange; but in none of them had there been any alteration of the amount for which the acceptor signed.

In *Ingham* v. *Primrose*, 7 C. B. N. S. 82, 7 W. R. C. L. Dig. 12, the facts were, that a blank acceptance was returned to the acceptor in the same condition in which it had been issued by him. He tore the bill in two, and threw away both parts in the street, where they were picked up by a passer-by, who pasted them together and negotiated the restored bill. The acceptor was found liable to an onerous holder, not because he had signed a bill which facilitated fraud, but upon the obvious consideration that he had negligently put into circulation a negotiable document which had not been properly cancelled.

Arnold v. *Cheque Bank*, 24 W. R. 759, 1 C. P. D. 578, had its origin in these circumstances. A firm in New York purchased there a genuine bill on London, which they indorsed to an English creditor, and enclosed in a letter addressed to him. The letter enclosing the bill was stolen from their letter-box by one of their clerks; and the stolen bill was paid by the Cheque Bank in London upon a forged indorsation. It was held that such payment did not afford a good defence to the bank against a claim by the genuine indorsee and true owner of the bill. No question arose as to any duty owing by the acceptor of the bill.

In *Baxendale* v. *Bennett*, 26 W. R. 899, 3 Q. B. D. 525, it was decided that an acceptor was not liable to the holder upon a bill accepted by him in blank, which had been stolen from his drawer and filled up and circulated by the thief. A different decision was given in *London and South-Western Bank* v. *Wentworth*, 28 W. R. 516, 5 Ex. D. 96, where a bill signed by him in blank was entrusted by the acceptor, for the purpose of its being negotiated, to a person who fraudulently filled in a larger sum than the acceptor intended, disposed of the bill, and appropriated its proceeds. The difference of result in these two cases was plainly due to the fact that in the one the acceptor had not, and in the other he had, issued the bill as a negotiable document. But in neither case did the decision of the court turn upon the supposed duty of the acceptor to guard against fraudulent alterations of the bill.

I shall now proceed to consider the remaining and only English authorities which appear to me to be in point. Before doing so, I think it is not immaterial to observe that Pothier, who is the real author of the doctrine relied on by the appellant, in the passage cited by the learned judges who decided *Young* v. *Grote*, only applies it to the case of a banker and his customer. But in Art. III. of the same chapter of his treatise the learned author discusses the nature of the contract which is constituted between the drawer and the acceptor of a bill which he asserts to be un *vrai contrat de mandat, mandatum solvendæ pecuniæ*. I think it is apparent from the context of Art. III. that the rule laid down by Pothier in section 99 was meant by him to apply, not only as between banker and customer, but as between a drawer and an acceptor who pays in compliance with his drawer's mandate. But the rule has no application to parties between whom there is no subsisting contract of mandate. According to its terms, an acceptor, who paid the full sum appearing upon the face of a bill which he knew or had reason to believe had been fraudulently increased after his acceptance, would have no right to recover the increased amount from his drawer.

It was argued that certain expressions used by Lord Blackburn (at that time Blackburn, J.) in *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175, tend to show that the rule which Pothier applies to a customer who draws a cheque upon his banker has application also as between the acceptor of a bill and possible future holders. His lordship there said, with reference to *Young* v. *Grote*: "It may be that the case is to be supported upon some of the grounds there stated or upon the broader ground apparently supported by the authority of Pothier in the passage cited in *Young* v. *Grote*, that the person putting into circulation a bill of exchange, by the law merchant

owes a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary to inquire how that may be." Lopes, L.J., infers from these words that "it is impossible not to see that in the case of negotiable instruments Blackburn, J., thought the duty did exist." I am unable to assent to that inference. The words convey anything but a hearty approval of the decision in *Young* v. *Grote*, and at the most they do not even amount to *obiter dicta*. They contain no expression of judicial opinion, and do nothing more than state the tenor of an argument which the noble and learned lord had not found it necessary to consider. One thing seems certain, namely, that his lordship had not examined the text of Pothier, which contains no such doctrine as his words impute.

Several points were raised for the decision of the Court of Common Plea in *Société Générale* v. *Metropolitan Bank* (*Limited*), 21 W. R. 335, and one of these came very near to the question which your lordships have to consider in this case. The time of payment of a bill of exchange had, after issue, been fraudulently altered from eight to eighty days after date. The alteration being material, it was sought to make the acceptor liable, upon the ground that he had negligently left a vacant space in the bill, between the words "eight" and "days," which enabled the fraudulent holder to add the letter "y" without risk of the fraud being detected upon inspection of the document. The court, consisting of Bovill, C.J., with Keating and Brett, JJ., came to the conclusion that the acceptor was not liable. None of the learned judges affirmed that there was any duty incumbent upon the acceptor to take precautions against forgery; but, on that assumption, they all held that there had been no negligence. Two of them used language which does not appear to me to be consistent with the existence of such a duty. The Chief Justice observed: "Persons are not to be supposed to commit forgery, and the protection against such a claim is the law of the land, not the vigilance of parties in excluding all possibility of committing it." The present Master of the Rolls said: "I not only protest that there was no negligence, but say that no judge ought to leave to a jury the fact as evidence of negligence. But there is no duty on any one to suppose that those against whose character there is no imputation will commit forgery whenever the opportunity occurs."

The next and the last of the English authorities which raised the same questions of law and fact which occur in this appeal is *Adelphi Bank* v. *Edwards*, decided in the year 1882. The case has not been reported: but in the course of the argument your lordships had the advantage of considering the shorthand writer's notes of the opinions delivered by the learned judges, both in the court of first instance and in the Court of Appeal. From these it appears that the defendant Edwards had accepted a bill for £22 10s., which was written on a stamp sufficient to cover £300. Spaces were left in the writing, which enabled a fraudulent holder to increase the amount of the bill to £222 10s. by inserting the figure "2" between the letter "£" and the figures "22" in the corner of the bill, and by adding the words "two hundred" at the end of one line, and the word "and" at the beginning of the next. The plaintiff bank, having paid the increased amount, sued the acceptor, upon the same arguments which have been submitted to your lordships on behalf of the appellant. Chitty, J., before whom the case was tried, was of opinion that, upon the law contended for by the plaintiff, the defendant had not been guilty of negligence. At the same time, the learned judge did not accept that law. He said: "The defendant, in my opinion, as a prudent man of business, was not bound to contemplate that the bill was coming into fraudulent hands, nor that by the perpetration of a crime it would be altered in the manner in which it has been altered." In the Appeal Court, the learned judges took the same view of the facts as Chitty, J., but they also negatived the existence of any rule or principle requiring the acceptor of a bill to exclude facilities for its alteration. Baggallay, L.J., said: "It seems to me impossible to say that there was any duty on the part of the acceptor of this bill towards the party who might subsequently become the holder of the bill, so to criticise, and so to examine the bill before he signed, as to put it out of the possibility of any additional words being afterwards inserted in it." The present Master of the Rolls (then Brett, L.J.) stated forcibly the same opinions, which he has expressed in stronger language and at greater length in this case. Lindley, L.J., after referring to *Young* v. *Grote* and "that class of cases," proceeded thus: "We cannot say there was negligence here, unless we go the whole length of saying that it is negligence to sign a negotiable instrument so that somebody else can tamper with it. I cannot go that length. I think it would be wrong. There is no authority which compels us to do anything of the sort."

Two decisions of the Court of Session belonging to a period when the Commercial Law of Scotland was in its infancy, *Grahame* v. *Gillespie*, Morr. Dict. 1453, and *Pagan & Hunter* v. *Wylie*, Morr. Dict. 1660, were founded on by the appellant. Both cases were decided upon what I consider a false analogy, namely, that the acceptor of a bill for a definite amount, which is capable of being fraudulently increased by the insertion of additional words and figures, stands in exactly the same position as the acceptor of a blank bill. The American case of *Garard* v. *Haddan*, 67 Pennsylv. (17 Smith) 82, which was also cited for the appellant, is open to the same criticism.

The result of the English authorities is, in my opinion, decidedly adverse to the appellant. Before the present action was brought, the rule for which he contends had, so far as I have been able to find, never been enforced in an English court or affirmed by an English judge. On the contrary, it had been disapproved by Bovill, C.J., and the present Master of the Rolls in *Société Générale* v. *Metropolitan Bank*; and the case of *Adelphi Bank* v. *Edwards*, in which four judges were unanimous, is a direct precedent against it. It is, no doubt, within the competency of this House to overrule the decision in *Adelphi Bank* v. *Edwards*; but I see no reason why your lordships should do so. The doctrine of Pothier, out of which the contention of the bill-holder in this and previous litigations has grown, is founded upon reasons which have no application to any question between a drawer or acceptor and a holder acquiring right to the bill after acceptance; and I know of no principle of law which would warrant its extension to that case.

I desire to add that, had your Lordships thought fit to accept the legal argument of the appellant's, I should not have been of opinion that the claim which he makes in this action was excluded by section 64 of the Bills of Exchange Act. That clause admits an action for the altered amount of the bill, when the acceptor has authorized the alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorize the fraud committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had

"authorized" the fraudulent alteration within the meaning of section 64.

For these reasons, I also am of opinion that the judgment appealed from ought to be affirmed.

Lord MACNAGHTEN.—Charles, J., and Lopes, L.J., are both of opinion that a person who accepts a bill of exchange intending that it should be put into circulation owes to every one who may become the holder a duty which they define or describe as the duty "not to be negligent with regard to the form of the instrument."

Agreeing so far, the opinions of the learned judges diverge at this point.

It is part of the history of the case that the bill presented to Lord Londesborough for his acceptance was designed to facilitate a premeditated forgery. But Charles, J., finds that under the circumstances the instrument as presented would not have aroused suspicion in the mind of a reasonably prudent person; and therefore he comes to the conclusion that Lord Londesborough was not guilty of that sort of negligence which would make him liable for the consequences of the crime afterwards consummated. Lopes, L.J., on the other hand, thinks that the bill before acceptance presented such obvious opportunities for alteration, and such a combination of suspicious circumstances, as ought to have attracted the attention of any man of ordinary prudence. He considers that Lord Londesborough by his want of care and caution "enabled" the drawer to commit the forgery. Thinking that forgery was the result "to be anticipated," he holds that Lord Londesborough must suffer for his neglect.

Assuming the existence of the duty which both these learned judges would cast upon the acceptor of a bill of exchange, I should be disposed to agree with Charles, J., rather than with the Lord Justice. To me it seems extravagant to suggest that the acceptor of a bill is bound to be familiar with the different steps in the scale of stamp duties, and to recognize a stamp of a higher grade than is required for the purpose in hand as an indication of fraud. With regard to the gaps, or vacant spaces in the bill as presented to Lord Londesborough. I think a person of ordinary prudence who had confidence in the man with whom he was dealing, and who never had had his attention called to this species of fraud, might well have passed them by unnoticed, or if he had happened to notice them might have thought them of no moment. I cannot think that there is any rule which forbids you to give a person with whom you are acquainted, and whom you believe to be honest, some little credit for honesty even when he comes for your promised acceptance to a bill of exchange. I cannot think that even on such an occasion you are bound to scan his handiwork with the eye of a detective, as if it were the production of a would-be forger. The prevention of crime is perhaps better left to the operation of the criminal law.

However that may be, I agree with your lordships in thinking that the supposed duty does not, in fact, exist.

Both the learned judges who are in favour of the doctrine refer it to "the principle of *Young* v. *Grote*." *Young* v. *Grote* is a case which has excited as much diversity of opinion as any case in the books. It has given rise to various explanations not altogether uniform or consistent. That circumstance of itself is regarded by some judges as a badge of merit and a passport to the confidence of the profession. But when you are in search of a principle, the effect is rather embarrassing. And therefore, it is with some diffidence that I venture to inquire, What, after all, is the true principle of *Young* v. *Grote*?

In *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, 3 W. R. Dig. 143, in 1854, and again in *Bank of Ireland* v. *Trustees of Evans' Charities*, in 1855, Cranworth, L.C., had occasion to comment on *Young* v. *Grote*. In the former case, referring to *Young* v. *Grote*, he says: "Whether the conclusion, in point of fact, was in that case well warranted is not important to consider. The principle is a sound one, that when the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine."

If that be the principle of *Young* v. *Grote*, I do not think it helps the appellant much. It will be observed that Lord Cranworth treats the relation of banker and customer as the governing feature in the case. That relation is, I think, a long way off from the connection between the acceptor of a bill and a subsequent holder.

The observations of Parke, B., on *Young* v. *Grote*, in delivering the opinions of the judges in *Bank of Ireland* v. *Trustees of Evans' Charities*, are much to the same effect. Nor do I think that there is any difference in substance between the views expressed by Lord Cranworth himself in the two cases. In the latter case he seems to treat the decision in *Young* v. *Grote* as founded on estoppel, though, as Cockburn, C.J., points out, *Young* v. *Grote* was "decided without reference to estoppel at all" (2 Ex. 189).

Other judges, including Parke, B., himself, in the earlier case of *Robarts* v. *Tucker* have held that *Young* v. *Grote* is to supported on the ground that the customer had by signing a blank cheque given authority to anyone in whose hand it was to fill it up in any way the blank permitted. If this is the real ground of the decision, it has still less bearing on the present case, where nothing further was required to be added after Lord Londesborough's acceptance to give effect or negotiability to the instrument.

Whatever may be the better ground for supporting the decision in *Young* v. *Grote*, it is obvious, on referring to the report in Bingham, that the court went very much on the authority of the doctrine laid down by Pothier, that in cases of mandate generally, and particularly in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder.

The other case on which much reliance was placed on the part of the appellant was the case of *Swan* v. *North British Australasian Co.*, which was cited for the observations of Blackburn, J. With the comments which have been made on those observations by my noble and learned friend Lord Watson, I quite agree. If the report is correct, the reference to Pothier is certainly inaccurate.

Passing from authority, I must say that I am not at all persuaded that the contention on the part of the appellant can be supported on principle or on grounds of convenience. It was said that the negotiability of bills of exchange would be seriously impaired if persons who act as Lord Londesborough acted are not to be held liable for all the consequences of their want of caution. But I must say I was very much struck with some observations which fell from one of your lordships during the argument that the consequences to the transaction and dispatch of mercantile business would be serious indeed if it were laid down that a person under obligation to accept a bill was at liberty to refuse or delay acceptance on the ground that there was something in the form of the

instrument of which a skilful forger might perhaps take advantage. After all, it is the drawer of a bill of exchange who has control over its form: the obligation of the acceptor is to pay the bill at maturity. Censorship over the form of the instrument is, I think, no part of his duty.

I am of opinion that the appeal must be dismissed.

Lord MORRIS.—I am of the same opinion. The liability of the defendant must arise from either, first, his complicity in the fraud; or, secondly, from some contractual relation, express or implied, between him and the holder of the bill of exchange; or, thirdly, from some duty he owed to the holder. There is no complicity by the defendant; there is no privity between the plaintiff and the defendant from which any contract can be spelt out. Well, is there any duty on the acceptance of a bill to a subsequent holder that the acceptor should scrutinize the bill presented to him for acceptance? In my opinion, none beyond this—that he should see that he accepts a bill filled up, because if he accepts a bill in blank that implies an authority to the person getting the acceptance to fill up the amount.

In *Young* v. *Grote* the acceptance was in blank. Even if well decided on its particular facts, and a case between banker and customer, I fail to see how it governs this case, where the defendant accepted a regularly filled up bill. If the defendant could be held liable, it appears to me an indorser would also be bound to enter on a scrutiny of the bill in order to protect himself from a subsequent holder. This case is an attempt to impose a new duty on an acceptor of a bill of exchange. The doctrine of estoppel binds an acceptor who accepts a blank bill, because by doing so he is precluded from setting up as a defence that he did not authorize the filling up; that doctrine has no application to the present case.

Lord SHAND.—I concur in thinking the appeal ought to be disallowed.

The weight of judicial opinion and authority is clearly against the contention of the appellant, unless indeed it could be shown that the case of *Young* v. *Grote* had a direct application, and that the grounds of that decision were applicable to the facts which have been here proved.

The question here raised was expressly decided in 1882 against the view contended for by the appellant, in the case of the *Adelphi Bank* v. *Edwards*, in which the judgment of Chitty, J., was unanimously affirmed by the Court of Appeal; and, besides the opinion of Bovill, C.J., and the present Master of the Rolls in the case of the *Société Générale* v. *Metropolitan Bank*, the same judgment has now been repeated by a majority of the Court of Appeal.

As to the case of *Young* v. *Grote*, I find nothing in the grounds of the judgment which supports the proposition that an indorsee of a bill of exchange for value has a legal claim against the acceptor, against whom no want of *bonâ fides* can be alleged, for a sum beyond the amount for which the acceptance was given, on the ground of negligence in his having given his acceptance to a bill in such a form and impressed with such a stamp as enabled the drawer to commit a forgery by enlarging the amount for which the acceptance was granted in such a way as to escape detection by the indorsee. The case of *Young* v. *Grote*, between a banker and his customer, was one in which there was the relation of parties contracting with each other. It appears to me that the ground of decision, as reported, was in conformity with the limited doctrine of Pothier that this relation inferred, if not expressly, at least by implication, the duty and obligation on the customer's part, in issuing cheques on his banker to third parties, to take care that these were not in such a form as to give the means of enlarging their amount without this being readily detected. In that view of the case the decision does not apply here, where the acceptor and the indorsee of the bill were strangers to each other, having no relation as contracting parties, which could imply the duty and obligation of the banker's customer to the banker. If, as has been suggested, the decision in *Young* v. *Grote* turned on the fact that the customer had signed cheques wholly blank in amount, by which the person acquiring possession might be held to have a mandate to fill in any sum he chose, the case has no application to the present. The acceptor here signed no bill blank in the sum, for there was expressed in writing in the body of the bill the amount for which he agreed to undertake liability.

I agree with your lordships in holding that there is no sound reason or legal principle to support the view that, on the ground of negligence, an acceptor of a bill becomes liable to a subsequent holder for a sum beyond the amount of his acceptance because the form of the document and the stamp used admits of a forgery in the hands of a dishonest person, such as occurred in this case. As to the stamp, I do not believe that in the course of ordinary business persons accepting bills scrutinize the paper on which a bill is written to see the amount it will carry; and I am certainly not prepared to say they are in any way required, as a matter of duty or obligation, to do so. Stamps of higher value than necessary must be often used when it is difficult or inconvenient to get a stamp of the precise value wanted. As to the form of the document, I think an acceptor, while himself acting in *bonâ fide*, who has the sum for which he has agreed to grant his acceptance expressed in the body of the bill is not called upon to anticipate and provide against forgery. To hold the contrary would lead to great inconvenience in business. An acceptor scrutinizing a bill might think it left room for a fraudulent addition, and might refuse acceptance to the serious injury of the drawer residing at a distance or abroad, or of a drawer who might have indorsed the bill for value given before acceptance, and he might be involved in litigation and found to have been unduly apprehensive and in the wrong; while after acceptance numerous and difficult questions might frequently arise as to what constituted negligence in particular cases like the present, in which two learned judges have differed on the point.

I think the appellant has failed to show that his contention is founded on sound legal principles; and though cases of successful fraud and forgery will, no doubt, occur from time to time, notwithstanding the risk of penal consequences incurred by the forger, yet a decision giving effect to the appellant's argument would, I think, lead to so great inconvenience in business and so much litigation as to create a greater evil than can arise under the existing law as now settled by your lordships' judgment.

Lord DAVEY.—I have had an opportunity of reading and considering the judgment which has been delivered by my noble and learned friend opposite (Lord Watson), and I so entirely agree in the conclusion at which he has arrived and the reasons which the noble and learned lord has expressed in support of his view, that I have not felt it necessary to write a judgment of my own. I only desire to say that, in my opinion, our judgment in this case is outside the case of *Young* v. *Grote*. The doctrine of that case was one arising out of the relation of mandant and mandatory, which does not exist in the case of the drawer and holder of a bill of exchange.

Order appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellant, *Smith, Fawdon, & Low.*

Solicitors for the respondent, *Saltwell, Tryon, & Saltwell.*

Privy Council.

(*From the Supreme Court of New South Wales.*)

July 28, 1896.

SMITH *v.* BROWN. (*a.*)

Company—Shares—Registration of contract—New South Wales Companies Act, 1874, *s.* 57—*Companies Act,* 1867 (30 & 31 *Vict. c.* 89), *s.* 25.

The contract in writing to be filed with the Registrar of Joint-Stock Companies at or before the issue of shares under section 57 *of the New South Wales Companies Act,* 1874, *and the* 25*th section of the Companies Act,* 1867, *so as to avoid the liability of payment in full on such shares, must be a document creating legal rights, duties, or obligations as between the parties to it. A mere resolution between certain persons interested in a property, setting forth the manner in which they propose to put the property before the public is insufficient, though registered under the statute.*

Hartley's case, 23 *W. R.* 203, *L. R.* 10 *Ch. App.* 157, *considered and explained.*

Appeal from the Supreme Court of New South Wales.

The facts sufficiently appear in their lordships' judgment.

Bray and *Malcolm Macnaghten*, for appellant.

The respondent did not appear.

The judgment of their lordships (Lord HALSBURY, L.C., Lord HERSCHELL, Lord WATSON, Lord HOBHOUSE, Lord MACNAGHTEN, Lord MORRIS, Lord DAVEY, Sir RICHARD COUCH) was delivered by

Lord HOBHOUSE.—The appeal in this case raises a question of a class which frequently arises in the winding-up of joint-stock companies—viz., the question whether a registered shareholder is entitled to escape contribution on the ground that the calls on his shares are to be taken as having been paid up wholly or partially.

At the date of the winding-up the respondent was the registered holder of 2,032 £1 shares. He contended that they were fully paid up; three shillings by actual payments, and the balance of seventeen shillings by contract. As to 1,666 shares his claim has been rejected, and so far there is no further contest. As to the remaining 366 shares his claim has been sustained, and the official liquidator appeals from that decision. A number of other shareholders are in the same position, and their interests are affected by this appeal; but unfortunately no one appears to oppose it.

The company was formed under the Companies Act, 1874, the 57th section of which is to the same purport with section 25 of the English Act of 1867. Every share is to be taken as subject to the payment of its whole amount in cash, unless otherwise determined by contract duly made in writing and filed with the registrar of joint-stock companies at or before the issue of the shares. It is the common case that the respondent has paid only three shillings on the shares which are of the nominal value of one pound; and that the balance of seventeen shillings was the subject of negotiations before the company was formed. The question between the respondent and the company is whether the seventeen shillings are to be taken as paid up by virtue of (*a*) a contract in writing (*b*) filed with the registrar (*c*) before the issue of the shares.

On the 8th of March, 1888, Messrs. Fletcher offered the property afterwards worked by the company to a syndicate of twenty persons, each contributing £500. Upon this offer a syndicate was formed of more than twenty persons, some of whom took a fortieth share instead of a twentieth. They in effect purchased the property of Messrs. Fletcher for £10,000, and it has been duly paid for.

The next document is a deed by which four gentlemen, named Walford, Laidley, Dibbs, and Taylor, declared themselves trustees of the property in question for the syndicate, whose members were named in a schedule with the share of each opposite his name. The deed appears to have been executed by the four trustees in April, 1888, but it is not dated, and is not executed by any other members of the syndicate. Walford, Taylor, and Dibbs were themselves along with twenty others named in the schedule as members of the syndicate, and the shares ascribed to the twenty-three are $\frac{23}{40}$ths of the whole.

On the 12th of July, 1888, the syndicate met and resolved that a company should be formed with a capital divided into 100,000 shares, and the shares allotted *pro rata* among the syndicate and issued as paid-up to seventeen shillings per share. After this it seems that the syndicate acted as if a company had been formed; and among other acts they allotted shares, though no certificates were issued till the month of October.

On the 30th of July a deed was executed by Dibbs, Taylor, Walford, and Laidley (who are called the vendors) as trustees for the syndicate comprised of the persons named in the schedule thereto of the one part, and McKellar (who is called the trustee) of the other part. Thereby the vendors purport to agree with the trustee that a limited liability company shall be formed for working the mining property in question, which the vendors purport to sell and the trustee for the projected company purports to buy. The deed contained the following clauses:—

"3. That the capital of the said company shall be one hundred thousand pounds in one hundred thousand shares of one pound each, which shall be deemed to be and issued as paid up to seventeen shillings per share, and subject to a liability of three shillings per share and no more.

"5. That the consideration for the before-mentioned sale and for the transfer of the said property to the said company after formation shall be the issue of one hundred thousand shares paid up to the extent of seventeen shillings, and with a liability of three shillings per share, duly allotted to the persons named and in the numbers set out in the said schedule.

"6. The said trustee for and on behalf of the said proposed company agrees that the one hundred thousand shares in such company shall be issued to the subscribers therefor on the following terms; namely, that the sum of seventeen shillings per share, which represents the sum at which the proprietors value the property to be transferred to the company, shall be deemed to have been paid on each share by such transfer, and that such shares still have a liability thereon of three shillings per share and no more; and such three shillings may be called up by direction of the company from time to time as the money is required for developing the property.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

"7. That within thirty days after the registration of the company this agreement shall be adopted by the board of directors of the said company by a resolution, which shall be duly entered on the minutes of the proceedings of the said company.

"8. That the said trustee shall incur no personal liability whatever in respect of this agreement."

In the schedule, which contains the names of the syndicate and their shares in the concern, the respondent appears as the holder of 1,666 shares. The syndicate now consisted of twenty-six persons, Laidley and two others having been added since the deed of April. The whole 100,000 shares were distributed among them.

The memorandum of association is dated the 8th of August. By the 5th and 6th clauses the terms, conditions, and objects of the agreement of the 30th of July are adopted. The memorandum is signed by nine shareholders, among whom is the respondent, signing for 1,666 shares. On the 6th of September the memorandum and also the articles of association were filed with the registrar, and the company was then completely formed. On the next day the deed of the 30th of July was filed. On the 14th of September the directors passed a resolution adopting that agreement. This resolution has never been filed.

The Master in Equity held that the respondent ought to be excluded from the list of contributories. The official liquidator appealed, and the case was heard by Manning, J. That learned judge held that 1,666 shares for which the respondent signed the memorandum of association were issued to him on the 6th of September when the memorandum was filed. Therefore they could not be protected by the agreement of the 30th of July, which was not filed till the 7th of September.

The remaining shares held by the respondent were issued later. As regards them Manning, J., states that his own opinion, apart from decided cases, would be that, in order to give protection under section 57, there ought to be filed a formal document under the seal of the company, acknowledging itself bound by the agreement relied on. But then he thinks that the decision in *Hartley's case*, 23 W. R. 203, L. R. 10 Ch. App. 157, compels him to hold that the agreement of the 30th of July, which was registered before the issue of the 366 shares, is such an agreement as satisfies the 57th section. For this reason he made an order dated the 25th of August, 1893, by which he varied the master's certificate to the extent of making the respondent a contributory for 1,666 shares, with a liability to the extent of fourteen shillings a share and to no further extent.

The respondent did not appeal from this order. The official liquidator appealed for the purpose of making the respondent a contributory for the other 366 shares. The full court, without going into the other arguments, expressed their concurrence in Manning, J.'s, view of the effect of *Hartley's case*, and they dismissed the appeal.

Their lordships have been furnished with a copy of the agreement in *Hartley's case*. It was made between a Mr. Boden of the one part and a Mr. Field of the other part. Field is described as the agent of a company then being formed, and of the promoters thereof. Boden agrees to sell and Field to purchase certain property at the price of £6,000, to be paid as to £4,800 by an equivalent amount of fully paid-up shares in the intended company, and as to £1,200 in cash after the registration of the company. If the company should fail within thirty days of registration to adopt the agreement the vendor was to be at liberty to annul the sale. After the formation of the company, but before the registration of the agreement under the Act of 1867, 200 of the vendor's paid-up shares were issued to his assignee or nominee Hartley. After the issue, registration of the agreement, which had been previously overlooked, was effected. Then the 200 issued shares were cancelled and 240 new ones allotted to Hartley. Those proceedings gave rise to two questions. First, the official liquidator put Hartley on the list in respect of the 200 cancelled shares; and the question was whether the cancellation was valid. The court held that it was; pointing out that 200 paid-up shares were part of the purchase-money, and that if they were not granted the vendor would to that extent be still unpaid. Owing to inadvertence, the 200 shares first issued were liable to calls, and in rectifying that mistake the company were only doing without suit what the court would have ordered them to do.

Their lordships notice these facts because in the authorized Law Reports (18 Eq. 542, and 10 Ch. App. 157), the statement of the case is confined to the cancelled shares, and except for one passage in Lord Cairns's judgment, there is nothing to show that the sufficiency of the agreement was in controversy. But from other reports (23 W. R. 203; 44 L. J. 240; 32 L. T. N. S. 106) it is clear that the official liquidator put Hartley on the list in respect of the 240 new shares as well as the 200 cancelled ones, and that the sufficiency of the agreement came into question with respect to those shares, and was upheld in both courts, and that Mellish, L.J., expressed his concurrence with Lord Cairns.

In delivering his opinion Manning, J., went into a careful and learned examination of the question whether other cases to which he referred can be reconciled with *Hartley's case*. The full court also addressed themselves to the same point. They said that the cases suggested as being in conflict with *Hartley's case* are not really so, because in them there was either no contract, or a document executed as an escrow, or one purporting to be executed by a non-existent body. Whereas here, the court says, there is an actual valid contract made by a person who was a trustee holding property for the proposed company.

The only document purporting to be an agreement which has been registered in the present case, and the only document therefore which it is necessary to consider, is that of the 30th of July, 1888. The courts below regard it as a contract sufficient to comply with the exigencies of section 57 of the Act of 1874.

In the opinion of their lordships that document is not a contract in any proper sense of the word. It is nothing more than a resolution by certain persons interested in a mining property setting forth the manner in which they proposed to put the property before the public. It does not create nor was it intended to create any legal rights, duties, or obligations as between the persons expressed to be parties to it. It was a contract in form only. The persons interested in the property and the shareholders in the company to be registered were just the same persons over again in a different guise; they had, as stated above, already distributed the whole of the share capital among themselves. In *Hartley's case* there was a genuine sale, and a genuine purchase, and a genuine bargain to pay the price by paid-up shares issued to the vendor, who could enforce the bargain under peril of annulling the sale.

The result is that the respondent has not brought himself within the protection given by section 57; that the order of the full court dismissing the appeal to them should be discharged; and that Manning, J.'s, order of the 25th of August, 1893, should be varied so as to include the respondent in the list of contributories for the whole number of shares for

which he was placed there by the Official Liquidator. In other respects that order should be affirmed. Their lordships will humbly advise Her Majesty in accordance with this opinion.

The Official Liquidator does not ask for costs against the respondent, which their lordships think to be a very reasonable course under the circumstances of the case. The appellant's costs will be answered by the estate that is being wound up along with the other costs of liquidation.

Solicitors for the appellant, *Lumley & Lumley*.

Court of Appeal.

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Rigby, L.JJ.) } June 10, 1896.

THOMSON *v.* THOMSON. (*a*.)

Divorce—Variation of settlement—Death of petitioner after decree absolute—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act,* 1878 (41 *Vict. c.* 19), *s.* 3—*Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 39.

A petitioner (the husband) having obtained a decree absolute for dissolution of marriage, presented a petition to vary the trusts of the marriage settlement and to carry out the terms of an agreement which had been made with his wife on the hearing of the suit. Shortly afterwards the petitioner died. An application was made by his legal personal representative to be made a party in order to continue the proceedings.

Held, that the court has no jurisdiction, under section 5 *of the Matrimonial Causes Act,* 1859, *and section* 3 *of the Matrimonial Causes Act,* 1878, *to order the legal personal representative of a deceased petitioner to be made a party for the purpose of continuing proceedings for the variation of the settlement. The Act of* 1859 *was intended for the benefit of living persons only.*

Appeal from a decision of the President of the Divorce Division.

The husband presented a petition for divorce by reason of his wife's adultery, and obtained a decree *nisi* on the 14th of June, 1895. On the marriage in 1873, the husband brought into settlement a sum of £10,000, which was invested and settled on the usual trusts—viz., the first life interest to the husband, second life interest to the wife without power of anticipation, remainder to the children of the marriage, and if there were no children, then to the husband absolutely. There were no children of the marriage.

On the hearing of the petition an agreement was made between the parties and was signed by their respective counsel, whereby the petitioner agreed to settle sufficient funds to secure to the respondent £120 per annum for her life, and the respondent agreed to the trusts of the settlement being set aside, and to the remainder of the trust funds being re-transferred to the petitioner absolutely. The respondent also agreed to the appointment of the same trustees of the new settlement as of the original settlement.

On the 19th of January, 1896, the decree *nisi* was made absolute, and on the 7th of February, 1896, the husband presented a petition to vary the trusts of the settlement and to carry out the agreement of the 14th of June, 1895. Shortly afterwards, on the 27th of February, and before the respondent's answer was delivered, the petitioner died. An application to make the legal personal representative of the petitioner a party to the proceedings was dismissed by the registrar, and his decision was affirmed by the President, who held that the court had no jurisdiction under the Divorce Acts, and that the Legislature intended in the Act of 1859 to limit the power of altering settlements to the personal benefit of a husband, wife, or children.

Section 5 of the Matrimonial Causes Act, 1859, provides that "the court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit the children of the marriage or of their respective parents as to the court shall seem fit."

By section 3 of the Matrimonial Causes Act, 1878, the court is empowered to exercise the powers vested in it by section 5 of the Act of 1859, "notwithstanding that there are no children of the marriage."

By section 39 (1) of the Conveyancing Act, 1881, "notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

The executor of the deceased husband appealed.

Bayford, Q.C., Haldane, Q.C., and *Bargrave Deane*, for the appellant.—An action for specific performance of the agreement would lie, and the agreement could be enforced: it is contemporaneous with the decree *nisi*, and the restraint on anticipation remains. At the time when the agreement was made it was for the benefit of the wife to accept the terms, and the court could have removed the restraint on anticipation by virtue of section 39 of the Conveyancing Act, 1881. The words of section 5 of the Matrimonial Causes Act, 1859, as modified by section 3 of the Act of 1878, are susceptible of a construction which would bring the husband in.

Inderwick, Q.C., and *Priestley*, for the respondent, were not called upon.

LINDLEY, L.J., stated the facts, and continued:—An application is now made by the legal personal representative of Mr. Thomson to vary the settlement upon the terms of the agreement from which he does not seek to depart. That can only be done in one of two ways; one way is to enforce the agreement of the 14th of June, 1895, without reference to the Matrimonial Causes Acts. If the wife had not been restrained from anticipation I do not see why that should not have been done, but unfortunately she was restrained, and the consequence is that the agreement cannot be enforced against her by her husband, or by his representative now that he is dead, unless the restraint can be dispensed with—that is, unless some means can be found of converting that agreement which is not binding upon her into an agreement which is binding on her. How can that be done? It cannot be done at all unless it be by the power given to the court by section 39 of the Conveyancing Act, 1881. But that section cannot be relied on for this purpose. [His lordship read the section, and proceeded:—] The first difficulty in the way is this: This section confers a certain power on the court to free married women from restraint upon anticipation. Here there is no married woman. Mrs. Thomson has been divorced, and her husband is dead. Even if she were married there would be a difficulty in saying that it was for her benefit to give up the life interest

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

in the entire income of the funds, to which she is now entitled in consideration of £120 a year. But the short and the best answer is this: that she is not a married woman, that the section does not apply, and the agreement cannot be enforced. The fact that she consented to the agreement did not make it binding on her.

Therefore the parties are driven back to the sections in the Matrimonial Causes Acts, and on these the question is equally hopeless. The jurisdiction of the Divorce Court to entertain applications of this kind is conferred by section 45 of the Act of 1857, and more extensively by section 5 of the Act of 1859, but it is really the latter section which we have to consider. [His lordship read the section, and continued:—] How can we say that there is jurisdiction in this case to make any order for the benefit of the children of the marriage or of their respective parents when the husband is dead and there are no children? How can we say that there is any jurisdiction to make any order for the benefit of deceased persons? The language of the section does not fit that construction, and it is not hypercriticism to say that the Act was intended for the benefit of living persons. It is a question of substance. The court is to inquire into the existence of settlements affecting the parties, and to consult their wishes and necessities, and the reason of the thing requires that they should be alive. In my opinion the President has taken the correct view, and the court has no jurisdiction to make this order. The appeal must be dismissed, with costs.

LOPES, L.J.—I am clearly of the same opinion, and agree with what has been said.

RIGBY, L.J.—I am of the same opinion. Section 39 of the Conveyancing Act, 1881, clearly does not apply, nor does section 45 of the Act of 1857, nor section 5 of the Act of 1859. No order now made can be for the benefit of any living person.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.; Seaton F. Taylor.*

High Court of Justice.

Chan. Div. } Kekewich, J. } Oct. 30.

In re VICTORIA STEAMBOATS CO. (LIMITED). SMITH *v.* WILKINSON. (*a.*)

Company—Debentures—Floating security—Crystallization—Protection of security—Receiver—Manager.

Where a petition had been presented to wind up a company, and a holder of debentures of the company of the nature of a floating security moved, before any winding-up order had been made, for the appointment of a receiver and manager, although no such default had been made by the company in payment of interest as to cause the principal money to become payable:

Held, that, although the debentures had not crystallized, they were in jeopardy; and the court had jurisdiction to appoint a receiver and manager.

Motion.

The plaintiff, Vere Herbert Smith, a holder of A debentures, and one of the trustees of the trust deed for such debentures, of the Victoria Steamboats (Limited), moved, on behalf of himself and the other debenture-holders, for the appointment of a receiver and manager of the business of the company, the defendant being the other trustee of the trust deed and the company.

The company in 1895 took over the undertaking of the Victoria Steamboats Association (Limited), then in liquidation, which consisted in running steamers and ferries on the Thames.

By its A debentures the company charged by way of a floating security all its property, present and future, including its uncalled capital, with payment of principal and interest; and by the tenth condition endorsed on the back of the debentures the principal moneys secured thereby became immediately payable: (*a*) If the company made default for six calendar months in paying interest secured thereby, and the registered holder should by notice in writing to the company before such interest was paid call in his principal moneys; (*b*) If an order should be made or an effective resolution be passed for winding up the company.

Interest was due upon the debentures, but such interest was not yet six months in arrear.

By clause 26 of the trust deed (made the 20th of July, 1896), to secure the A debentures the company agreed, during the continuance of the security, and before entry by the trustees, to carry on and conduct the business of the company to the greatest possible advantage, and by clause 35 covenanted with the trustees that they would duly perform and observe the obligation therein imposed upon them.

On the 27th of October, 1896, the London Graving Dock Co. (Limited) presented a petition to wind up the Victoria Steamboats (Limited), and on the same day a receiver was, upon motion by the debenture-holders, appointed over the 30th of October.

On the 28th of October judgment was signed by Messrs. J. & C. Harrison, creditors of the company.

On the 29th of October, on the application of the London Graving Dock Co. (Limited), Vaughan Williams, J., made an order appointing one of the official receivers provisional liquidator of the Victoria Steamboats (Limited) for the purpose of appearing on behalf of the petitioners on the motion to be heard on the 30th of October.

Renshaw, Q.C., and *C. E. Jenkins*, for the plaintiff.—A petition has been presented to wind up the company, and the debentures are in jeopardy. We want an order continuing the receiver and appointing him manager. The ferry business is profitable, and the court can, although nothing is as yet payable on the debentures, appoint a manager as well as a receiver: *Edwards* v. *Standard Rolling Stock Syndicate*, 41 W. R. 343, [1893] 1 Ch. 574. The company cannot carry out their covenant to carry on the business to the best possible advantage, as the petition has been presented, therefore the debentures have crystallized.

P. F. S. Stokes, for B. debenture-holders.

Sheldon, for a judgment creditor.

Waggett, for the company.

Upjohn, for the provisional liquidator.—I take the place of the directors, and shall preserve the assets for the benefit of all parties, therefore there is no need to appoint a receiver and manager.

KEKEWICH, J.—The essential thing to remember is that these debentures represented by the plaintiff have not—to use the newly-adopted term—crystallized. I have not forgotten the point raised by the plaintiff's counsel upon that, but I assume that does not make any difference in the conclusion that as a

(*a*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

matter of fact the debentures have not crystallized. But for that fact the case is one of debenture-holders having a charge upon the assets of the company.

A winding-up petition has been presented, and it is very much a matter of course, certainly before me, to apply for the appointment of a receiver and manager. The plaintiff's counsel suggest that inasmuch as there is a covenant in the trust deed by the company to carry on the business to the best possible advantage, and inasmuch as the winding-up petition, which has been presented, prevents that being done, that therefore the covenant has been broken, and the debentures have crystallized. Possibly that would be so if any covenant had in fact been broken, but I would not decide that point without full argument.

But at any rate until a winding-up order has been made the company must be considered to be carrying on their business in the absence of evidence that they have closed their doors. I cannot assume that the business is not being carried on.

The winding-up petition has been presented to put a stop to the business of the company. Subject to that, it is common ground that the debentures have not crystallized.

The debenture-holders ask for a receiver, and it is argued on behalf of the liquidator that the assets are not in jeopardy. What has happened? A creditor, either secured or unsecured, has presented a petition for winding up the company. It is argued that the liquidator of the company is acting under the jurisdiction of the court for the benefit of the shareholders and creditors; and that their interests are not inimical to those of the debenture-holders, who would have precedence of them all.

It is desired, of course, so far as possible to squeeze out the debenture-holders; it is the duty of the representative of the shareholders and creditors to do so.

It would be giving a very narrow meaning to the word jeopardy, to hold that because nothing could be done by the liquidator that is improper, and the security of the debenture-holders will of course be preserved, that they ought not to take care of themselves.

That being so I can appoint a receiver, it is a mere protection.

Now comes the question, which I have had to consider before now, but never to decide—namely, whether I can add to the appointment of a receiver the appointment of a manager. About that I have had very great doubt. You cannot appoint a manager unless you have got the goodwill of the business, which has been mortgaged, and which is to be managed. There is no doubt about it that there would be grounds for the appointment of a manager in this case, when the debentures crystallized. But can I do it when the debentures have not crystallized? That is the question, and it seems to me that the jurisdiction to appoint a manager depends upon there being a necessity or a probability of an eventual sale. When the court sees that the security can only be realized, and the debenture-holders and mortgagees can only get their rights by means of a sale, then only will the court appoint a manager to carry on the business with the view to a sale. The object is merely for the realization of the security. When you cannot say that there is a likelihood of a sale taking place in the immediate future, can you appoint a manager? That has been my doubt, and one which has been entertained by others besides myself.

On the whole, having had an opportunity of considering the question and seeing not only North, J.'s, conclusion in the case of *Edwards* v. *Standard Rolling Stock Syndicate* but also Mr. Macnaghten's argument, which I consider to be to some extent incorporated in the judgment, I am satisfied that the court has jurisdiction and ought to exercise it, and for this reason: Here is a subsisting charge though not immediately effective. But the charge is there, everything has been done to make it a charge, and all that is wanted is something to call it into life. Of course the court would hesitate to appoint a manager where there was no reasonable probability of the charge being called into activity. I should be extremely reluctant to do so unless the property would have to be realized within a reasonable time. Here the company is about to be wound up; at any rate, there is a probability of a winding-up order being made. If it is made then we shall certainly have in the near future the necessity for a realization in some form or other of the debenture-holders' security. It seems to me that on principle I can appoint a manager, notwithstanding that the debentures have not crystallized, where I see that it is necessary, not only for the protection but for the realization of what is due to the debenture-holders.

And here the case is of that character, and I ought to appoint a manager, but only for a fortnight, on the plaintiff undertaking to be answerable for his receipts during that time.

Solicitors, *Hicks, Davis, & Hunt; Hill, Son, & Richards; Keene, Marsland, Bryden, & Besant; Norman Herbert Smith; Arnold Williams & Co.*

Chan. Div.
Vaughan Williams, J. } July 9, 1896.

In re HAMPSHIRE LAND CO. (LIMITED). (*a*.)

Company—Winding up—Borrowing powers—Common officers—Irregularity—Notice—Proof in winding up.

At a general meeting of a company—which by its articles was not allowed to borrow money to an amount greater than its paid-up capital, unless the borrowing of a larger amount should have been previously authorized by a general meeting—a resolution was passed purporting to authorize the directors to borrow £30,000 when the paid-up capital was only £10,000. The articles also required that notices convening general meetings should specify the general nature of any special business to be transacted at the meeting, but the notices convening the meeting at which the above-mentioned resolution was passed did not refer to the intended loan. The money was borrowed from a building society that had its offices in the same building as the company, and the company and the society had four directors and a secretary in common. The society claimed to prove for the whole loan in the winding up of the company.

Held, that the knowledge of the officers of the company as to the irregularity in summoning the meeting could not be imputed to the society, that the society was justified in assuming that all affairs relating to internal management of the company had been properly carried out, and that the society was entitled to prove for the loan in the winding up of the company.

This was a summons by one of the liquidators in the Hampshire Land Co. (hereafter spoken of as the "company") that it might be determined whether the Portsea Island Building Society, also in liquidation (hereafter spoken of as the "society"), were entitled to rank as creditors of the company for any, and, if so, for what amount.

The company was formed in 1891 under the Companies Act, 1862, with a capital of £50,000, divided

(*a*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

5,000 shares of £10 each, and carried on business as a land company at and near Portsmouth.

The winding-up of the company commenced on the 30th of January, 1893.

The society claimed to prove in the winding-up of the company for a sum of £30,000 in respect of money lent.

The company and the society had had their offices in the same building, they had four directors in common, and Mr. Wills was secretary to both the company and the society.

The memorandum of association of the company contained no provisions as to borrowing money. The articles provided (article 38) that seven days' notice should be given in the case of special business, and (article 82) empowered the directors to borrow such sums of money as they might think expedient, provided that the aggregate of the principal money so borrowed should not at any time exceed the amount of the paid-up capital, unless the borrowing of a larger amount should have been previously authorized by a general meeting, in which case the directors might borrow to such an extent as was authorized.

The £30,000 exceeded the paid-up capital of the company, and there was no trace of any special notice having been sent to the shareholders convening a meeting to pass a resolution authorizing the directors to borrow a sum exceeding the paid-up capital, nor was there any minute to be found of any resolution having been passed giving such authority to the directors. It appeared, however, that such a resolution had, in fact, been passed, though at a meeting convened by a notice not referring to a proposal to raise money in excess of the paid-up capital of the company.

The question was whether the society could prove for the whole loan.

Bramwell Davis, Q.C., and *C. E. E. Jenkins*, for the company.—Wills was the officer of both the company and the society, and his knowledge that no proper notice was given is the knowledge of both the company and the society.

They cited the following authorities: *Garden Gully Co. v. McLister*, 24 W. R. 744, 1 App. Cas. 39; *Royal British Bank v. Turquand*, 6 E. & B. 327; Buckley on The Companies Acts, 6th ed., pp. 74, 502; *Irvine v. Union Bank of Australia*, 25 W. R. 682, 2 App. Cas. 366; *Gale v. Lewis*, 9 Q. B. 730; *Ex parte Waithman*, 4 Deac. & Ch. 412; *Alletson v. Chichester*, 23 W. R. 393, L. R. 10 C. P. 319.

Haldane, Q.C., Eve, Q.C., and *Macnaghten*, for the society.—The society was entitled to assume that all matters of internal management were properly performed, and that every resolution was properly passed: *Royal British Bank v. Turquand*. It was no part of Will's duty to make further inquiries. Any knowledge that came to him in another capacity than secretary of the society cannot be said to be his knowledge as secretary of the society so as to be imputed to the society. *Marseilles, &c., Co.*, 20 W. R. 254, L. R. 7 Ch. App. 161, is conclusive in our favour. [They were stopped.]

VAUGHAN WILLIAMS, J.—The question clearly is whether the shareholders in the society or in the company ought to bear any loss that would result from the resolution authorizing the company to borrow this sum of money, both classes of shareholders being innocent. It must be taken that a resolution was, in fact, passed authorizing the borrowing of £30,000, that no mention was made of this special matter in the notice convening the meeting, and, therefore, that the authority of the directors of the company to borrow this money, was not perfected. They had no authority in the absence of a properly-passed resolution. The money having been borrowed by the company and lent by the society, the question I have stated arises. It is not disputed that the authority of *Royal British Bank v. Turquand* is such that the society had a right to assume in a case like this that all the essentials of internal management had been carried out by the borrowing company. And it is only if the law properly imputes to the society knowledge of the irregularities which have been committed that the society are debarred from ranking as creditors for the £30,000 in the estate of the company. Is it right to impute such knowledge in this case? It is said that it is, because Wills was the secretary of both the company and the society, and was aware of the irregularities, and that his knowledge as secretary of the company was knowledge as secretary of the society. I do not agree. Both Mr. Bramwell Davis and Mr. Jenkins shrank from saying that in all cases where one person is the secretary of two societies his knowledge is the knowledge of both bodies. It is impossible to say that, in view of the case of *In re Marseilles Extension Railway Co.* Both the Lords Justices in that case were of opinion that there might be cases where the knowledge of officers common to two companies would not bind both companies. What is the line to be drawn or what is the test to be applied in order to see when the knowledge is common to both companies? It seems to me, broadly, that the Lords Justices do draw the line that knowledge acquired by the officer of one company will not be imputed to the other company unless the common officer of both had some duty imposed on him to communicate that knowledge to the other company, and had some duty imposed on him by the second company to receive notice thereof. I think that view of the case is confirmed on considering the case of *Gale v. Lewis*. In that case the jury found that the company's agent was authorized to receive the notice given him as officer of the company. Lord Denman says (at p. 743): "It was further contended that Densem communicated to Loosemoore in his capacity of attorney, and not as agent for the insurance office. But, where the two capacities are united in one person, a notice received in one capacity for the purpose of being transmitted to the other is an effectual notice in both capacities." The test applied in both cases was, Was it within the scope of the duty of one company's officer to give notice to the other company? and, Was it within the scope of his duty as the officer of the other company to receive such notice? That is not the case here. This is more like the case which both Mr. Bramwell Davis and Mr. Jenkins had to admit to be an exception to the general rule. They admitted that if Wills was guilty of fraud his knowledge of the fraud on the company would not have been the knowledge of the society as to the facts constituting the fraud. That is the inference in a case of fraud, and the same inference applies in the case of irregularity. Whether it is fraud or irregularity, knowledge of the fraud or breach of duty is not to be imputed to the other company. Under these circumstances I must admit the proof.

Costs of all parties out of estate of the company.

Solicitors, *Munns & Longden; Learoyd, James, & Mellor.*

Q. B. Div.
(Grantham and Kennedy, JJ.) Oct. 29.

SHIELDS v. HOWARD. (a.)

Metropolis Management—Street Music—Refusal to go away from neighbourhood—Metropolis Street Music Act, 1864 (27 & 28 *Vict. c.* 55), *s.* 1.

It is not an offence under section 1 *of* 27 & 28 *Vict. c.* 55, *for a street musician to refuse to move away from a neighbourhood when requested to do so by a householder, unless the complainant has at the same time given the man a reason why he requires him to cease playing near his house.*

Semble, *it makes no difference that in fact the householder had a reasonable and sufficient cause of complaint.*

This was an appeal by way of special case from the decision of Mr. Plowden, metropolitan police magistrate sitting at Marylebone, who had dismissed a charge which had been preferred by Mr. Frederick Shields, an artist, against an organ-grinder named Howard.

The short point of law for the decision of the court was whether, under section 1 of 27 & 28 Vict. c. 55 (an Act for the regulation of street music within the Metropolitan Police District), it was necessary, when a street musician was required by a householder to depart, to inform him of the reason why he was required to move away.

The facts set out in the special case were, shortly, as follows: An information was preferred by Frederick Shields against Arthur Howard under section 1 of 27 & Vict. c. 55, charging that he, Arthur Howard, being a street musician, did on the 11th of April, 1896, unlawfully sound a musical instrument in a thoroughfare—to wit, in Lodge-road, St. John's Wood—near the house of the appellant after having been required by the appellant's servant to depart from the neighbourhood.

It appeared that on the day in question Mr. Shields was worried by the respondent playing a piano-organ outside his residence. He sent a servant out to turn the man away, but the latter refused to go. Mr. Shields then went out and told the respondent that he had sent his servant to require him to move away, and shortly afterwards, as he still refused to cease playing, gave him into custody. Neither the appellant nor his servant stated a reason why the respondent was required to depart.

When the case came before the magistrate on the following Monday, he asked Mr. Shields, before any evidence whatever had been offered, if he gave the respondent a reason for ordering him to go away, and on receiving a reply in the negative, he there and then dismissed the case. The magistrate stated that in doing so, he had no reason to doubt that the appellant had in fact a reasonable and sufficient cause for requiring the respondent to depart; but he held as a matter of law, that the meaning of the statute was that it was not sufficient to order a street musician to depart without at the same time informing him of the reason why he was ordered away; and as no reason of any kind had been given the respondent either by the appellant or his servant, the magistrate dismissed the information, and at the request of the appellant stated a case.

Section 1 of 27 & 28 Vict. c. 55 is as follows: Any householder within the Metropolitan Police District, personally or by his servant or by any police constable, may require any street musician or street singer to depart from the neighbourhood of the house of such householder on account of illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house or for other reasonable and sufficient cause; and every person who shall sound or play upon any instrument or shall sing . . . near any such house after being so required to depart shall be liable to a penalty, . . . or, in the discretion of the magistrate, may be imprisoned for any time not more than three days.

Sceales, for the appellant.—The Act no doubt requires that the person who desires the organ-grinder to move on must have a reasonable and sufficient cause for requiring him to do so; but that is not the question raised in this case. The Act does not in terms direct that the householder must, before he can give the man in charge for refusing to go away, first communicate to him the reason he desires him to go away for. In a considered judgment in the case of *The Northcote* v. *The Owners of the Henrich Bjorn*, 11 App. Cas. 281, Bramwell, L.J., said: "I think that where the Legislature in its laws or parties in their agreement might have expressly stated a particular intention and have not, that intention ought not to be implied, and the law or agreement dealt with as if the intention were expressed, without the most cogent considerations amounting almost to a necessity." The learned magistrate ought not to have held that the Legislature intended that a reason must be given to the organ-grinder before the penalties imposed for refusal to move on could be enforced. [GRANTHAM, J.—But organ-grinding is a lawful calling, unless it is pursued to the annoyance of an individual. Until the man is given a reason why he ought to move on, how can he tell whether he can legally go on playing his organ or not? It is contrary to the policy of English law to punish a man for the committal of an offence which he had no means of knowing he was committing.] If the man was an Italian he might not understand even if the reason were explained to him. [GRANTHAM, J.—That would be his misfortune.] The very fact that he was ordered away showed him that the person telling him to move on had a reason for so doing. It is for the magistrate to decide whether in fact the reason assigned for asking him to go away is reasonable and sufficient. If told to go, he is bound to go, or [illegible] the consequences of his refusal if given in c[illegible] of twenty-seven metropolit[illegible] five have, at di[illegible] Act.

The respond[illegible] or in person.

GRANTHAM, [illegible] right, and the [illegible]

KENNEDY, J. [illegible]

Appeal dismi[illegible]

Solicitor, *J.* [illegible]

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Q. B. Div.
(Pollock, B., and Bruce, J.) May 19; July 2, 1896.

THE CHICAGO RAILWAY TERMINAL ELEVATOR CO. (*Appellants*) v. THE COMMISSIONERS OF INLAND REVENUE (*Respondents*). (a.) aff. mf. 242

Inland revenue—Stamp duty—Marketable securities—

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Bond of foreign company — Security "issued," "offered for subscription," or "assigned or transferred" in United Kingdom—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (b).

An arrangement for reconstructing an English company and transferring its business, property, and liabilities to a new company formed in America, provided that the debenture-holders of the old English company should receive in lieu of their debentures new gold bonds issued by the new American company and payable at Chicago. The holders in London of a debenture of the old company lodged their debenture with the London agent of the new company, who sent it to the officials of the new company in America, and such officials presented it in Chicago and received in exchange a new bond which they sent to their agent in London, by whom it was given in London to the owners in exchange for their debenture.

Held, that this bond did not come within section 82 (1) (b) *of the Stamp Act,* 1891, *as having been either "issued," or "offered for subscription," or "assigned or transferred" in the United Kingdom.*

Case stated by the Commissioners of Inland Revenue, pursuant to section 13 of the Stamp Act, 1891.

The facts, as stated in the judgment, were as follows:—

On the 25th of November, 1895, a bond, a copy of which was annexed to this case, was presented on behalf of the Chicago Railway Terminal Elevator Co., an American company formed under the laws of the State of New York, to the Commissioners of Inland Revenue, under the provisions of section 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The main question in the case was whether the bond was issued in the United Kingdom, or whether it was offered for subscription and given or delivered to a subscriber in the United Kingdom, within the meaning of section 82 (*b*) (1) and (2) of the Stamp Act, 1891.

The bond was an instrument bearing date the 1st of March, 1894, under the seal of the Chicago Railway Terminal Elevator Co.—the appellant company—for [illegible], to be paid to the bearer on the 1st of [illegible], 1943, at the office of the company in [illegible], in gold coin of the United States, with inter- [illegible] the 1st day of November, 1893, at the rate of [illegible] per annum, payable half-yearly, at the [illegible] the holder either in like gold coin at its [illegible] city of Chicago or at its office in New [illegible] in sterling at its office in London, [illegible] rate of exchange of 4s. to the [illegible]

[illegible] was one of a series executed and issued [illegible] ovisions of an indenture bearing the same [illegible] bond (the 1st of March, 1894), but not [illegible] cuted until the 31st of December, 1894. [illegible] re was made in America between the [illegible] pany, referred to in the indenture as [illegible] r, of the one part, and the Illinois Trust [illegible] Bank, a company in the United States, [illegible] the indenture as the trustee of the [illegible] This indenture assigned the property of the mortgagors (the appellant company) to a trustee in trust for the debenture-holders. It was made in pursuance of an arrangement entered into for the purpose of reconstructing an English company called the City of Chicago Grain Elevators (Limited). This company, which is referred to as the old company, had issued debentures to bearer which were secured by an indenture of mortgage and trust dated the 31st of March, 1890, made between the old company and a trust company in England, hereinafter called the old debenture trustee.

As part of the scheme for reconstructing the old company an agreement in writing was entered into—dated the 29th of November, 1892—between John Aste, on behalf of the old company, and Charles Wells, on behalf of the new company (the appellant company) then about to be formed in America, by which it was provided that the old company should sell and the new company should purchase the whole of the business, goodwill, and property of the old company, part of the consideration for such sale being shares in the new company. It was provided that the new company should pay the debts and obligations of the old company, and should use their best endeavours to make arrangements whereby the debenture-holders of the old company should surrender their debentures and receive in lieu thereof mortgage bonds of the new company.

A petition was presented under the Joint-Stock Companies' Arrangement Act, 1870, s. 2, and an order was made by Vaughan Williams, J., that the scheme of arrangement be sanctioned.

The new company (the appellant company), which was an American company, was duly formed and the before-mentioned indenture, dated the 1st of March, 1894, was, as before stated, made to carry out the scheme of arrangement.

By this indenture the property of the appellant company was assigned to the trustee therein mentioned in trust for the debenture-holders, and provision was made for the issue of bonds of the new company (the appellant company) in exchange for the debentures of the old company. It was provided by the indenture that a certain number of the new mortgage bonds, equivalent in value to certain old debenture bonds which had been purchased to form a sinking fund for the redemption of the debentures of the old company at maturity, should be delivered by the trustee in the indenture mentioned to the new company, and that the remainder of the new mortgage bonds should be issued only in substitution and exchange for the old debentures, one new bond for each debenture; and it further provided that whenever any of the outstanding debentures should be delivered to the trustee for the purpose of exchange under the provisions of the indenture, the trustee should issue to the owner or holder of each debenture so deposited for exchange a first mortgage bond. It was provided that the trustee should keep a register of all the debentures so exchanged, and that he should cause each debenture deposited for exchange to be stamped "exchanged debenture."

The appellant company handed over to the trustee, party to the indenture of the 1st of March, 1894, duly executed bonds as provided for in the indenture; and, amongst others, delivered to the trustee the bond now in question.

The London and New York Investment Corporation (Limited), which was a company having its registered office in England, was the holder of a debenture of the old company. This corporation, in October, 1895, received a circular from the agent of the new company stating that the debenture bonds of the new company would shortly be ready in Chicago for exchange for the debentures of the old company. The agent stated that he should be pleased to forward the debenture of the corporation free of all cost to them if they would lodge the same, and that the debentures of the old company would have to be sent to Chicago and exchanged there for the new mortgage bonds; and generally, that he would forward the old debentures free of cost if the holders of the debentures would lodge the sum at the office of the appellants' agent in London, taking his receipt for the

same. The circular further stated that if the holders of the old debentures preferred it, they could forward the debenture shares to their own correspondents at Chicago, and the secretary of the company would there give all the necessary information with regard to their lodgment for exchange with the trustee in Chicago.

The corporation accepted the offer of the agent of the new company, and lodged their debenture with him. He forwarded it to the officials of the appellant company in America, who presented it to the trustee at Chicago, who gave the bond in question to the officers of the appellant company in America, by whom it was then transmitted to the agent of the appellant company in London, and the latter delivered the bond to the corporation at their registered office in London.

The question arose whether the bond was liable to stamp duty by virtue of the provisions of the Stamp Act, 1891.

It was not disputed, and the Commissioners held that the bond was a marketable security, and they were also of opinion that under the circumstances the bond was issued in the United Kingdom, and that it was therefore chargeable with duty under section 82 (*b*) (1) and (2) of the Stamp Act, 1891, at the rate of 1s. for every £10, and for any fractional part of £10 of the money thereby secured, and they accordingly assessed the duty at 11s., the value of the bond in English currency being £102 1s. 8d.

The questions for the opinion of the court were (1) whether the instrument was chargeable with the duty of 11s. in accordance with the assessment of the Commissioners; (2) if not, with what duty the instrument was chargeable.

Section 82 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), provides: "Marketable securities for the purpose of the charge of duty thereon include (*b*) a marketable security by or on behalf of any foreign corporation or company (hereinafter called a foreign security), bearing date or signed after the 3rd day of June, 1862; (1) which is made or issued in the United Kingdom; or (2) which, though originally issued out of the United Kingdom, has been, after the 6th day of August, 1885, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom; or (3) which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom."

Arthur Cohen, Q.C. (*T. T. Paine* with him), for the appellants.—The bond in question was not "made" in the United Kingdom; that is not disputed. It was not "issued" in the United Kingdom. It was "issued" in Chicago when it was given over in exchange for the old debenture, and at that time the title of the owner in England to the new bond was complete. Although it was delivered in Chicago to the agents of the new company, yet such agents held it from that moment for the holder in London, in whom the property then vested. The bond, therefore, was not "issued" in England, but in America. So, it was not "offered for subscription and given or delivered to a subscriber" in the United Kingdom; neither can it be said to have been "assigned, transferred, or negotiated" in the United Kingdom. It does not therefore come within any of the classes in section 82 (1) (*b*), and is not liable to stamp duty under that section. [He then referred to sections of previous Acts dealing with the subject, which are referred to in the judgment.]

Sir Robert Finlay, S.G., and *Danckwerts*, for the respondents.—The commissioners were right, and the Crown is entitled to succeed. The case falls within all the divisions in sub-head (*b*) of sub-section 1. The bond was "issued" in England, as it was then for the first time in the hands of a person entitled to sue upon it; and to constitute an "issue" of the bond, the bond must be in the hands of a person entitled to sue upon it: *Downes* v. *Richardson*, 5 B. & Ald. 674; section 2 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), where "issue" is defined as "the first delivery of a bill or note, complete in form to a person who takes it as a holder." The cases, also, of *Grenfell* v. *The Commissioners of Inland Revenue*, 24 W. R. 582, 1 Ex. D. 242; *In re The Imperial Rubber Co.*, 22 W. R. 699, L. R. 9 Ch. App. 554; and *Mowatt* v. *The Castle Steel and Iron Works Co.*, 34 Ch. D. 58, 35 W. R. Dig. 82, illustrate the same principle and show that the "issue" here was in the United Kingdom. The bond was also "offered for subscription and given or delivered to a subscriber" in the United Kingdom, within sub-head (2), and it was also "assigned, or transferred," in the United Kingdom, within sub-head (3). It therefore falls within all three categories and is liable to the duty as a foreign marketable security.

Cohen, Q.C., in reply.

Cur. adv. vult.

July 2.—The judgment of the COURT was read by

BRUCE, J.—[His lordship stated the facts as above set out and read section 82, and continued:—] In the course of a very full and elaborate argument Mr. Cohen, who argued the case on behalf of the appellants, called our attention to the various provisions made from time to time by the Legislature with regard to the duties to be paid in respect of foreign marketable securities. In the year 1862, by the 25 & 26 Vict. c. 22, Schedule C, provision was made imposing duties upon a bond made on behalf of a foreign company, issued, delivered, assigned, transferred, or negotiated within the United Kingdom. These provisions were altered, or modified, or extended in the year 1870, by the 33 & 34 Vict. c. 97, s. 113; in the year 1871, by the 34 Vict. c. 4, s. 2; in the year 1885, by the 48 & 49 Vict. c. 51, s. 21; and in the year 1888, by the 51 Vict. c. 8, s. 12. None of these provisions are now in force, and they were only referred to by Mr. Cohen as showing that at various periods the attention of the Legislature has been directed to the consideration of the stamp duties to be levied on the class of documents now in question; and that at various periods various definitions have been attempted which from time to time have been modified or repealed, and that after many attempts to define the circumstances in which stamp duty becomes payable on marketable securities, the words in the Act of 1891, as altered or modified by the Act of 1893 (56 Vict. c. 7, s. 4), have become the governing words regulating the duty. So that after giving full consideration to the various provisions of the repealed statutes, to which our attention has been directed, the question comes back to this, What is the meaning of the words "made or issued in the United Kingdom," as used in section 82 of the Act of 1891? The instrument in question was certainly not "made" in the United Kingdom, and we do not think that it can be said to have been "issued" there. It seems to us that it was issued in Chicago. If the London and New York Investment Corporation (Limited) had sent the old debenture by an agent of their own to be exchanged for the new mortgage bond at Chicago we cannot entertain a doubt that the delivery of the bond to him at Chicago would have been an issue of the bond, and we think it makes no difference that the persons who acted as the agents of the London and New York Investment Corporation (Limited) were the officers of the appellant company

The right of the London and New York Investment Corporation to the old debenture had gone as soon as it was delivered up to the trustee, or exchanged for the new bond. The whole object of the arrangement made by the documents we have referred to, was to prevent the appellant company obtaining bonds from the trustee except in exchange for the old debentures, and except in the character of agents for the holders of the old debentures. The officers of the appellant company in Chicago, when they received the bond from the trustee, received it on behalf of the London and New York Investment Corporation, and were bound to hold it on behalf of and for the benefit of that company. The title of that company to the bond was, we think, complete the moment it was delivered by the trustee to the appellant company in Chicago on behalf of the London and New York Investment Corporation.

Although the appellant company had the possession of the bond they had not the control of it; they had no property in it. They held the bond simply as agents for the London and New York Investment Corporation, and the delivery of the bond to the corporation in England did not confer any fresh title on them. It only operated as the delivery to them of the bond by one who had acted as their own agent to manage the exchange for them would have operated. Our attention was called by the Solicitor-General to the case of *Downes* v. *Richardson*, where there were three persons joined as drawer, acceptor, and joint indorser of an accommodation bill, and the date of the bill was altered before it was handed over to a holder for valuable consideration. It was held that the document did not require a fresh stamp, because it could not be said to have been issued until it was delivered to a holder for value. But we think the whole point of that case depends upon the fact that the bill was an accommodation bill, and because of that fact the original parties had no right of action *inter se*. That case does not seem to us to be in point. We think the decision in *Grenfell* v. *The Commissioners of Inland Revenue* is much more like the present case. The case of *In re The Imperial Rubber Co.*, which was cited by the Solicitor-General, is, we think, clearly distinguished from the present case, because the law with respect to the issue of shares in a company registered under the Companies Acts bears little analogy to the transfer or exchange of bonds. The decision in the case of *Mowatt* v. *The Castle Steel and Iron Works Co.* turns simply upon the fact that the company had given no authority to anyone to issue the debentures in question in that case, and affords us little assistance in determining the questions raised in the present case. For the reasons we have given we are of opinion that the bond was not "issued" in the United Kingdom. We were then asked to say that the bond, although issued out of the United Kingdom, was "offered for subscription, and given or delivered to a subscriber" in the United Kingdom within clause (*b*) (2) of the section before-mentioned. In our opinion the bond was not offered for subscription in the United Kingdom. It seems to us that the bond was not offered for subscription at all. The words "offered for subscription" are not, we think, apt words to describe the transaction in this case. We think, for the reasons we have given, that there are no words in the section to which we have been referred that render this bond liable to stamp duty, and our judgment must be for the appellants.

Appeal allowed.

Solicitors for the appellants, *Paines, Blyth, & Hartable.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Prob. Div. & Adm. Div. Admiralty. } June 29, 1896.

"THE MARECHAL SUCHET." (*a*.)

Admiralty — Practice — Salvage — Right of owners, masters, and crews of salving vessels to institute one action of salvage in rem *against salved property — Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 21 — *Rules of the Supreme Court, ord.* 72, *r.* 2.

The procedure and practice in force in the High Court of Admiralty at the time of the passing of the Judicature Act entitled the owners, masters, and crews of different vessels who had rendered salvage services to a vessel, freight, or cargo in need of salvage services to institute one suit of salvage in rem *against the salved property; and all such salvors have now, under the procedure and practice in force in the Admiralty Division, a similar right to join in an action* in rem *to recover the salvage remuneration due to them, and are not bound to sue out in it more than one writ of summons.*

Smurthwaite *v.* Hannay, 43 *W. R.* 113, [1894] *A. C.* 494 *distinguished.*

This was an action of salvage instituted on behalf of the owners, masters, and crews of the steam tugs *British King, Andrew Joliffe, Sea King*, and *Great Emperor* against the vessel *Marechal Suchet*, her cargo and freight, to recover salvage remuneration for services rendered to that vessel when on fire in the River Mersey on the 11th and 12th of June last.

An appearance under protest was entered on behalf of the owners of *The Marechal Suchet*, and their solicitors gave notice that the judge in court would be moved to set aside the writ of summons in the action whenever the owners, masters, and crews of the above-named four steam tugs were entered as the plaintiffs in the action, or to strike out all the plaintiffs' names in such writ other than one, on the ground that the owners, masters, and crews of the four tugs in question were wrongly proceeding in one and the same action.

Carver, on behalf of the defendants under protest, now moved the judge in court in accordance with the above notice of motion.—The owner, master, and crew of each steam tug named in the writ sought to be set aside by the motion have a separate and distinct cause of action against *The Marechal Suchet* to recover salvage reward, and these several causes of action cannot now, since the decision of the House of Lords in *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, be joined in one action, as was formerly supposed might be done under R. S. C., 1883, ord. 18, r. 1; and, having regard to the same case, cannot properly be made parties to one action under R. S. C., 1883, ord. 16. Separate claims, in fact, ought to have been made in separate actions by each set of plaintiffs, and if this had been done the suits would in due course have come on for trial in the county court at Liverpool having admiralty jurisdiction; the amount of salvage claimed by each separate set of salvors being within the amount to which the jurisdiction of the county court in salvage is limited.

He also referred to *Carter* v. *Rigby & Co.*, 44 W. R. 566, [1896] 2 Q. B. 118, and *The Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, [1895] A. C. 661, as showing the application of the principle laid down in *Smurthwaite* v. *Hannay*.

Butler Aspinall, for the plaintiffs, *contrà*.—It has been the constant practice both before and after the coming into operation of the Judicature Acts for single actions in admiralty to be brought to recover

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

the salvage reward due for separate services rendered, as in the present case, by several vessels to the same salved property, just as it has been the invariable practice for the owners of several consignments of cargo, however numerous, to join in admiralty as plaintiffs in one action of collision; for seamen proceeding for their private effects to join in such last-named action, and for all the members of the crew to join in one wages suit: *The Charles Adolphe*, Swa. 153; *The Bartley*, Swa. 198; *The Coromandel*, Swa. 205. Indeed, in *Hook* v. *Moreton*, 1 Lord Raym. 397, the power of the seamen to join in one action in admiralty for their wages is given as a reason why such suits were not prohibited by the courts of common law. The practice of joining several claims in salvage and other admiralty actions does not depend at all upon the provisions contained in orders 16 and 18 of the Rules of the Supreme Court, or the interpretation placed on those rules by *Smurthwaite* v. *Hannay*, but is the inherent practice of the High Court of Admiralty still in force in the Admiralty Division by virtue of the Judicature Act, 1875, s. 21, and R. S. C., 1883, ord. 72, r. 2. [He referred to *The Mona*, 43 W. R. 173, [1894] P. 265.] The motion, therefore, ought to be dismissed with costs, and the defendants under protest assigned to appear absolutely.

BARNES, J.—This is a motion on behalf of the defendants in a salvage suit instituted by the owners, masters, and crews of the steam tugs *British King*, *Andrew Joliffe*, *Sea King*, and *Great Emperor* against the owners of the ship or vessel *Marechal Suchet* and the cargo now or lately laden therein, and the freight for the transportation thereof, that the writ of summons in the action be set aside, or, in the alternative, that all the plaintiffs with the exception of one may be struck out, on the ground that the respective plaintiffs cannot properly sue in one action. The only matter necessary to state in considering the point, besides the fact of the nature of the suit and the motion, is that the action is brought by these four tugs and those who are interested in them—the owners and masters and crews of the tugs—for salvage services rendered to *The Marechal Suchet*, which was on fire in the Mersey recently, and which, by the assistance of the tugs, was beached, and also by their assistance the fire was, as I understand, put out. The motion is made with the object of preventing these four sets of plaintiffs from suing together and obtaining their trial in this court by an action in which they all remain as plaintiffs against the defendants. The real object of the motion is to force the plaintiffs to sue in the Liverpool County Court; because it is said that if each plaintiff sues separately his claim will come within the county court rate, while collectively the claims will exceed that rate. But even if the defendants could succeed in their motion they could not compel the plaintiffs to go to the county court, and the only effect would be that four writs or more would be issued against them in this court, and they would have the pleasure of paying extra costs by reason of the motion they make. But the point which it is important to consider is, whether or not the plaintiffs have the power to issue this writ collectively.

Now, it is said on the defendants' part that, according to the decision in *Smurthwaite* v. *Hannay*, the plaintiffs have no right whatever to issue their writ against the defendants as they have done, and that, having regard to the construction put upon ord. 16, r. 1, by that decision, this writ is a bad one. I do not think it necessary really to say anything about the case of *Smurthwaite* v. *Hannay*, because, in my judgment, it has no application to this particular case and to the form of suit of which this particular suit is an instance. I do not think that ord. 16, r. 1, excludes the power of the plaintiffs to issue this writ. It is an enabling rule. In the old days parties could not join together. The rule allows certain parties to be joined together in a suit. But the Act of 1875, s. 21, and also ord. 72, r. 2, leave untouched the practice of this court in those respects, in which it is not inconsistent with the rules made under the Judicature Act.

Now, what was the practice of this court? There is no doubt that the practice of this court was that all the persons interested in a salvage service might be joined together in one suit for the purpose of obtaining the reward for those services; and also in all collision cases all those persons who had interest in the ship which was damaged could do the same thing. In seamens' suits for wages the same thing applies; and it is all based on convenience. It would be a dreadful thing, in my judgment, if Mr. Carver's contention should prove correct, because I see nothing for it but that every person interested in goods on board a ship damaged in collision would have to bring a separate action, and so on in all suits in this court. That would have a most disastrous effect upon the work of the court and would be most disastrous for the defendant, because he would have to pay the whole amount of the necessary costs. Take this particular case which we are considering. It is admitted that if the plaintiffs started several separate suits the defendants would be entitled to apply to consolidate, and that this would be a proper suit for a consolidation order to be made. If, when that is admitted, it is shown that the convenience of the case is met by allowing everybody to sue together, then that, in my judgment, is in accordance with the whole practice of the court. The practice is not, I think, in any way shaken by the rule referred to and the decision upon it, and in this case, in my judgment, the motion fails.

I am very glad that that is the conclusion I have come to; because otherwise I think I should be upsetting the practice of this court and the great convenience which has resulted.

In my opinion this motion should be dismissed with costs.

Solicitor for the plaintiffs, *H. J. Holme*.

Solicitors for the defendants under protest, *Hill & Dickenson*.

Prob. Div. & Adm. Div. } Divorce (Divisional Court). } Dec. 1.

BRADSHAW (*Appellant*) v. BRADSHAW AND JUSTICES FOR THE BOROUGH OF RICHMOND, SURREY (*Respondents*). (*a*.)

Married woman—Maintenance—Desertion — Cohabitation—Parties not living under same roof—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

There may be cohabitation without the parties necessarily living under the same roof.

A husband from time to time visited his wife, who was in service, and she had a child by him. She left service and he refused to receive her, and said if she sent her boxes to the house where he was living they would be returned.

Held, that there had been cohabitation giving justices jurisdiction to hear a summons by the wife for desertion under the Summary Jurisdiction (Married Women) Act 1895.

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Fitzgerald *v.* Fitzgerald, 17 *W. R.* 264, *L. R.* 1 *P. & D.* 697, *and* Reg. *v.* Leresche, 40 *W. R.* 2, [1891] 2 *Q. B.* 418, *considered and explained.*

Appeal from the decision of justices for the borough of Richmond, Surrey, dismissing a wife's summons against her husband under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that under the circumstances they had no jurisdiction.

The wife, Ellen Bradshaw, complained that her husband, Richard Landale Bradshaw, had neglected to provide reasonable maintenance for her, ". . . and by such neglect caused her to live separately and apart from him" (section 4), and asked for an order for maintenance.

The following evidence was given before the justices. Ellen Bradshaw said: I am the wife of the defendant. I produce certificate of the marriage. I was married to him at the Registry Office, Brentford, on the 19th of December, 1893. He was then living where he is now at 103, Kew-road. At that time I was in a certain condition. I went to reside with my sister at Lewisham. He knew of my condition. I was confined at Queen Charlotte's Lying-in Hospital of a girl. I wrote to defendant. He made no reply. A child was born. It was in a delicate condition. He was employed at an election and said he would not come or give me anything. It died. I acquainted him of its death. I had to sell and pledge my goods to bury it. He visited me after the child was born, and on the 19th of July, 1895, I had to go back to hospital. I applied to him for help. That child also died. He refused to come and see it. I paid funeral. I have been to the house where he resides. He said if my boxes were sent to the house they would be returned.—Cross-examined: I have never lived with him, and was in service when I was married. I have been in service since and left two weeks ago. My sister is not doing my work there for me.

Richard Landale Bradshaw, defendant.—I live with my father, a bootmaker, at 103, Kew-road, Richmond. I am a sort of an artist. I only disposed of one picture. I have heard my wife give evidence. I am willing to maintain my wife, but have no means.

The solicitor for the defendant submitted that the evidence disclosed that there never was any existing cohabitation, and therefore there could be no desertion and no remedy under the Act, and he relied on *Fitzgerald* v. *Fitzgerald* and *Reg.* v. *Leresche.* A question arose also as to whether an adjournment should be granted for further proof of means, but the justices, having considered the point, held on the point of no cohabitation that they had no jurisdiction, and dismissed the summons. The wife appealed.

Powles, for the appellant, was stopped by the court.

S. Lynch, for the respondent, relied on the cases cited before the justices, and submitted that in this case there had never been an existing cohabitation.

JEUNE, P.—The only question we have to decide is one of jurisdiction. The magistrates who heard this case in the first instance held on the authority of two cases, *Fitzgerald* v. *Fitzgerald* and *Reg.* v. *Leresche*, that they had no jurisdiction. Very often there appears to be some misunderstanding as to the meaning and effect of the decisions in these two cases. It is true that there can be no desertion without cohabitation, but cohabitation does not necessarily mean persons living under the same roof; there are many cases where this is not the case, as where the wife is in domestic service. The two cases cited have this in common, that at the time of the alleged desertion the parties were living separate and apart, and were not cohabiting, and what those two cases decide is that a person cannot complain of desertion after voluntarily leaving his or her consort, and also that when parties are living apart by mutual consent—as under a separation deed—there cannot be desertion. In this case there had been cohabitation, and we find the husband refusing to allow his wife anything, and that he refused to receive her boxes. The magistrates decided the case on the point that they had no jurisdiction because there had been no cohabitation. I think there had, and that the magistrates had jurisdiction; the case must go back to them for decision on the merits.

BARNES, J.—I am of the same opinion. I think the magistrates misunderstood the two cases already cited.

Case remitted to magistrates.

Appeal allowed with costs.

Solicitor for the appellant, *Geo. M. Lay*, Twickenham.

Solicitor for the respondent, *Charles Robinson*, Hounslow.

Prob. Div. & Adm. Div. Probate (Barnes, J.) } July 27; Aug. 5, 1896.

In the Goods of ROBERT PEARSON (DECEASED). (*a.*

Probate—Lost will—Proof of will—Motion—Consent next of kin—Next of kin minors.

The court will not allow the contents of a lost will to be proved on motion without the consent of the next of kin, unless the estate be small.

Where the next of kin were minors, and therefore could not consent, the court refused to allow proof of a lost will on motion, and ordered the will to be propounded.

Motion on behalf of Mary Elizabeth Pearson, widow of Robert Pearson deceased, for leave to prove the contents of his last will.

The testator left three children surviving him, all of whom were then and now minors.

July 27.—*Bargrave Deane*, for the applicant.

Cur. adv. vult.

Aug. 5.—BARNES, J.—In this case I am asked to allow the applicant to prove on motion the contents of a lost will.

The applicant is the widow of the testator, and there are three children of the testator who are minors, and consequently there arises the difficulty of obtaining their consent as next of kin to the granting of this application on motion. I was desirous of assisting the parties, and adjourned the case in order to see what was the value of the property, whether it was reasonably substantial or of such a small amount as to justify my making the grant in order to save expense. I am told the value of the property is between £1,100 and £1,200, and must therefore deal with the question on the principles which ought to be applied in dealing with lost wills in all cases. I have made inquiry in the registry and am unable to find a single case in which a lost will has been allowed to be proved on motion without the consent of the next of kin, and am also informed that it is always the practice to require such consent, and therefore where such consent cannot be or is not given it is the practice to require the will to be propounded in the usual way, and I am therefore compelled to

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

refuse this motion as I cannot grant it without departing from a rule of this court which to my mind is one which it is desirable to maintain—viz., that where the property is substantial and no will is produced the court should not take the case on motion on affidavits only without full investigation, but it is desirable that the will should be propounded unless the estate is small or the consent of all parties is obtained. I must therefore require this will to be propounded.

Motion refused.

Solicitors, *Rowcliffes, Rawle, & Co.*

Prob. Div. and Adm. Div. } June 2; July 7, 1896.
Divorce (Divisional Court). }

ELLIS *v.* ELLIS. (*a.*)

Married woman—Justices—Summary jurisdiction—Persistent cruelty causing wife to live apart—Continuing offence—Limit of time—Six months—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 30), *ss.* 4, 8—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

The offence of persistent cruelty or wilful neglect, causing a wife to leave and live separately and apart from her husband within the meaning of section 4 *of the Summary Jurisdiction (Married Women) Act,* 1895, *is not a continuing offence, but is complete when the wife leaves the husband, and complaint must be made or information laid within six calendar months from that time, as required by section* 11 *of the Summary Jurisdiction Act,* 1848, *which is incorporated by section* 8 *of the first-named Act.*

Appeal by the husband from the order of the stipendiary magistrate sitting at Greenwich Police Court, from an order made under the Summary Jurisdiction (Married Women) Act, 1895, that his wife be no longer bound to cohabit with him, &c., on the ground that he had been guilty of persistent cruelty to her and wilful neglect to provide her reasonable maintenance, and by such cruelty and neglect had caused her to leave and live separately and apart from him.

In 1889 the wife left her husband in consequence of his cruelty, and did not return to cohabitation. The husband did not after the separation maintain his wife. The summons was heard and order made in 1896.

June 2.—*Gover*, for the appellant.—The Summary Jurisdiction (Married Women) Act, 1895, by section 8, requires that "all applications under this Act shall be made in accordance with the Summary Jurisdiction Acts." The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, imposes a limit of time, six months, for making the complaint or laying the information from the time when the matter arises. Here the matter arose in 1889, the offence was complete then, it was not a continuing offence, and the complaint not being made till 1896 is out of time: *Reg.* v. *Slade*, [1895] 2 Q. B. 247, 43 W. R. Dig. 86.

Lewis Thomas, for the wife, the respondent, referred to *Wilkinson* v. *Wilkinson*, 58 J. P. 415; *Reg.* v. *Evans*, 44 W. R. 271, [1896] 1 Q. B. 228; *Lane* v. *Lane*, [1896] P. 133, 44 W. R. Dig. 54; *Reg.* v. *Birtwhistle*, 58 L. J. M. C. 158, 38 W. R. Dig. 86.

Cur. adv. vult.

July 7.—JEUNE, P.—The order made by the learned magistrate in this case states that the complaint that the appellant has been guilty of persistent cruelty to the respondent, and wilfully neglected to provide reasonable maintenance for her, and has by such cruelty and neglect caused her to leave and live separately and apart from him, is true. The respondent finally left the appellant in August, 1889. It was suggested before us, and the evidence appears to show, that the appellant has neglected to maintain the respondent since she left him. This, however, seems to me to be immaterial. The "neglect to maintain" referred to in the 4th section of the Summary Jurisdiction (Married Women) Act, 1895, is neglect antecedent to its effect of the wife leaving her husband; and it is such neglect, and such neglect only, that the magistrate has found to be proved.

The only question, therefore, raised in this case is whether the offences proved are continuing offences, so that the limit of time imposed by the reference to the Summary Jurisdiction Acts contained in section 8 does not apply. I am of opinion that they are not continuing offences. It appears to me clear that when the course of conduct consisting either of persistent cruelty or neglect to maintain produces the result of causing the wife to leave her husband and live apart from him the offence contemplated by the Act is complete.

The test whether an offence is to be treated in law as continuous is, I think, whether its gravamen is to be found in something which the offender can at will discontinue. The gravamen of desertion is placed by the matrimonial law, not so much in one spouse leaving the other, as in his or her persisting in separation. But the gravamen of the offences of such cruelty or neglect on the part of a husband as drive a wife from her home consist in the cruelty or neglect carried to that point of aggravation. A husband whose misconduct has been so serious as to produce such a result is, I think, deemed by this Act to be guilty of a complete offence as soon as the result ensues. There is not, so far as I know, any authority on the point. The case of *Reeve* v. *Yeates*, 10 W. R. 779, 1 H. & C. 435, referred to in argument, presents some, but not a close, analogy. That case was decided on the words of 5 Geo. 4, c. 83, s. 4, which makes it an offence in "every person running away and leaving his wife or his or her child or children chargeable to the parish." It was held by Pollock, C.B., and Martin, B., Bramwell, B., dissenting, that the limit of six months ran, not from the time of leaving, but from the time of the chargeability arising. But it was not doubted that this period of limitation did then begin. So here I think that it begins when the husband's conduct causes his wife to leave him. In allowing the summary remedy provided for by this Act the Legislature in such cases as the present has thought right to prescribe that complaint shall be made within six months. But if that time be exceeded there remains the right to come to this court, which can give relief unless there has been undue or unreasonable delay. This appeal must therefore be allowed; but I think that the wife's costs here and in the court below should be paid by the husband.

BARNES, J.—According to the evidence the husband had been convicted of "persistent cruelty," causing his wife to leave and live apart from him, but the acts complained of took place in the year 1889. The question this court has, therefore, to consider is whether the acts complained of, having occurred more than six months before complaint made, come within the Act of 1895. It appears from section 8 of that Act that all applications thereunder must be made in accordance with the Summary Jurisdiction

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Acts, and therefore, as in this case not only the cruelty, but also the consequences of it, occurred more than six months before the complaint was made, in my opinion the Act does not apply to this case. The offence complained of in the present case is not on the same footing as "desertion," which could at once be put an end to by the parties. The appeal must therefore be allowed.

The COURT, while doubting if leave were required, refused leave to appeal.

Appeal allowed, costs of wife to be paid by husband.

Solicitors for the appellant, *Frederick Kent & Co.*

Solicitors for the respondent, *Busk & Mellor.*

Court of Appeal.

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — Nov. 7.

POTTER & CO. *v.* BURRELL & SON. (*a.*)

Ship—Charter-party—Construction—Salvage services—Limits of deviation.

By a charter-party the shipowners agreed to supply the charterers with five steamers, to load between August and December inclusive, as nearly as possible a steamer a month, at an agreed foreign port, the charterers undertaking to supply cargo within twenty-four hours of notice of each ship's arrival. The charter-party expressly excepted perils of the sea, and allowed towage services.

The S. 1 should have arrived at the agreed port on or about the 23rd of September, but did not as a fact arrive until the 8th or 9th of October, owing to heavy weather. The S. 2 arrived at her agreed time, on the 12th of October, and gave notice the same day that she was ready to receive cargo. None was tendered to her until the 24th of October, there not being sufficient labour at the port to load more than one steamer at a time. In an action for damages by the owners for the detention of The S. 2,

Held (affirming the award of the arbitrator and the decision of the Divisional Court), *that the owners were entitled to damages.*

The S. 3, on her voyage out, fell in with a disabled steamer and towed her to Mauritius on a salvage service. Such towage was out of the course of the voyage, and delayed the arrival of the vessel for three weeks. The arbitrator found that the towage service was not such as to frustrate the object of the adventure as between the charterers and the owners, and awarded damages.

Held, by the Court of Appeal, *that such a salvage service was an allowable deviation within the meaning of the charter-party, and that the charterers were bound to present cargo on the arrival of* The S. 3.

Appeal by the plaintiffs from a decision of the Divisional Court (Day, and Lawrance, JJ.) who upheld the award of an arbitrator on the construction of a charter-party.

By the charter-party dated the 5th of May, 1894, the shipowners, the defendants, agreed to supply the plaintiffs, the charterers, with five steamers at a certain rate of freight to proceed to a port in New Caledonia, there to load from charterers' agent a part cargo of nickel ore, and then go direct in a certain order to any three Australian or New Zealand ports as ordered by charterers, and there load in docks to complete their full cargo, and ultimately return to Havre or Glasgow.

The five steamers were to be provided to load between August and early December inclusive "at times to be in good time mutually arranged," but as nearly as possible a steamer a month.

The steamers were, with all convenient speed, to proceed direct in ballast to the port in New Caledonia to which they should be respectively ordered. Perils of the sea were (*inter alia*) mutually excepted.

The cargo was to be presented upon lighters, which were to commence to come alongside the steamer within twenty-four hours after receipt of notice by charterers' agent that the vessel was ready to receive cargo. The steamers were to have liberty to tow and be towed, and to assist vessels in all situations, salvages procured being for the benefit of the owners.

The steamers were to load as nearly as possible one steamer a month. Five new steamers were provided by the owners, and Noumea was agreed upon as the port of arrival in New Caledonia. *The Strathairly*, which should have arrived on or about the 23rd of September, did not arrive until the 8th or 9th of October owing to heavy weather. *The Strathnairn* arrived on the 12th of October, and gave notice the same day that she was ready to receive cargo, but no cargo was tendered to her until the 24th of October, there being not sufficient labour at Noumea to load more than one steamer at a time. Damages were claimed by the shipowners for the detention of *The Strathnairn* at Noumea. The arbitrator decided in their favour.

The Strathord on her voyage out, between the Cape and Australia on the 2nd of October, fell in with a disabled vessel, *The Buteshire*, on a voyage from London to Adelaide and towed her to Mauritius as a salvage service. This towage delayed the voyage of *The Strathord* for about three weeks. As a result of the delay an agreement between the plaintiffs and an Australian firm for loading the vessel in Australia was cancelled, and the vessel proceeded to a New Zealand port for loading, where she arrived on the 15th of December. Due notice of her arrival having been given to the charterers' agents, no cargo was tendered until the 3rd of January. The charterers therefore claimed that they were not bound to load in accordance with the terms of the charter, but only within a reasonable time. The arbitrator found as a fact that the towage services were not such as to frustrate the object of the adventure as between the charterers and the owners, and decided that the charter continued in force, and that charterers were bound to load in New Zealand in accordance with it; he accordingly awarded damages to the owners for the detention of the ship in New Zealand.

The plaintiffs appealed.

Cohen, Q.C., and *T. E. Scrutton*, for the appellants.

Bigham, Q.C., and *J. E. Bankes*, for the respondents.

LINDLEY, L.J.—The questions raised in this appeal turn entirely upon the construction of the charter-party. The charter-party provides that certain ships shall proceed in ballast to a port in New Caledonia, as ordered by the charterers, and they are to float and load part cargo of nickel ore. Having done that, they are to proceed direct "to any three Australian or New Zealand ports, in their geographical order, beginning at most northern port, as ordered by charterers or their agents, and there load at such usual docks, wharves, piers, or places therein, where the vessel can safely lie afloat, any sort of lawful merchandize, including wool," and so on. It also appears from the charter-party that besides Noumea, there is another port in New Caledonia, or at least one, Kuana, which is named in clause 16, and it was uncertain at the date of this charter to which

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

port these ships were to go; but it was arranged afterwards they should go to Noumea. Clause 35 of the charter-party says this: "Under this charter it is agreed that Burrell & Son are to provide John Potter & Co. with five steamers of 2,000 to 3,200 tons net register, size at Burrell & Son's option, to load between August and early December inclusive, at times to be in good time mutually arranged, but as nearly as possible a steamer a month." Now that is unquestionably an important clause; but what is meant by the expression "in good time to be mutually arranged, but as nearly as possible a steamer a month"? That expression "as nearly as possible," shows that the actual date which may be mutually arranged is not to be taken as a fixed date which cannot be departed from, because the expression "as nearly as possible a steamer a month" throws you back on clause 6 and clause 26. Clause 6 is the perils of the sea clause. It is not a fixed date, but it is a flexible date. Clause 26 is the towage clause: "Steamer to have liberty to tow and be towed, and assist vessels in all situations, and salvages procured to be for benefit of owners." Therefore towing is contemplated. Of course an unreasonable towage service is not contemplated, and I take it no towing service which would defeat the objects of the parties to the contract is contemplated, but any towage which is consistent with the attainment of the objects is contemplated. All towage, of course, involves delay. The ships were not to take a full cargo, but a partial cargo of nickel, and they were to fill up with wool, or anything else they liked, coming home. Clause 19 says: "As regards cargo to be shipped in New Caledonia"—that is, nickel—"the same shall be presented upon lighters, barges, and other vessels, which shall commence to come alongside the steamship within twenty-four hours after receipt of notice by charterer's agents that vessel is ready to receive cargo." That means that if a vessel arrives at a time which is consistent with this charter-party, the charterers are to send the nickel ore in lighters, barges, and other vessels alongside the steamship within twenty-four hours after notice. That is what they undertake to do. That means that unless they can show they are discharged from the obligation imposed upon them by this charter, by the non-performance of some condition or by some breach of contract on the part of the owners, they must carry out that undertaking. They take the risk of that. What happens?

Let us take the first point raised by this appeal, with reference to the ship named *The Strathnairn*. It was arranged the ship should arrive at certain dates. *The Strathnairn* was to arrive on the 10th of October; she arrived on the 12th. Why was not she loaded by the charterers pursuant to their obligation (which I have read) imposed upon them by clause 19? Because the preceding ship, *The Strathairly*, had arrived late, and because there was not labour enough at Noumea to load both ships at once. It was late, not by reason of any fault of the owners, but by reason of perils of the sea. The truth is she was not late according to to the true meaning of this contract—she had arrived in time. As I have pointed out the 23rd of September, the time named for her arrival, was not a fixed date, but was an approximate date—as nearly as possible consistent with the clause—consistent with perils of the sea. There was no breach of the contract in her being late; there was no breach or non-performance of any condition in her being late. She was there as contemplated by the parties to this charter. There was nothing wrong, nothing unperformed, and therefore no reason which could justify the charterers in saying they ought not to pay for the delay in loading *The Strathnairn*. According to the true construction of this charter-party, I have not the slightest doubt the risk of finding labour for loading two ships, if they should happen to overlap, was on the charterers, and I cannot read clause 19 as exonerating them in any way from finding lighters and labour to ship the ore. That is made a little plainer, to my mind, by looking at a clause which has not been referred to—clause 16, which provides that if the charterers name Noumea and cannot get ore there (this has nothing to do with the time) they can order the ship to another port in New Caledonia, upon certain terms there mentioned. To my mind that is a further reason for holding that the risk of finding labour is on the charterers. Clause 19, in my opinion, makes their appeal upon that point untenable. That is the first point, and my answer is: There is no breach of contract nor the non-fulfilment of a condition precedent.

Now I will take the next, which is the case of *The Strathord*. In order to make the case plain, one must read the clause in the charter which relates to loading in Australia. What happened was this. *The Strathord* was going out to New Caledonia, *viâ* Sydney. Before she got to Sydney she fell in with a ship in distress, *The Buteshire*, and she towed her back, as I understand it, to Mauritius. That caused delay, and a good deal of delay; but the arbitrator has found the delay so caused was not greater than would have been caused if *The Strathord* had towed *The Buteshire* on to Australia, which was in the course of her voyage. He has found that as a fact. There was a delay of three weeks, and we are asked to say that that towage caused such a delay as to be inconsistent with the attainment of the object of this charter. I cannot say anything of the sort. If *The Strathord* had towed *The Buteshire* up to the North Pole it probably would have been, but she towed her back to Mauritius. It was a deviation, of course, but a deviation, unless it is so great as to be inconsistent with the contract, is an allowable deviation, and having regard to the facts found in this case, it seems to me that we cannot possibly hold that the deviation which did take place in consequence of this towage was an inadmissible one. The delay was not so great—and the arbitrator finds that—as to defeat the object of the parties. If so, it was admissible; there was no breach of contract by that towage, and there was no non-performance of any condition precedent within the meaning of this contract. In my opinion both these grounds of appeal fail.

A. L. SMITH, L.J.—The questions arise upon a charter-party dated the 5th of May, 1894, between the shipowners and charterers. Now, although the charterers are the plaintiffs, I shall treat this case as if in reality it was an action by shipowner against charterer for damages for not loading the ship in pursuance of the charter. The clause upon which the shipowner relies and has apparently founded his claim is clause 19 of the charter, by which the charterer has bound himself in these terms. [His lordship read the clause, and continued:—] The vessel arrived there in due course. There is no complaint made of the time when she arrived at this berth in Noumea; but the charterer presented no cargo within twenty-four hours after notice of the readiness of the vessel to receive her cargo, and it is for the delay which there occurred that the first claim is made by the shipowner against the charterer. The arbitrator has awarded damages—or you may call it demurrage—for this delay in breach of the contract, and against that the charterer appeals.

It was said that clause 19 was not an absolute contract by the charterer to provide freight within

twenty-four hours after receipt of notice that a vessel was ready to receive cargo, but no argument was directed to that point. The point taken was this, If you look at the whole charter-party there was a condition precedent that no demurrage was to be paid by the charterer for not loading the ship unless the five ships arrived at certain stipulated periods, and if it happened by reason of perils of the sea, or what not, that two ships arrived at the same time and one was already in process of loading, it was a condition precedent that no obligation was imposed upon the charterer to load the second ship. As a matter of fact, I cannot read this charter as saying any such thing as an exception in this way to the absolute contract contained in clause 19. The appellants say: "First of all there is a contract clause which does not apply to this case." If there is no contract within that clause then it appears to me the absolute obligation in clause 19 would be done away with, and also the clause as to perils of the sea. Mr. Cohen says: "If you read clause 35 there is a condition precedent that if any two of the vessels happened to arrive so as to overlap each other, then the obligation so far as regards paying demurrage, which would otherwise apply, would be done away with." What is this clause? Did anyone ever read a clause like this as constituting a condition precedent to the performance of the other parts of a contract, one clause of which, as I have already pointed out, is absolute in its terms? "Under this charter it is agreed that Burrell & Son are to provide John Potter & Co. with five steamers . . . to load between August and early December inclusive"—that, so far, is conclusive; in that part there is no express stipulation to be there one a month. I will read on: "At times, to be in good time mutually arranged, but as nearly as possible a steamer a month." That is said to be a condition precedent that there shall be a steamer once a month, and, if they overlap, it does away with the right of the shipowner against the charterer. That was the contract made on the 5th of May, 1894. Then, pursuant to that term of the contract made in May, 1894, long after—namely, on the 31st of July, 1894—they came to a mutual arrangement as to how the ships were to go out. The letter written is this—it is from the shipowner to the charterer: "Dear Sirs,—We have your favour of yesterday"—and so on—"the fourth and fifth boats and dates are as Mr. Burrell named to you, but we repeat them here—viz., *Strathtay* due Noumea 18th August; *Strathairly*, 23rd September; *Strathnairn*,"—that is the ship in question—"10th October; *Strathord*, 23rd October; *Strathness*, 7th November." Now where do you find the condition precedent that if these ships overlap the contract with regard to demurrage shall be at an end? I cannot find it, and I say it does not exist. That was the point Mr. Cohen took—this was a condition precedent that no two ships should arrive at the same time. As a matter of fact that is not to be found in the contract.

Then Mr. Scrutton has a point as to *The Strathairly*, but I should point out before I deal with *The Strathairly* that *The Strathnairn* went there all right according to the contract, by which she was to be there about the 10th of October. She got there shortly after, on the 12th of October, and no complaint is made of the time she arrived. She was ready in due course, and was ready to take her cargo on board, and notice was given that she was ready for the charterers' agents to load. They did not load because, as it is said, they could not load two ships at the same time. Take it that it was so. How did that abrogate the express contract, which I read first in clause 19—that they will load within twenty-four hours? The shipowner was guilty of no breach at all by reason of the *The Strathairly* getting there late. He had done nothing by himself which would hinder and prevent the charterer from carrying out his contract, and I cannot see myself how the mere fact of *The Strathairly* getting there late abrogates that express contract in the charter. If the ship gets there in time, which *The Strathnairn* did, and notice is given within twenty-four hours, the charterer is to provide cargo for the ship. It seems to me, upon these grounds, the arbitrator's finding that the shipowner was entitled to damages for delay in loading *The Strathnairn* at Noumea, is well founded, and I think the appeal fails.

I now come to *The Strathord*. This is how I think this case really stands. [His lordship stated the facts, and continued:—] Then Mr. Cohen says: "There is a clause in the charter-party which allows you to render salvage service, but some limit must be put upon that. The charterer says you could not render such salvage services as would cause you to come to the port of loading six, twelve, or fifteen months after the stipulated period." With that I agree. Mr. Cohen cited the judgment of Bramwell, B., in *Stuart v. The British and African Steam Navigation Co.*, 32 L. T. N. S. 260, 23 W. R. Dig. 214. In that case Bramwell, B., said to Mr. Benjamin, who was arguing the case, "I wish you could tell us what that limit must be." Mr. Benjamin did not; and as he did not try, I am not going to try. But what Bramwell, B., did say was that that case was well within the line and not over the line. What the arbitrator has found as a fact is that the time which was occupied by this salvage service did not frustrate the object of the adventure between the shipowner or the charterer. By the contract, as I read it, the shipowner had the right to perform these services. Then may not the limit be—I do not say it is—if he performs this service in such a way as not to prevent the object of the adventure between charterer and shipowner, that would be said to be within the limit. It might, on the other hand, be said, If the salvage service occupied such a time as to frustrate the object of the adventure, it was outside the limit spoken of by Bramwell, B. I cannot find in this case that these salvage services have exceeded the limit which was mentioned. It seems to me that on both these points the appeal ought to be dismissed.

Appeal dismissed.

Solicitors, *Parker, Garrett, & Holman*; *Botterell & Roche.*

From Chan. Div. (Lindley and Lopes, L.JJ.) } Aug. 5, 10, 1896.

In re LUMLEY.
Ex parte HOOD BARRS. (*a.*)

Married woman—Restraint on anticipation—Limitation not containing words "separate use"—Estate "without impeachment of waste"—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75).

Income accrued due after judgment in respect of property subject to a restraint on anticipation cannot be taken in execution or by the appointment of a receiver.

Hood Barrs *v.* Heriot, 44 *W. R.* 481, [1896] *A. C.* 174, *distinguished.*

Hood Barrs *v.* Cathcart, 42 *W. R.* 628, [1894] 2 *Q. B.* 559, *and* Whiteley *v.* Edwards, 44 *W. R.* 530, [1896] 2 *Q. B.* 559, *followed.*

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

A restraint on anticipation may be validly annexed to the separate estate created by the Married Women's Property Act, 1882, though the words "for her separate use" do not occur in the limitation; and even to an estate expressed to be granted "without impeachment of waste."

Appeal by H. H. Hood Barrs, a solicitor, from North, J.

In 1893 and 1894 the appellant had obtained several orders directing payment of costs to him by Mrs. Mary Cathcart, a married woman. The orders were in the form adopted in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120, limiting execution to separate property of the debtor not subject to any restraint on anticipation. Hood Barrs now sought to enforce his claim against certain rents of Mrs. Cathcart's property which had accrued due after judgment. The property from which the rents arose had, by Mrs. Cathcart's marriage settlement, been conveyed to trustees to hold the same (after the solemnization of her then intended marriage) to her use "during her life without impeachment of waste and without power of anticipation," the deed containing no mention of "separate use." In June, 1896, Hood Barrs moved for a receiver of the rents and profits due and in arrear of certain real estates comprised in Mrs. Cathcart's marriage settlement. North, J., refused the motion, and Hood Barrs appealed.

H. H. Hood Barrs, in person, for the appeal.—*Hood Barrs* v. *Heriot*, 44 W. R. 481, [1896] A. C. 174, is an authority that the judgments can be enforced against rents accrued due. The attempted restraint on anticipation is invalid for want of the words "for her separate use": *Stogdon* v. *Lee*, 39 W. R. 467, [1891] 1 Q. B. 661; *Tullett* v. *Armstrong*, 1 Beav. 1; the judgment of the Divisional Court in *In re Armstrong, Ex parte Gilchrist*, 34 W. R. 709, 17 Q. B. D. 167, 521; *In re Armstrong, Ex parte Boyd*, 36 W. R. 772, 21 Q. B. D. 264. [He also referred to Wolstenholme on the Conveyancing Acts, &c., 4th ed., note on section 1 of the Married Women's Property Act, 1882; sections 2, 19 of that Act; *Symonds* v. *Wilkes*, 13 W. R. 1026; and *Hood Barrs* v. *Cathcart*, C. A., 23rd of July, 1894, reported only in a pamphlet.] The words "without impeachment of waste" are inconsistent with the existence of a restraint on anticipation: *Clive* v. *Clive*, 20 W. R. 477, L. R. 7 Ch. App. 433; *Cope* v. *Cope*, 15 Sim. 118; and Sheppard's Touchstone, 8th ed., p. 88.

Willoughby Williams, for Mrs. Cathcart.—*Whiteley* v. *Edwards*, 44 W. R. 530, [1896] 2 Q. B. 48, decides that rents accrued due after judgment cannot be taken in execution. The point on the omission of the words "separate use" was decided against the appellant in *Hood Barrs* v. *Cathcart*, 23rd of July, 1894.

He also referred to Davidson's Conveyancing, vol. 3 (3rd ed.), p. 309; Key and Elphinstone's Precedents (4th ed.), vol. 2, p. 613. If the words "without impeachment of waste" are inconsistent with the restraint, the former, as the smaller, must yield to the latter, the larger and more important. But there is no inconsistency.

Hood Barrs replied.

Cur. adv. vult.

Aug. 10.—LINDLEY, L.J., read the following judgment: Mr. Hood Barrs seeks to enforce an order for costs against rents which became due to Mrs. Cathcart since the order was made. North, J., has decided that he is not entitled to do this, because the property from which the rents are due was settled on Mrs. Cathcart without power of anticipation. Mr. Hood Barrs has appealed—first, on the ground that the restraint against anticipation is invalid; and secondly, on the ground that, even if it is valid, he can reach the rents now that they are in arrear. That he cannot reach them if Mrs. Cathcart is effectually restrained from anticipation is now settled by the decisions of the Court of Appeal in *Hood Barrs* v. *Cathcart*, 42 W. R. 628, [1894] 2 Q. B. 559, and *Whiteley* v. *Edwards*. These decisions are in no way opposed to *Hood Barrs* v. *Heriot*, but are quite consistent with it. They are, I admit, opposed to some remarks of my own in *Cox* v. *Bennett*, 39 W. R. 401, [1891] 1 Ch. 617, but they are not opposed to the decision in that case, which was approved by the House of Lords in *Hood Barrs* v. *Heriot*. *Whiteley* v. *Edwards*, which was decided after *Hood Barrs* v. *Heriot*, is conclusive on this point.

The question whether the restraint against anticipation in Mrs. Cathcart's marriage settlement is valid or not is, in my opinion, also settled by the Court of Appeal in *Hood Barrs* v. *Cathcart*, on the 23rd of July, 1894, a report of which has been furnished to us by Mr. Hood Barrs. In that case he urged the argument which he has addressed to us on the present occasion, and the court decided against him. The Master of the Rolls and A. L. Smith, L.J., considered the point not open after the previous decision in *Hood Barrs* v. *Cathcart*, but Kay, L.J., showed that the argument was inconsistent with section 19 of the Married Women's Property Act, 1882. It may be that the validity of the restraint against anticipation had previously been assumed, and not decided; but it was distinctly raised and decided on the 23rd of July, 1894. Having, however, looked into the matter myself, before I had satisfied myself that the point had been already actually decided, I will state that, in my opinion Mr. Hood Barrs' argument is quite untenable. The omission of the words "for her separate use," which would have been fatal if the case did not fall within the Act of 1882—see *Stogdon* v. *Lee*—is not so if that Act applies, as it clearly does. By sections 1 and 2 of the Act the property settled became Mrs. Cathcart's separate property, although the words "for her separate use" were not inserted in the settlement, and, as the settlement did restrain her from anticipation, that restraint became operative by section 19. The attempt to draw a distinction between the separate property of a married woman and property settled on her for her separate use has been made before, and made in vain: see *In re Armstrong, Ex parte Boyd*. That case also shows that "affect" in section 19 means "invalidate" or "render inoperative."

As to the introduction of the words "without impeachment of waste," they might perhaps create a difficulty if we were dealing with a case of waste, although I doubt whether they would even then, but we are not dealing with such a case. The appeal must be dismissed, with costs.

LOPES, L.J.—I am of the same opinion. As to the words "for her separate use," whatever may have been the state of the authorities before the Act of 1882, that Act, in my judgment, now supplies them, and therefore the restraint on anticipation at once attaches.

As to the rents in arrear, I add nothing to what has been said by Lindley, L.J. I think the question is already settled by the decision of the House of Lords.

It was argued that a gift "without impeachment of waste" is inconsistent with a restraint on anticipation. I do not think that contention can be maintained. It might be right if waste were actually committed, but only in that case. I have read the judgment of Lindley, L.J., and I agree with it.

Appeal dismissed.

Solicitors, *H. H. Hood Barrs; E. H. Quicke.*

From Chan. Div. (Lindley and Lopes, L.JJ.) July 1, 1896.

EHRMANN v. EHRMANN. (a.)

Practice—Evidence—Letters of request to take evidence before foreign tribunal—Discretionary power of court.

In order to justify the court, in the exercise of its discretion, ordering the issue of letters of request to a foreign tribunal to take evidence, there must be clear proof that the evidence abroad which is sought to be obtained is material to the case in issue, and is not merely such as incidentally might be useful on a collateral matter.

Appeal from an order of Stirling, J.

The plaintiffs and defendant had carried on in partnership the business of wine merchants.

In June, 1894, the plaintiffs commenced this action for the dissolution of the partnership.

In their statement of claim the plaintiffs alleged (*inter alia*) that the defendant had bribed a person in the employ of a firm of carriers to inform him of the names and addresses of persons to whom such carriers forwarded wines on behalf of Continental wine merchants, and had sent to the plaintiffs lists of the names and addresses of such persons and of the merchants by whom the wines were supplied to them for the purpose of their being made use of by the plaintiffs in their journeys on behalf of the firm.

The plaintiffs alleged that when they received such lists they did not know by what means they had been obtained by the defendant, but that it had afterwards come to their knowledge, and had also come to the knowledge of other persons, and had injuriously affected the reputation of the firm.

The defendant denied these allegations, and in May, 1895, the court directed the action to be tried only upon certain matters, and expressed an opinion that particulars ought to be given of the allegations above set out.

The action had been set down for trial, and the plaintiffs on the 13th of May, 1896, gave notice of motion for the issue of letters of request to the tribunals in Germany to examine as witnesses for the plaintiffs some of the Continental merchants referred to by the plaintiffs in their statement of claim; their evidence was required by the plaintiffs to prove that certain wines were forwarded on their behalf to certain persons by the carriers.

When the motion first came before Stirling, J., he required the plaintiffs to give further particulars, not being satisfied that they were in a position to go to trial upon the particular issue in question.

Particulars having been supplied of the names of persons to whom the wine had been sent, the merchants who sent it, and the quantities of wine sent, on the 19th of June, 1896, when the motion again came on, Stirling, J., without expressing any opinion as to whether the particulars were sufficiently full, said that they satisfied him that the plaintiffs meant to go to trial upon the particular issue, and ordered the letters of request to issue, but not before the 8th of July, so that in the meantime the defendant might make certain inquiries, and if the answers would justify him in making admissions, he could apply to the court on the 7th of July to stay the issue of the letters.

The defendant appealed.

Buckley, Q.C., and *H. Terrell*, for the appellant.—If the plaintiffs prove that the merchants in question did send wine through the carriers, it does not prove that the defendant obtained the names of the persons to whom it was sent by bribery. On that ground the letters of request ought not to be issued. Further, the defendant ought not to be required to make the admissions which the judge thought he should make. It would injure him if he had to go or write to foreign firms and tell them of the charge made against him, and ask them to help him to defend himself against it.

Jelf, Q.C., and *Solomon*, for the respondents.—It is difficult to prove the bribery directly, but it would assist the plaintiffs if they could prove that Continental merchants sent through the carriers wine to the persons whose names are on the lists supplied to them by the defendant; and if it could be found that the defendant acquired the information, and that a present was given by him to the agent of the carriers, the inference of bribery would be strong. The issue of the letters is a matter of discreton, and Stirling, J., who is well acquainted with the case, has exercised his discretion by ordering it.

LINDLEY, L.J.—I do not think it is possible to support this order. Although it is quite true that an order for a commission depends very much upon the discretion of the judge, and the circumstances must be very peculiar to induce the Court of Appeal to take a different view from that which the learned judge has taken about such a matter as that; still we all know that a commission abroad to take evidence, or, in this form, letters of request to a foreign Government to allow evidence to be taken, is a very serious matter; it involves great expense and involves great delay, and recourse should not be had to it unless it is really wanted for the purposes of the trial. You must look and see whether the evidence which it is desired to obtain abroad is really necessary for the purposes of justice. It is not enough to say that possibly it may be of some use on some collateral matter to bolster up a witness or something of that kind. It must have a closer bearing on the issue. Now, what is the issue here? This is an unfortunate partnership quarrel. The plaintiffs are in partnership with the defendant under articles which say that the partnership is to last forty years. The plaintiffs say that the defendant has so misconducted himself as to entitle them to a dissolution before the expiration of the forty years, and they allege amongst other matters misconduct as a ground to induce the court to dissolve the partnership before the expiration of the forty years. They say that he has been guilty of conduct which is discreditable on the part of a wine merchant. They say in paragraph 8 of the statement of claim: "The defendant bribed a person in the employ of Messrs. Pickford & Co., carriers, to inform him of the names and addresses of persons to whom such carriers forwarded wines on behalf of Continental wine merchants, and sent to the plaintiffs lists of the names and addresses of such persons, and of the merchants by whom such wines were supplied to them, for the purpose of their being made use of by the plaintiffs in the course of their journeys on behalf of the firm." The plaintiffs when they received such lists did not know by what means they had been obtained by the defendant. The fact of the said bribery afterwards came to the knowledge of the plaintiffs, and also came to the knowledge of other persons, and injuriously affected the reputation of the firm. They allege that he has been guilty of discreditable conduct as a wine merchant, in having bribed a person in Messrs. Pickford's employ here in England. The plaintiffs ask for a commission to prove that certain Continental wine merchants did make consignments to people in this country through Messrs. Pickford somewhere between 1883 and 1887. Now, suppose they did prove that. I do not say that it may not possibly be corroborated by the person

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

bribed, or something of that kind; but the evidence does not prove the charge a bit, and it has nothing to do with it except possibly to throw discredit on a witness. It is quite new to me to grant a commission for such a purpose as that. Stirling, J., says this: "I think you ought to have a commission for that purpose unless the defendant will make admissions." Now, what sort of admissions is he to make? Admissions that rival Continental merchants had consigned wine through Messrs. Pickford to some people in this country. How can the defendant be in a position to make any admissions if he does not know anything about it? It is a good ground for asking a person to make admissions if those admissions are with regard to something that he knows, or can ascertain; but to ask a person in trade to make admissions as to what rivals in trade have done years ago appears to me to be a mistake. The learned judge took a view with regard to that which I cannot share at all, and I do not think it was a reasonable term to impose upon the defendant, who knows no more about the matter than I do. The defendant cannot make the admissions in reason, and yet unless he does the commission is to go. It appears to me to be far short of what is necessary for the purposes of justice, and I do not believe it is necessary for the purposes of justice. I think the order must be discharged with costs here and below, and the defendant's costs in any event.

LOPES, L.J.—I am entirely of the same opinion. The analogy that Mr. Jelf sought to draw between evidence obtainable in this country and evidence that is only obtainable by the issue of a commission is altogether fallacious. There is a great deal of evidence, I can quite imagine, that can be easily obtainable, and within reach of this country, that a learned counsel advising on evidence might be of opinion had better be given. To obtain evidence on commission is an entirely different thing. In my opinion a commission to examine witnesses ought not to be permitted to issue very lightly. I think in order to justify the issue of a commission there ought to be a very clear proof that the evidence abroad which is sought to be obtained is material, and material directly to the case in hand; not merely evidence which incidentally might be useful, such as I think the evidence sought to be obtained here. That is not the kind of evidence that ought to be permitted to be obtained on commission. In point of fact the evidence here sought is very much, as was said by my learned brother Lindley in the course of the case, "for the purpose of bolstering up other evidence by incidental evidence." That is not the kind of evidence that ought to be permitted to be obtained on commission. Now the learned judge, in fact, has exercised his discretion with regard to this matter, and we ought not lightly to interfere with it. On the other hand, if we think the discretion has been wrongly exercised, it is our duty to interpose. After thinking the case carefully over, it occurs to me in this way. I firmly believe the learned judge would not have permitted these letters of request to go unless he had thought that the defendant might and ought to make certain admissions which he indicated. If there were certain admissions that the defendant could and ought to have made, I am inclined to think that the judge would be right, and that if the defendant refused to make such admissions the commission ought to go; but to my mind the admissions proposed were admissions that the defendant could not be reasonably asked to make; they were admissions in respect of matters about which, in my opinion, he would know nothing, and if he had known anything about them think what a difficulty he would be placed in. The admissions required him to write to rival tradesmen—wine merchants abroad—asking them what consignments they made to customers in certain years long past. The answer he would receive would be something of this kind: "What business is it of yours?" Whether that was so or not, I am clearly of opinion that these admissions the defendant could not be reasonably asked to make, for the reasons which I have given. I think, therefore, that the learned judge was wrong in permitting these letters of request to go, and that the appeal ought to be allowed, with costs.

Appeal allowed.

Solicitors, *Wild & Wild; Goldberg, Langdon, Barrett, & Newall.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 11, 12, 1896.

In re TRADE-MARK, "BOVRIL" (*a.*)

Trade-mark—"Fancy word not in common use"—Removing from register—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.

The word "Bovril" is a "fancy word not in common use" within the meaning of section 64 *of the Patents, Designs, and Trade-Marks Act,* 1883, *and is properly registered as a trade-mark under that Act; though possibly, as applied to meat extract, &c., it has "reference to the character or quality of the goods" within the meaning of section* 10, *sub-section* 1 (e), *of the Act of* 1888, *and therefore could not now be registered.*

Appeal from Kekewich, J.

The word "Bovril" had been registered in 1886 as a new trade-mark for foods and ingredients of food, and a very large business was now being done in a form of meat extract known as "Bovril." One John Rosetree, who was carrying on a trade in similar articles, desired to apply the name "Bovril," as a well-known name for that class of goods, to fluid beef and meat extracts manufactured by him. Rosetree accordingly applied to Kekewich, J., to remove the word "Bovril" from the register of trade-marks.

Kekewich, J., refused the application, and the applicant appealed.

G. S. Bower and *W. F. Drew*, for the appeal.—"Bovril" is simply a diminutive from "bos, bovis," an ox, and is not "a fancy word not in common use."

They cited *In re Van Duzer's Trade-Mark* and *In re Leaf, Sons, & Co.'s Trade-Mark* ("*Melrose*" and "*Electric*" cases), 35 W. R. 294, 34 Ch. D. 623; *Waterman* v. *Ayres*, 37 W. R. 110, 39 Ch. D. 29; *In re Farbenfabriken's Trade-Mark* ("*Somatose*" case), 42 W. R. 488, [1894] 1 Ch. 645; *Edwards* v. *Dennis*, 30 Ch. D. 454, 34 W. R. Dig. 197; and *In re Holt's Trade-Mark*, 44 W. R. 369, [1896] 1 Ch. 711.

Moulton, Q.C., and *John Cutler* (with them *Warmington, Q.C.*), for the respondents.—At the date of its registration, "Bovril" had no meaning in the English language; it was a fancy word, and had never been used before at all.

They cited *Powell* v. *Birmingham Vinegar Brewery Co.*, [1894] A. C. 8, and *In re Densham's Trade-Mark*, 43 W. R. 515, [1895] 2 Ch. 176.

G. S. Bower, in reply.—The argument that a descriptive word, if it is also a fancy word, is entitled

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

to be on the register, cannot succeed in this court after the *Van Duzer* and "*Somatose*" cases.

LINDLEY, L.J.—I do not think we need take any time for consideration in this case. The argument for the appellant is a very ingenious one, and extremely creditable to Mr. Bower. He seeks to force us to do that which I think is quite wrong, and to substitute some expressions used by judges in certain cases for the language used in the Act of Parliament; and, having got that far, he seeks to drive us to do that which, I think, would be a gross injustice. When we are asked to do that, of course we are very cautious; we do not do that, if we can help it. What we have got to do here is to consider whether, on the 2nd of November, 1886, Mr. Johnston was entitled to register as a trade-mark for articles of food, in Class 42, the word "Bovril." We have to consider that with reference to the Act of Parliament which was then in force—that is, the Patents, Designs, and Trade-Marks Act, 1883; and, with reference to this point, we have to look at section 64, which says this: [The Lord Justice read the section, and continued:—] This is what we have got to ask ourselves: Was the word "Bovril" on the 2nd of November, 1886, a distinctive fancy word not in common use?

Passing there, and not referring to any of the decisions, can anybody say with truth that "Bovril" was not then a fancy word? I confess I find myself quite unequal to the task; I cannot do it. It is admitted that the word was new, and had never been heard of before. If such a word as that is not to be deemed a fancy word not in common use, it is very difficult to say what is. Mr. Bower says that that view might have prevailed in 1886 or 1887, but that since then the Appeal Court has said what is a fancy word, and nothing can now be held to be a fancy word unless it is obviously non-descriptive of the article to which it is applied. "Bovril," he says, is not obviously non-descriptive; on the contrary it describes or means "ox." Let us, then, look at what this court has said. It has said with reference to the use of common English words—that is, in dealing with the *Van Duzer case*—in which a newly-coined word was not under consideration, but a common English word was: That won't do; you must have a word obviously non-descriptive. A step further was taken in the "*Somatose*" *case*. But that case was on a different Act of Parliament altogether; an Act which substituted the expression "an invented word" for "a fancy word not in common use." I think the substitution is important. So you have the decision in the "*Somatose*" *case*, from which I dissented, that "Somatose" is not an "invented word." We did not differ, about more than this; I thought it was an invented word, and the other members of the Court of Appeal thought it was not. But I disregard that case, except for this purpose, to show that that was the ground of the decision. It would be altogether wrong for us to take the Act of 1883 and substitute for "a fancy word not in common use" the phrase, "a non-descriptive word." That is not the language of the Legislature. I agree we must ask whether the word is non-descriptive. To my mind it is, notwithstanding Mr. Bower's very ingenious argument. He makes out, or tries to make out, that "Bovril" is descriptive by taking a bit of the word, the syllable "bov," and then saying that because "bos" means an ox, therefore "bovril" means something about an ox, and is not a fancy word. I do not see the *sequitur* at all. Does it cease to be a fancy word not in common use because part of it is derived from the Latin word for an ox? Its descriptive character can be got at only by a very ingenious argument, by taking the first syllable by itself. When the appellant's counsel is asked to say what the whole word means, he can give no answer. Of course it is applied to extracted meat, but at the time this word was first formed could anyone say more than that it had some relation or other, or might have some relation or other to the word for an ox? Is that, then, a descriptive word, so as to destroy the real truth of the case, and oblige us to remove it from the register?

I think the test suggested by Mr. Moulton is the right one: whether the word is descriptive or not is eminently and peculiarly a question of fact. I ask myself: Suppose a jury were asked to say whether, on the 2nd of November, 1886, "Bovril" was a fancy word not in common use; and suppose they received a direction from the judge—which, I think, it would be the duty of the judge to give—that what they had to consider was whether the word had been known to ordinary Englishmen before that date, could they, with that direction, reasonably say that it was not a fancy word not in common use? I do not think they could. In my judgment, therefrom, the appeal fails.

LOPES, L.J.—In this case the words we have to deal with are the words "fancy word not in common use," and those words are to be found in the 64th section of the Act of 1883. These are the words of the statute. In determining whether any particular word is a "fancy word" we must look at the statute, and also, of course, at any decisions of the courts with regard to it. But it is the statute we must first look at, and I cannot agree with Mr. Bower when he suggests that if any interpretation has been put by decision upon "fancy word" we must look at that, substituting for those words the interpretation put on them, without reference, or with very little reference, to the statute. The statute is the dominant matter to be considered in determining such a question.

It is material to consider the time when the particular word was placed on the register. This word "Bovril" was placed on the register in 1886. We must consider that time, and not criticize the word by what has happened, or has become known, subsequently. In 1886 the word "Bovril" was clearly a new word coined for the occasion. It can be found in no dictionary; it was not known in any language; and in my opinion it is therefore a word distinguishable from the word "Melrose" in the *Van Duzer case*, and "Electric" in *Leaf, Sons, & Co.'s case*, because these were old words, of a well-ascertained and established meaning. But I hold entirely to the definition of a fancy word laid down in the "Melrose" and "Electric" cases—namely, that to be a good fancy word it must be obviously meaningless as applied to the article in question, and fanciful in that application. It is said that "Bovril" indicates a substance made from beef, because the first syllable of that word is "bov," which, it is said, relates to an ox. In my judgment you must look at the whole word, and not at part of it. You must look at the rest of the word in its combination, and that combination may qualify the first syllable so as to make it meaningless and non-descriptive. That is the view which I take of "Bovril," and I cannot think that in 1886 it would have conveyed to the mind of an ordinary Englishman any idea involving any connection with "bos" or "bovis."

Mr. Bower has argued this case with exceptional ability. His strongest case was, I think, the "*Somatose*" *case*. But I think this observation is to be made with regard to that case, that every case must be determined according to its particular circumstances; and, moreover, that a word may strike some people as a fancy word, and not other people. The

"*Somatose*" *case* was under another Act of Parliament, where different words were used. I am bound by that case, of course, though I think if I had been a member of the court which decided it, I should have placed myself beside the learned judge who was in a minority. On the whole, therefore, I come to the conclusion that the appeal ought to be dismissed.

RIGBY, L.J.—I am of the same opinion. Shortly, my judgment is founded on this: We have to determine what is a "fancy word not in common use." Now, the word "Bovril" was not in use at all, and therefore we have to deal only with the words "a fancy word." I can only say that I do not know what would be a fancy word if this is not one. Mr. Bower tries to place us in a dilemma by telling us that there are cases which drive us to the conclusion that "Bovril" is not a fancy word, and that this court has committed itself so far that only the House of Lords can set the matter straight. When we look at the *Van Duzer case*, and I think the same may be said of all the cases, it does not, as Mr. Moulton said, go nearly far enough for the appellant's purpose. In that case there was an attempt to create a secondary meaning of the word "fancy." "Melrose" is obviously not a fancy word; "Electric" is not a fancy word; and I can only read that judgment as saying: "If you show that you have taken an ordinary word and applied it in such a manner that the application is really fanciful, it may for that particular case be a fancy word; but in extending the Act in that way great care must be taken, and therefore if you ask us to extend the Act we must be careful that we do not transgress it." In short, the ordinary word taken must be of such a nature that it is obviously unmeaning, obviously non-descriptive, as applied to the particular goods. I will only say as regards "Bovril," that to an ordinary Englishman—even if the evidence is sufficient to show that the word is, when interpreted, a descriptive word—I cannot imagine that such an idea would ever occur. I cannot better express my meaning that by referring to the "*Somatose*" *case* and seeing what the test there was. To bring "Somatose" within section 10, subsection 1 (*e*), of the Act of 1888, which was the thing attempted there, it had to be shown to be a word having no reference to the character or quality of the goods. I am by no means prepared to say that "Bovril" has any reference to the character or quality. When we know what it means, it appears to me, on the authority of the one decided case which bears on that point, to be at any rate a very plausible argument to say that it has such a reference, though the reference is so wrapped up that an ordinary man might not see it. But in this case we have not to deal with those words. The Act of 1888 was passed because the criterion of "fancy words not in common use" had not turned out satisfactory. Whether the substituted words are satisfactory is another question; but we have now to deal with the words of the earlier Act of 1883, and I think that by no stretch can we hold that this is not "a fancy word not in common use."

Appeal dismissed.

Solicitors, *Joseph Davis; C. Urquhart Fisher.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 5, 6, 1896.

McKEOWN *v.* BOUDARD PEVERIL GEAR CO. (LIMITED). (*a.*)

Company—Prospectus—Contract to take shares—Rescission—Non-disclosure of material facts.

A person who has contracted to take shares in a company cannot avoid his contract on the ground that the prospectus did not set forth all the facts which were known to the directors, and which might induce a person to apply or not apply for shares. In order to avoid the contract, a mis-statement or concealment of facts must be of such a character as to make the prospectus as it stands misleading.

Decision of Romer, J. (44 *W. R.* 664), *affirmed.*

Appeal from Romer, J. (reported 44 W. R. 664).

The plaintiff in the action claimed rescission of a contract to take shares in the defendant company on the ground of misrepresentation and suppression of material facts in the prospectus issued by the directors of the company.

Romer, J., dismissed the action.

The plaintiff in person appealed.

Neville, Q.C., and *Percy Wheeler*, for the company, were not called upon.

LINDLEY, L.J.—Having read the prospectus with some care, and having heard the plaintiff's comments, and he has argued his case with great ability, the conclusion at which I have arrived is that if you look at it, not with a view to pick holes in it, but with a view to understand it, it is distinctly not a fraudulent or misleading prospectus. The obvious object of those who issued this prospectus was to induce people to suppose that the Boudard gear was better than others, and faster. The Boudard gear is so described and so alluded to in this prospectus as to lead people to suppose that it is the fastest-going gear known up to the date of the final prospectus, which was sent to this gentleman, and on the faith of which he took his shares on the 15th of October, 1894, and he is quite right in basing his case upon the prospectus which he received, and which is now before us, and on which he has commented. On p. 1 it sets out certain statements in the shape of extracts from papers and so on praising this machine. It afterwards puts before the public the merits, or supposed merits, of this gear, and a great deal that is to be found in this prospectus is mere puffing, and to do the plaintiff justice he does not rest his case on that which everybody can see is only mere puffing. I will now read the passages which are important, or which he asks us to consider important. [His lordship then read those parts of the prospectus referring to record performances on cycles set out in the report in the court below.] If there were nothing else in this prospectus, though it does not contain any direct statement to the effect that these are the best performances known up to date, I think it probably would be inferred by an ordinary reader that, so far as the directors knew, at all events, these were the best performances up to date. The object, of course, was to induce people to believe that this Boudard gear applied to machines made them faster than any others, and in order to do that they set out these performances. But then there is a clause which, as I read it, negatives that entirely. I do not say it was put in for that purpose; but being put in it has the effect of displacing that possible construction of the prospectus. This clause is, to my

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

mind, all important, and says: "Of course the records quoted are by no means final. Such velocity has been, and will be, increased on both old and new gear, and the true merits of the new Boudard system are therefore all the more likely to be clearly seen and appreciated." Now, that gives anybody who reads it attentively sufficient warning not to be misled by the first part, a warning or caution that these records are not the best up to date. I cannot read "such velocity" as a mere statement of a record velocity in general. I do not think that is the object the phrase at all. "Such velocity" refers back to the records quoted, and I cannot understand "such velocity" to mean anything more or less than this, that the speed attained by the Boudard gear cycle had been beaten. Of course it had. They say: "Of course the records quoted are by no means final." It not only says that they will be beaten, but such velocity has been beaten. To say after that that this prospectus is misleading, and that the inference which might be drawn in the absence of that passage to which I have referred can fairly be drawn when that passage is attended to, seems to me to be a hopeless contention. That was the view taken by Romer, J., and I think that is the fair view. Then, if that is the fair view apart from the criticisms to which I have alluded, and to which I will again refer, there is no fault to be found with this prospectus.

Now I pass to the two statements of fact which are said to be false. To my mind, even if they are proved to be so up to the hilt, they do not make this a false or a fraudulent prospectus. Supposing that there are two errors in this list of records, to say that the plaintiff was induced to take shares upon the faith of the truth of those particular records, when all the rest is true, is to ask the court to believe that which no jury would listen to for one moment. One of the two mis-statements of fact is that the fifty miles Polytechnic race by Leitch was a record at that time. It does not say so; but I think that is the fair inference, and now it turns out that somebody had done that course in a less time. That is an instance. As to the other mis-statement of fact, that the Humber gear of 1891, or the Humber cycle of 1891, and the Humber cycle of 1894 were precisely the same, is, to my mind, far too trivial to take notice of it. Now, what is the function or duty of the court in dealing with this prospectus? I do not think it can be better put than it was by Turner, L.J., in a passage in his judgment in *Jennings* v. *Broughton*, 5 De G. M. & G. 126, 140, 3 W. R. Dig. 45, which passage was adopted and approved by Sir George Jessel, M.R., in *Smith* v. *Chadwick*, 30 W. R. 661, 20 Ch. D. 27, 67. Sir George Jessel said: "I cannot, I think, do better than conclude my judgment with a quotation from a well-known judgment of Turner, L.J., in *Jennings* v. *Broughton*, which I think emphatically applies to this case: 'And, finally, I think that although it is the undoubted duty of this court to relieve persons who have been deceived by false representations, it is equally the duty of this court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined. That, in my opinion, would be the effect of giving the plaintiff the relief which he asks, and I think, therefore, that this bill has been properly dismissed.' That is the result I have come to," said Sir George Jessel; and that is the result to which I have come. I do not consider, and do not think that it can be fairly suggested, that this is a fraudulent or misleading prospectus. There may be one or two trifling errors in it, but to say that those trifling errors are material, and induced this gentleman to take shares, is to say that which to my mind is utterly impossible.

I think it is an honest prospectus, and that this appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I cannot add anything to what has been already said.

RIGBY, L.J.—In this case the plaintiff seeks rescission of a contract to take shares, and consequential relief, on the ground, which would be a good ground if it could be established, that he was misled by the prospectus; in other words, that the prospectus, taken as a whole, misrepresented the true state of facts. I say that not forgetting, of course, that he relies on non-statement and the non-disclosure; because I think the law is this, that if you rely as a ground for the rescission of a contract on the omission of a statement, you must show that the omission of that statement makes what is stated misleading. It is not that the omission of material facts is an independent ground for rescission, but the omission must be of such a nature as to make the statement actually made misleading. In other words, as has often been said before, suppression of the truth may contain a suggestion of falsity—may make what is actually stated reasonably untrue. I think in a case of this kind it is important to consider the impression produced by a prospectus generally, and I do not think that I can better express my view of the case than by saying that on reading through this prospectus it never occurred to me that they were stating that the records made were records up to the date of the issue of the prospectus. The very ingenious argument on which the plaintiff has founded, with great ability, a suggestion of a different construction certainly had not presented itself to my mind; and, reading the prospectus without that minute criticism to which it has now been subjected, I should have come to the conclusion that the framers of the prospectus did intend to say such and such performances were the best known at the time, but they did not mean to say that they have not since been beaten. What was the effect produced upon the mind of the plaintiff? He most candidly says that he had not made an analysis of the prospectus at this time—he had not so dealt with these sentences as to arrive at the conclusion, which after very careful consideration of the prospectus he thinks might have been arrived at; but these conclusions really are conclusions founded to a certain extent upon that minute analysis which he submitted to the learned judge in the course of the evidence he gave, and with regard to which the learned judge was not satisfied that he entertained that belief at the time he first read the prospectus. I could not overrule a learned judge who said with regard to the evidence of the witness what he says. I do not feel disposed in any way to differ from him, and I say that such a reading of this prospectus as an ordinary reasonable man would have given to it, not a man looking into minute points, would not lead him to suppose that there was a representation that the different performances remained unsurpassed. That, I think, is a clear answer, because I take the same view that the Lord Justice has taken with regard to the inaccuracies, as to the records of the five performances referred to in the prospectus, that it would be unreasonable to suppose, and no jury would believe, that those inaccuracies induced the plaintiff to enter into this contract.

I am of opinion that the learned judge's decision was right, and that the appeal ought to be dismissed.

Solicitors for the plaintiff, *Woodcock, Ryland, & Parker*, for *Gaunt & Lingard*, Manchester.

Solicitor for the defendants, *John B. Purchase*.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 4, 5, 1896.

In re MACDUFF.
MACDUFF *v.* MACDUFF. (*a.*)

Will—Construction — Charity—"Philanthropic" purpose—Bequest for "purposes charitable, philanthropic, or . . ."—Validity.

A testator having bequeathed a sum of money for "some one or more purposes charitable, philanthropic, or . . ."

Held, that the gift was to be read as for "purposes charitable or philanthropic"; but that the word "philanthropic" was wide enough to include purposes not "charitable" in the technical sense; and that, therefore, the gift failed, as being too indefinite.

Decision of Stirling, J., 44 *W. R.* 344, *affirmed.*

Appeal by the Attorney-General from a decision of Stirling, J. (reported 44 W. R. 344, where the facts are sufficiently stated).

Sir R. E. Webster, A.G., and *Ingle Joyce*, for the appeal, used the same arguments as in the court below, and also relied upon the following authorities: *In re White, White* v. *White*, 41 W. R. 683, [1893] 2 Ch. 41; *Cocks* v. *Manners*, 19 W. R. 1055, L. R. 12 Eq. 574; *Dolan* v. *Macdermot*, 17 W. R. 3, L. R. 3 Ch. App. 676; *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, 583; *Whicker* v. *Hume*, 6 W. R. 813, 7 H. L. Cas. 124; *Browne* v. *Yeall*, 7 Ves. 50*n*, cited 10 Ves. 539; *Jones* v. *Williams*, Ambl. 651; *Trustees of the British Museum* v. *White*, 2 Sim. & St. 594; and *Nightingale* v. *Goulburn*, 5 Ha. 484, 2 Ph. 594. [RIGBY, L.J., referred to *Kendall* v. *Granger*, 5 Beav. 300, and LOPES, L.J., to *In re Foveaux, Cross* v. *London Anti-Vivisection Society*, 43 W. R. 661, [1895] 2 Ch. 501.]

Hadley, for the plaintiff, Miss Annie S. Macduff, cited the following additional authorities: *In re Nottage, Jones* v. *Palmer*, 44 W. R. 22, [1895] 2 Ch. 649; *Nash* v. *Morley*, 5 Beav. 177; *In re Jarman's Estate, Leavers* v. *Clayton*, 26 W. R. 907, 8 Ch. D. 584; *Goodman* v. *Mayor of Saltash*, 31 W. R. 293, 7 App. Cas. 633; and *In re Wall, Pomeroy* v. *Willway*, 37 W. R. 779, 42 Ch. D. 510.

Sir R. E. Webster, A.G., in reply, referred to *In re Douglas, Obert* v. *Barrow*, 35 W. R. 740, 35 Ch. D. 472; *Mayor of Wrexham* v. *Tamplin*, 21 W. R. 768; and Tudor on Charitable Trusts, 3rd ed., pp. 159, 160.

LINDLEY, L.J.—I do not think we shall be any the better off by considering our judgment in this case. All of us have thought over it since the case was first opened, and the conclusion we have arrived at is that the judgment of Stirling, J., is right. The case is a difficult one, and turns on the construction of the testator's will. [The lord justice read the material parts of the documents admitted to probate, and continued:—] Now, the question we have to consider is, What is the effect of those clauses in a will? On the one hand it is said that, notwithstanding the generality of this language, the sum of £10,000 is appropriated for general charitable purposes, and if so of course a scheme must be directed. On the other hand it is said—and the learned judge has taken that view—that the language is too general, too uncertain, too vague to amount to a charitable bequest and disposition of the sum of £10,000, and that the gift therefore fails. Now, without going through the cases which have been decided on this subject, it appears to me that the first point to consider is this, What is the effect of the language used by the testator? We have here a will which contains the expression, "for some one or more purposes, charitable, philanthropic, or . . ." At first I was inclined to think that that blank made the gift too indefinite, but on reconsidering that question, and on observing a similar blank in the will in *In re White, White* v. *White*, I have come to the conclusion that the learned judge was right on that point, and that the true construction is that the £10,000 is to be appropriated and allocated for some purposes, charitable or philanthropic. That gets over the first difficulty. I am not inclined to dissent from the view taken by the learned judge; on the contrary, I think it is right, having regard to the authorities and especially to the blank in the will in *White* v. *White*.

That difficulty being got over, the question is, What is the meaning of this gift? The first point to observe is that there is nothing definite here at all. It is all indefinite; not a gift to some specific institution—there is not a context of that kind. There is no context except this, that the £10,000 is to be appropriated or allocated to some one or more purposes, charitable or philanthropic, within the additional clause that the testator is unable to tie himself down to any specific scheme. Now, in order to hold such a gift to be valid you must get at something sufficiently definite to guide the court as to the kind of trust it is to execute, and the kind of trust the court will in such a case execute must be of the kind technically called a charitable trust. I am bound to say that having looked at the authorities and attended to the argument, I cannot form any definite idea of what the testator meant. To show that that is the right principle I may refer to the case of *Morice* v. *The Bishop of Durham*, 10 Ves. 522, which came first before Sir William Grant, and came again before Lord Eldon, whose judgment is most important in all questions of charity. Lord Eldon incidentally remarks, what is unquestionably true, that this court has taken strong liberties upon the subject of charity. But, notwithstanding that, there are certain principles which have to be observed. At p. 539 of that case we shall find Lord Eldon saying this: "As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the court, . . . a trust, therefore, which in case of maladministration could be reformed, and due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases it must be decided that the court can neither reform maladministration nor direct a due administration." I may also refer to the cases of *James* v. *Allen*, 3 Mer. 17, and *Ellis* v. *Selby*, 1 My. & Cr. 286. Therefore, when we are dealing with general words, we must look at the will and inquire whether there is such a general indication of trusts which the court is called upon to execute, that the court can see what it is to execute.

That brings us to this question about the meaning of the words "charitable or philanthropic." "Charitable," I suppose, is used in the popular sense. I do not suppose for a moment that the testator intended to use the word in the very wide and indefinite sense in which it is used in the courts of equity. What, then, is the meaning of "philanthropic"? Obviously, I think it means something distinct from "charitable." What exactly he does mean by philanthropic is not clear at all. I cannot put any definite meaning on that word. All that I can say is that a "philanthropic purpose" must be a purpose which indicates goodwill to mankind in general.

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Here arises a difficulty which the Attorney-General availed himself of with great skill. He says, What philanthiopic purpose is there which is not charitable? The word "philanthropic" is of such a vague character that it is extremely difficult to say. But I think I can suggest indications of goodwill to rich men, as distinguished from poor men—not wide, loose indications of goodwill towards mankind at large—which would not be charitable. I am aware that a trust may be charitable, though it benefits the rich as well as the poor, but I doubt very much whether, if it excluded the poor, it could be held to be charitable, though even in that case it might be philanthropic. I do not know with anything like certainty what is meant by the word "charitable" in this will, and I do not know at all what is meant by "philanthropic." It follows that the trustees might apply this £10,000 to purposes which might or might not be charitable in the technical sense. If that be so, this gift cannot be treated as a charitable bequest. Reliance is placed upon the judgment of Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel*. When we look at that judgment it is plain what Lord Macnaghten meant. He took the classification of charities from the argument of Sir Samuel Romilly in *Morice* v. *The Bishop of Durham*. The passage in Lord Macnaghten's judgment runs thus: "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Now, Sir S. Romilly did not mean to say, and I am quite certain Lord Macnaghten did not mean to say, that everything which was an object of public utility must necessarily be a charity. Some may be, and some may not. That is the true explanation of *Kendall* v. *Granger*, where the language of the gift was that the property was to be "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," and that was held not to be a valid charitable bequest. Lord Langdale, a great authority on such questions, came to the conclusion that that was not necessarily a charity, and I am not aware that that decision has ever been overruled. Now, what Lord Macnaghten said was simply this: he said that charity in its legal sense comprises four principal divisions. No doubt in dealing with the fourth head he leaves out those somewhat significant words "which is the most difficult"; words which show that Sir S. Romilly saw, as I have no doubt Lord Macnaghten also saw, that there might be cases of trusts for purposes beneficial to the community which yet were not charitable trusts. After all, we must fall back on the statute of Elizabeth (43 Eliz., c. 4), and must have regard, as Lord Eldon says, to the spirit of that Act. This court has, as I have said, taken great liberties with charities, but the number of such liberties is always restricted by falling back, or professing to fall back, on the statute of Elizabeth. Can we find in this will any direction that the £10,000 is to be applied only to uses which this court considers charitable? My answer is, No. I think the learned judge was perfectly right, and that the appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. [His lordship read the gift, and proceeded:—] I read those words in this way: "I will from my estate the sum of £10,000 to be appropriated and allocated for some one or more purposes charitable or philanthropic or . . ."; and I think in all probability the words contemplated would be "or some other purpose to be indicated by me hereafter in any codicil to this will." I think that was the view taken by Stirling, J., and with that view I entirely agree. Now, no doubt very great liberties have been taken with the statute, as has been said by Lindley, L.J., and a sense was attributed to charity very much larger than was probably ever intended. There are numberless decisions on that point. But the special difficulty in this case arises from the use of the word "philanthropic"; a word the meaning of which is not dealt with in any of the previous decisions. The Attorney-General contends that "philanthropic" is synonymous with "charitable." I cannot adopt that view. The language is disjunctive; there is a word "or" between "philanthropic" and "charitable." I cannot help thinking that the testator intended to draw a distinction between "charitable" and "philanthropic." If it had stopped with the word "charitable," I presume it would have been a good gift. I suppose the principle applicable to this case is not and cannot be in dispute. I adopt the words of Sir Wm. Grant, M.R., in *James* v. *Allen*: "If the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." Now, looking at those words, I ask myself whether or not the property might consistently with the will, having regard to the word "philanthropic," be applied to purposes other than strictly charitable purposes; and I feel compelled to answer that question in the affirmative. It has been said that no object can be suggested which would come within the word "philanthropic" and which is not charitable. If that were so the argument for the Attorney-General would be maintained; but that is not the view I am inclined to adopt. I think I can suggest many objects which would come within the word "philanthropic" and yet would not be charitable, and therefore the trustees would be entitled to apply the money to purposes which might not be charitable. I will not again allude to the instances which I mentioned during the argument — recreation grounds and grounds devoted to sport, not for the benefit of the poorer classes only, but generally for rich and poor alike; or a gift, for instance, to landowners of agricultural land who have suffered from agricultural depression and whose incomes have been reduced below £300 a year. It appears to me that that is an object which would be "philanthropic," but which would not be charitable.

I come, therefore, to the conclusion that the words are too wide and too indefinite to support the gift. I agree with the judgment delivered by Stirling, J.

RIGBY, L.J.—I am of the same opinion. With reference to the blank in the will I only say that I am inclined to think the proper way of looking at it is this: "Purposes charitable, philanthropic, or . . . " means "charitable or philanthropic purposes." It must be taken that the testator has deliberately determined not to fill up that blank, and left the court to deal with the construction of the instrument as it is found. I think, then, that this is a gift for charitable or philanthropic purposes. The cases with regard to charities are innumerable, but in the cases on charities, as in all other cases, precedents are useful only so far as they enable you to educe a principle. No previous will can properly be treated as a precedent for construing another will expressed in different language; and no decisions on the precise terms of a former will can, as a general rule, be of the least service in guiding the court as to the construction of other words. Unless you can get a principle from the cases which is applicable generally to other cases, it is useless to cite earlier decisions. Now, what principle do you find really applicable to

the whole class of cases? First of all, a bequest must be sufficiently certain to enable the old Court of Chancery, or the High Court of Justice, and this court, which have succeeded to its powers, to superintend the trusts created according to its terms. So far we have nothing specially to do with charity, for the same rule applies to all trusts. All trusts must be sufficiently definite to enable the court to draw a a line and say: "This is within and that is outside the line." Charitable trusts differ in this respect only from other trusts, that when you get the idea of charity properly expressed in a will you have a standard to go by—one adopted for centuries—that is to say, the standard established by the preamble to the statute of Elizabeth which deals with certain things specifically as instances of existing charities, from which by analogy you can deduce for yourself what other things are charities. But before you can apply that standard at all you must find, sufficiently expressed in the will you are construing, the idea of charity, and it will not do if there is any alternative allowed to the trustees as to whether or not they shall apply the property devised to them to charitable purposes. Directly there is an alternative a reference to the statute is of no service, and the rule comes in that this is a gift too indefinite for the court to give effect to it.

Now then, what is the present case? A gift for "charitable or philanthropic purposes." I am bound to say I do not think it is very different from a gift for philanthropic purposes simply. There may be an argument that, being joined with "charitable," "philanthropic purposes" must mean purposes which are charitable also. But there is another way of looking at it—that, as it is distinguished from "charitable," "philanthropic" should be construed to mean those purposes which are not charitable. I think the one argument may be set off against the other; and very little assistance can be got from the fact that there is here the word "charitable" along with the word "philanthropic." I am quite sure that no court has yet defined that word, because it has never come before any court. Suppose we try now to define it. I am unable to do so; at any rate, in any sense which would show that the definition meant the same thing as "charitable." I do not wish to admit any further process of illustration, but I am inclined to think that a very general illustration may be, that of services to the community, and I can suppose a case of a person saying in his will, "I know that the ordinary objects of charity are such and such; but I regard the position of the well-to-do classes of the metropolis as one also requiring consideration, and I leave my residue to trustees for their benefit," that would be a gift which aimed at advancing the happiness and the position in life of those who are not objects of charity, but who may be made happier and in some sense better than they now are, and might be the outcome of a very weighty desire to improve the position of a large class of persons. It would no doubt be "philanthropic"; but I am pretty certain it would not be "charitable." So we get to the conclusion that "philanthropic" may include not only cases of a totally exceptional character, but cases of a very wide class, which in numerous instances would be within the real popular meaning of the word "philanthropic," and yet would have nothing to do with charity.

I do not propose to enter into any general examination of the authorities; but I would refer to one or two of them, showing that the matter has come under the consideration of learned judges, and that the decisions have been in accordance with what I conceive is the principle applicable to such cases. In *Kendall* v. *Granger* the gift was for purposes of general utility, and Lord Langdale, a great authority on cases of this kind, thought that was not sufficiently definite to be enforced. His view was that there were or might be purposes of general utility which were not charitable purposes. I see no reason to doubt that, and I do not know that any case has ever occurred in which that was doubted. Take the case of *Brown* v. *Yeall*, which Mr. Hadley very properly referred us to. Notwithstanding the doubts which have been thrown on the construction of that particular will, that appears to be a case in which the question, as considered by Lord Thurlow, is this: Whether a gift for publishing books for promoting the happiness of mankind was sufficiently definite? and I consider that Lord Thurlow, as explained by Lord Eldon in *Morice* v. *The Bishop of Durham*, came to the conclusion that a gift of this kind for the promotion of the happiness of mankind was not sufficiently definite to be capable of being administered by the court as a charitable gift. That is what I understand to be the view taken by Lord Eldon. He said that he doubted, not whether the principle laid down by Lord Thurlow was correct, but whether Lord Thurlow was right in deciding the case on the principle he did. But there are grounds for saying that the bequest Lord Thurlow was dealing with was a more limited one than he supposed it to be. I am inclined to think that Lord Eldon's view is preferable to Lord Thurlow's. But what does that matter? It was upon the question whether "the happiness of mankind" was sufficiently definite, that Lord Thurlow decided the case, and I do not understand that, if that had been the only question, either Lord Eldon or Sir William Grant would have differed.

I think Mr. Hadley is right in so far as the cases brought before us are concerned. A gift to promote the happiness of mankind more nearly resembles a gift for philanthropic purposes than does the gift in any of the other cases cited. I may also refer to the case of *Whicker* v. *Hume*. I say nothing about the wide extent of the gift in that case, which was for the advancement of education and learning. The objection taken by the counsel who were impeaching the validity of the gift, was that though education is no doubt a charitable purpose within the statute, "learning" is not; that is to say, it was argued that a gift for the promotion of abstract learning would not be a charitable gift. That argument was dealt with by Lord Chelmsford and Lord Cranworth, who came to the conclusion that, reading learning as you found it in that will in connection with "education," you must understand it to mean the advancement of learning as equivalent to teaching, and therefore as a certain branch of education, and I rather gather from the judgments, and especially from the pains they took to draw out and elucidate the meaning of the word "learning," that if they could not have put that meaning on the word, they would have doubted whether a gift for the advancement of learning could have been a charitable bequest. That case appears to me to be in favour of the view taken by Lord Langdale, that a gift for purposes of general utility is not sufficiently definite. Then we come to the argument arising from the judgment of Lord Macnaghten in *Commissioners of Income Tax* v. *Pemsel*. What Lord Macnaghten says seems to me altogether logical. He says that cases of charity may be divided into four classes, and one class is gifts for the benefit of the community. But it does not follow that all gifts for the benefit of the community are charitable. You at least come to this. There is one miscellaneous set of charities which can be classed on that principle. But to deduce from that all gifts for the benefit of the community are charitable gifts is just

about as logical as the supposition that, because an insurance society divides persons insured with it into men, women, and children, every man, every woman, and every child is insured with that society.

In *In re White* the court understood the other authorities to say that "religious" is equivalent to "charitable"; at least, that if it was not a synonym in the sense that there could be no charities that are not religious, it would come to this: that a religious society is a charity, and that a gift to a particular religious society must be held to be a gift to a charity. That creates no difficulty at all, because when you say—and so far as I know, and for the purposes of this case I think it is true—that gifts to the poor, and gifts for education, are charitable because they are for the benefit of the community, that does not mean that every conceivable gift which you can prove to be for the general benefit under these general words is necessarily a charity. It means that gifts for the general benefit of the community is one of the heads or categories under which charities may be divided. No one would suggest that "education" includes the education of a pickpocket to fit him for his calling. The gift, if it is to be supported as charitable, must be for the promotion of education of a particular kind, and the same remark applies to a gift to a religious society. You may say that "religious" cannot be said to be included under "charitable," because there may be a religious society which does not attempt to promote religion. The particular convent to which a gift was made in *Cocks* v. *Manners* was a society of religious people who abstained even from good works as regards the outside public. It was held that that might have been a charity so far as the object of the gift to a religious society was concerned, but that under the peculiar circumstances of the case it was only a gift to the particular men and women who happened at the moment to be members of that society. In view of the law as established by the earlier cases, I do not think Lord Macnaghten in his classification of charities lays down any rule of law whatsoever; and, that being so, I think the cases which have been referred to show that you must have words sufficiently definite to enable the court to administer the trust, and that, when the definition does not sufficiently show that what is meant is a charitable trust, according to the standard supplied by the statute of Elizabeth, the gift must fail. To my mind the word "philanthropic" is too wide altogether, and the judgment of Stirling, J., must be affirmed.

Appeal dismissed.

Solicitors, *Hare & Co.; Thomas Webster.*

High Court of Justice.

Chan. Div. North, J. } Nov. 3.

PROUT v. COCK. (a.)

Mortgage—Right to redeem—Remainderman.

A widow to whom a testator devised the equity of redemption in certain hereditaments durante minore ætate *of her two sons, mortgaged her interest under the will to the person to whom the testator had previously mortgaged the hereditaments.*

Held, that, after the death of the widow, the sons were not entitled to redeem the mortgage effected by the testator until they both attained the age of twenty-one, unless they obtained the mortgagee's consent as owner of the widow's limited interest.

Action for redemption.

By an indenture dated the 6th of July, 1878, Abraham Prout mortgaged to the defendant certain houses and land at Perramporth, Cornwall, to secure the repayment of £550 together with interest at the rate of 5 per cent.

Abraham Prout made his will, dated the 30th of May, 1882, in the following terms: "I desire that all my property in Perramporth, Cornwall, consisting of four houses and an acre and three quarters of land, be made over to my wife, Elizabeth Prout, and two children, Abraham and Samuel John Prout. The property is on no account to be sold. A mortgage of £550 is on the said property. I desire that during my children's minority my wife should receive all income that may accrue from the property, and that when they are all of age the property should be equally divided between my wife and children, whichever of them may be living at that time. I desire that my wife's sister should live with my wife, and in the event of my wife's death before my children become of age, that she shall have the care of them."

The testator died on the 30th of May, 1882.

By an indenture dated the 1st of May, 1889, Elizabeth Prout mortgaged all her interest under the will to the defendant to secure the repayment of a sum of £250 and interest.

In December, 1893, the defendant entered into possession, and on the 28th of February, 1895, Elizabeth Prout died intestate.

This action was commenced on the 27th of May, 1895, by the testator's infant children by a next friend.

Letters of administration to Elizabeth Prout's estate had not been taken out, and North, J., said it was clear that he could not make any order in the absence of the legal personal representative of the wife. The income was given to her during the children's minority. On the construction of the will, the direction was that she should receive the whole income. *Laxton* v. *Eldle*, 19 Beav. 2 W. R. 584, 321, was a very similar case. The action was directed to stand over generally, with liberty to amend.

Letters of administration to the estate of Elizabeth Prout were taken out, and the administrator was joined as a defendant. The statement of claim as amended, asked for redemption of the mortgage of the 6th of July, 1878, or in the alternative, for the redemption of the two mortgages.

Ryland, for the plaintiffs.

Dauney, for the defendant mortgagee.—The children have no right to redeem. The tenant for life of an equity of redemption has the first right to redeem, and during the continuance of his estate the remaindermen can only redeem with his consent. *Ravald* v. *Russell*, Younge 9, Fisher on Mortgages, 4th ed., p. 708; *Raffety* v. *King*, 1 Keen 601; *Riley* v. *Croydon*, 13 W. R. 223, 2 Dr. & Sm. 293; *Hyde* v. *Dallaway*, 2 Hare 528. As the mortgagee has acquired the estate of the widow *durante minore ætate*, while that mortgage subsists the remaindermen cannot redeem the first mortgage.

Ryland replied.

NORTH, J., was of opinion that *Ravald* v. *Russell* applied, and held that the plaintiffs were not entitled during the minority of either of them to redeem the testator's mortgage without the consent of the mortgagee as owner of the widow's limited interest.

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Solicitors, *G. K. Wright*, for *E. L. Carlyon*, Truro; *Street, Poynder, & Whatley*, for *Hearle, Cock, & Parkin*, Truro.

Q. B. Div. (Collins, J.) June 15, 26, 1896.

ELGOOD v. HARRIS AND ANOTHER. (a.)

Bankruptcy—Set-off—Marine insurance—Bankruptcy of underwriter—Insurance brokers—Claim by trustee against brokers for salvage—Right of brokers to set off unpaid losses.

An underwriter carried on an underwriting business with insurance brokers, who effected policies of marine insurance with the underwriter in their own names and for principals, to whom they guaranted the solvency of the underwriter. The underwriter became bankrupt, and at the date of his bankruptcy he owed a balance to the brokers in respect of losses upon policies. After the bankruptcy the brokers received various sums by way of salvage upon losses which had been settled with the brokers by the underwriter before his bankruptcy. The trustee in the bankruptcy claimed from the brokers the sums so received as salvage, but the brokers claimed to set off against the salvage the larger sum due to them from the bankrupt for the unpaid losses.

Held, that the brokers were not entitled to set off their unpaid losses against the sums received by them as salvage after the bankruptcy.

Action tried before Collins, J., in the Commercial Court.

The plaintiff was the assignee of the trustee in the bankruptcy of an underwriter, and the defendants were insurance brokers, who carried on an underwriting business in the usual manner with the underwriter before his bankruptcy. The defendants effected from time to time policies of marine insurance with the underwriter as well in their own names as for their principals, to whom they guaranteed the solvency of the underwriter, and there had been mutual credits, mutual debits, or other mutual dealings between the parties on these underwriting transactions, the underwriter debiting the brokers with the premiums and crediting them with the losses as they occurred under the policies.

At the date of the bankruptcy there was a balance due from the underwriter to the defendants for unpaid losses on policies, and after the bankruptcy the defendants received various sums by way of salvage upon losses which had been settled and paid by the underwriter in account before the bankruptcy.

The plaintiff claimed the sum of £90 4s. 9d. as being due to the trustee in the bankruptcy of the underwriter in respect of additional premiums due from the defendants after the bankruptcy on policies effected by them with the bankrupt before the bankruptcy and in respect of sums received by the defendants after the bankruptcy by way of salvage upon losses which had been settled before the bankruptcy.

The defendants claimed to set off against this claim of the trustee the unpaid losses due to them from the bankrupt. It was not disputed for the plaintiff that the brokers were entitled to this set-off as against the additional premiums, but it was contended that the brokers were not entitled to set off their unpaid losses against the sums so received by way of salvage.

Joseph Walton, Q.C., and *Manisty*, for the plaintiff.

Herbert Reed, Q.C., and *Reginald Brown*, for the defendants.

(a) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

The following cases were referred to: *Ex parte Rhodes*, 15 Ves. 539; *Ex parte Young*, 27 W. R. 942; *Young* v. *Bank of Bengal*, 1 Moo. P. C. 150; *Parker* v. *Smith*, 16 East 382; *Naoroji* v. *Chartered Bank of India*, 16 W. R. 791, L. R. 3 C. P. 444; *In re Asphaltic Wood Pavement Co.*, 33 W. R. 513, 30 Ch. D. 216; *Booth* v. *Hutchinson*, 21 W. R. 116, L. R. 15 Eq. 30.

The arguments are sufficiently indicated in the judgment.

Cur. adv. vult.

June 26.—COLLINS, J., read the following judgment:—This is a claim by a person who has taken an assignment from the trustee of a bankrupt underwriter for additional premiums due from the defendants, who are insurance brokers, upon policies effected by them with the bankrupt, and for moneys received by them by way of salvage upon losses settled with the underwriter before the bankruptcy. The bankrupt was a member of Lloyd's, and business was done between him and the defendants in the ordinary manner, which is described in Arnould on Marine Insurance, Part I., chap. 4. The defendants seek to set off against this claim a much larger sum due to them for losses on other policies effected by them as well in their own names as for their principals, to whom they guaranteed the solvency of the underwriter. It was admitted by the plaintiff that the defendants, having effected the policies in their own names, and having guaranteed the solvency of the underwriter, were entitled to set off unpaid losses against any claim upon them based on a credit given by the bankrupt to them at the date of the bankruptcy; and they did not dispute that the claim for additional premiums, which became payable after the bankruptcy under policies effected before the bankruptcy, was based on such credit, and was therefore met by the set-off. The plaintiff contended, however, that the claim for salvage stood upon a different footing, and was, in effect, a mere demand by the trustee to get in the property of the bankrupt which had come to the hands of the defendants after the bankruptcy, a right which arose for the trustee as soon as, and not before, such property came into the hands of the defendants, and was therefore in no sense based upon a credit given by the bankrupt, and consequently could not be met by a set-off of sums due from the bankrupt in respect of losses underwritten by him, whether they accrued before or after the bankruptcy. Such losses, if occurring before the bankruptcy, would, at the date of the bankruptcy, be a debt presently payable by the underwriter to the defendants; if occurring after the bankruptcy, would found a credit given by the defendants to the bankrupt; that the debt or credits, therefore, were not mutual, the claim of the plaintiff being one that first accrued to the trustee as assignee of the bankrupt's estate, the claim of the defendant being based on a credit given to the bankrupt himself.

The point is one of some nicety, and involves an analysis of the exact position of the parties towards each other at the date of the bankruptcy. At that date the losses on all the policies in respect of which salvage is claimed had been paid in account as between the underwriter and the defendants. On the other hand, there were several policies underwritten by the bankrupt, upon which he was liable to make good losses. The effect of payment by the underwriter to the defendants, who as between them and the underwriter are claiming rights to set off, as being themselves the persons insured, was as against them to vest in the underwriter an equitable right to all property or interest which they might have in the thing insured. Therefore, at the date of the

bankruptcy the underwriter was the owner in equity, subject perhaps to disclaimer by him of whatever existed of the thing insured, and the defendants became trustees for him of anything which they might receive in respect thereof in diminution of the loss. See per Lord Blackburn in *Burnand* v. *Rodocanachi*, 31 W. R., at pp. 66-7, 7 App. Cas., at p. 339; Phillips on Insurance, ss. 1723 *et seq.*

I think it is immaterial for this purpose whether his right was legal or equitable. He had by payment become the true owner of the subject matter insured, and of anything that might be received by the assurred in respect of it, as soon as it came into existence. When, therefore, sums were received by the defendants by way of salvage, those sums became part of the bankrupt's estate which his trustee was entitled to get in; but the defendants were under no contract to enforce payment of such sums for the benefit of the bankrupt. They had simply divested themselves of all interest in or rights in respect of the subject-matter, except as trustees for the bankrupt. As such trustees they could be called upon to hand over anything which came to their hands in diminution of the loss; but at the date of the bankruptcy no debt existed, and no credit was given to them by the bankrupt in respect thereof, nor could their obligation as trustees be said, I think, to be a money claim arising out of a mutual dealing, as described by Lord Esher, M.R., in *Eberle's Hotels and Restaurant Co.* v. *Jonas*, 35 W. R., at p. 468, 18 Q. B. D., at p. 465. Suppose the defendants had executed a deed transferring the wreck to the underwriter, and that after his bankruptcy some part of the wreck had come into the possession of the defendants, would not this have been the subject of a claim arising for the trustee when, and not before, the defendants got possession. Would it make any difference that the thing saved and held by them was money, so that it could be sued for as money had and received? Clearly not. It would still be part of the bankrupt's estate which had found its way into the hands of the defendants after the bankruptcy, and in respect of which no debt or credit had ever existed between the defendants and the bankrupt. Is there, then, any difference in the position of the parties, because the right of the trustee in bankruptcy is not based upon a legal assignment, but upon an equity arising out of the contract of indemnity, based on the fact that a complete indemnity had been paid? I cannot think that the obligation to admit this equity, which arose by operation of law when the defendants received such payment, could be deemed in any sense a credit given by the bankrupt to them, or a money claim existing for him in respect of mutual dealings with them. In analyzing the relation of the underwriter to the defendants at the date of the bankruptcy for the purpose of determining the question of set-off, I carefully exclude considerations based on the fact that the defendants were also agents for the underwriter, who, had he not have become bankrupt, might in ordinary course have received on his behalf salvage in the form of money compensation. Such agency, so far as it existed, was revoked by the bankruptcy: See *Parker* v. *Smith*, 16 East 382; *Minett* v. *Forrester*, 4 Taunt. 541; and no claim of mutual credit or mutual dealing based on its expected continuance can be supported. I have also excluded all consideration of the rights of the defendants as between them and their clients for whom the insurances were in fact effected. These latter may or may not have been bound by the custom of Lloyd's: See *Batt* v. *Irving*, 1 B. & Ad. 605, and *Stewart* v. *Aberdein*, 4 M. & W. 211; but this case is to be considered entirely apart from them, upon the basis upon which the defendants have placed it, namely, that of persons insured who have a claim as such to be paid losses, but who, in respect of other losses, have received indemnity. Such being my view of the law, my judgment must be for the plaintiff for £37 6s. 10d., which was the figure agreed between the parties if the plaintiff was entitled to succeed.

Judgment for plaintiff, with costs on High Court scale.

Solicitors for the plaintiff, *Elgood & Moyle.*

Solicitors for the defendants, *Turner, Son, & Foley.*

Prob. Div. & Adm. Div. } Nov. 9, 26.
Probate (Jeune, P.) }

In the Goods of JAMES SPRATT. (*a.*)

Probate—Will—Condition.

A soldier, whilst on active military service in New Zealand in 1864, *made a will in the form of a holograph letter addressed from the camp to his sister, in the following terms: "This is the most important part of my letter. If we remain here taking Pahs for some time, the chances are in favour of more of us being killed, and, as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place, there is money at Cox's, over* £100 *in New South Wales Bank, New Zealand. Keep this till I ask you for it.—Your affectionate brother, J. S.*

The testator died in 1896.

The court held the will not conditional, and admitted it to probate.

Where there is an ambiguity as to whether a will is contingent or not, the whole language and the surrounding circumstances must be considered. There are two criteria specially useful for determining the problem—first, whether the nature of the disposition made appears to have relation to the time or circumstances of the contingency; and, secondly, whether the period of danger which is apprehended is or is not coincident with the period of contingency.

Motion for a grant of letters of administration, with the will annexed, of the goods of James Spratt, who died on the 10th day of July, 1896, to a sister of the deceased.

The will was a holograph letter written by the deceased on the 4th of May, 1864, he then being an officer in her Majesty's army on active service in New Zealand, and was addressed by endorsement to "Miss Robina Spratt, from her brother James Spratt, captain 68th Light Infantry." The letter was in the following terms: "Camp Te Pa Pa, Tarranga, 4th May, 1864. My dear Robe,—This is the most important part of my letter. If we remain here taking Pahs for some time to come the chances are in favour of more of us being killed, and as I may not have another opportunity of saying what I wish to be done with any little money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place there is money at Cox's, over £100 in New South Wales Bank, New Zealand. Keep this until I ask you for it.—Your affectionate brother, J. SPRATT."

The deceased left three brothers and one sister (the appellant), and a nephew and niece, children of a deceased sister.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Inderwick, Q.C., and *Bargrave Deane*, in support of the motion.

Sir Walter Phillimore and *Barnard*, for all the other next of kin, agreed that the only question was whether the will was conditional. They submitted that it was, referring, in addition to the cases cited in the judgment, to Williams on Executors, 9th ed., at pp. 157, 158.

Cur. adv. vult.

Nov. 26.—JEUNE, P., delivered the following written judgment: The testamentary paper in this case consists of a holograph letter written by an officer in her Majesty's army on the 4th of May, 1864, while on active service in New Zealand. It is clearly, therefore, a valid will under the 11th section of the Wills Act. The only question is whether it is, on the true construction of its provisions, to be regarded as conditional. [His lordship read the will, and continued:]

The testator died on the 10th of July, 1896; of course long after the termination of the New Zealand War. In cases of the character of the present, the difficulty which arises in determining the intention of the testator as expressed in his will is that an ambiguity in some cases is caused by the use of language which renders it doubtful whether the testator meant to refer to a possible event as his reason for making a will, or as limiting the operation of the will made. If the will is clearly expressed to take effect only on the happening, or not happening, of a certain event, whatever its nature, *cadit quæstio* it is conditional. If the testator says in effect—that he is led to make his will by reason of the uncertainty of life in general, or for some special reason *cadit quæstio*, it is not conditional. But if it be not clear whether the words used import a reason for making a will or impress a contingent character on it, the whole language of the document, and also the surrounding circumstances, must be considered. In such case there are two criteria which are especially useful for determining the problem: First, whether the nature of the disposition made appears to have relation to the time, or circumstances, of the contingency; and secondly, whether the period of danger which is apprehended is, or is not, coincident with the period of contingency. The best illustrations of what I wish to convey are, I think, to be found in the various decided cases; and as they have not in any instance been considered as a whole, it may be worth while to review them.

The authority which heads the series is a decision of Lord Hardwick's in 1748, *Parsons* v. *Lanoe*, 1 Ves. Sen. 189. There a testator intending to go to Ireland, and probably to be there, as in fact he was; for some time, made a paper writing declaring it to be his last will in manner following: "If I die before my return from my journey to Ireland, that my house and land at Farly-hill . . . be sold as soon as possible after my death," and then follow directions as to the disposition of the proceeds. The instrument as a whole was held to be conditional. I doubt if there is any ambiguity in the language in this case; but if there be, I think that the second of the tests which I have mentioned applies, because the period of contingency—that is, the whole stay in Ireland—can hardly have been considered by the testator to be a period of special danger. The case of *Strauss* v. *Schmidt*, decided by Sir John Nicholl in 1820 (3 Phill. 209), is complicated by reference to documents subsequent to the will which the learned judge held should be considered as explaining its character, and showing that the testator adhered to it. The words constituting the devise were written before the testator proceeded on a voyage, and were, "therefore as I may easily die, I think it my duty to inform you what you have to do with my property in case I should die." The will was held not to be contingent, this being, I think, an instance of the period of danger being the same as the period of the contingency. The case of *Burton* v. *Collingwood*, 4 Hagg. 176, decided in 1832, is a typical instance of a contingency being referred to only as a reason for making a will. The words were, "All men are mortal, and no one knows how soon his life may be required of him. Lest I should die before the next sun, I make this my last will and testament." The first of the more recent cases is that of *In the Goods of Winn*, 9 W. R. 852, 2 Swa. & T. 147, decided in 1861. The material words were, "Being on the eve of embarking for San Francisco, South America, or Mexico, do hereby, in the case of my decease during my absence being fully ascertained and approved." Sir Cresswell Cresswell, while saying that the court was unwilling to set aside such testamentary papers, held that the words clearly made the will contingent. The case, indeed, seems on all fours with *Parsons* v. *Lanoe*, which was relied on in argument. The case also of *Roberts* v. *Roberts*, 2 Swa. & T. 337, was considered by Sir Cresswell Cresswell to be governed by *Parsons* v. *Lanoe*. The testator wrote, "I leave in possession two bank-books to my wife . . . should anything happen to me on my passage to Wales or during my stay," then follows the dispositions. Here, the leaving of the bank-books pointed to a conditional disposition, and the period was one defined, and in part at least independent of special danger. In the case of *In the Goods of William Cawthron*, 3 Sw. & T. 417, the material words were: "In the prospect of a long journey, should God not permit me to return to my home, I make this my last will and testament"; but the will was not, in fact, validly executed till after the testator's return from his journey. The case is therefore not a direct authority, but it seems clear that Lord Penzance did not consider the language used showed that the will was intended to be conditional. This would, if so, be consistent with the view that the period of danger apprehended by the testator and the apparent period within which the will was to operate were the same; and by executing it after the journey the testator showed that he did not in fact intend it to be conditional. In the case of *In the Goods of Thorne*, 4 Swa. & T. 36, 13 W. R. Prob. Dig. 7, the testamentary document, which was a letter, contained the following expressions: "I request that in the event of my death while serving in this horrid climate or any accident happening to me, I leave and bequeath . . . I consider that every person should be prepared for the worst, and particularly in such a treacherous climate as this which is considered one of the worst in the world which has compelled me to write this letter." This letter was written on the 2nd of November, 1863; testator left Africa in July, 1864, invalided, and died on the 16th of September, 1864, in London. Lord Penzance held that it "was not necessary to limit the operation of the will to the event of death while on the Gold Coast," or, as his lordship is reported in 34 L. J. P. & M. 131, 132, to have said, "the testator did not intend to limit its operation to the event of his death happening in Africa." I agree with Sir Walter Phillimore's suggestion that this means that the contingency contemplated by the testator was that of death from the effects of the climate of Africa, and that such contingency must be considered to have occurred in fact. I think also that the whole language of the document points rather to the testator feeling the necessity for making a will than desiring to limit the operation of it. In the case of *In the Goods of Dobson*, 14 W. R. 40

L. R. 1 P. & D. 88, the words were, "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave . . . ." Lord Penzance, after expressing unwillingness to refuse probate of a testamentary paper on the ground that it was contingent, unless it was clear that the testator intended it should operate only in a given event, or during a certain period, held that as the operation of the will was not limited to a certain time, the case was not governed by *Parsons* v. *Lanoe*. The testator's meaning, the learned judge said, was this: "My mind is drawn to the consideration that all railway travelling is attended with danger, and therefore I think I had better make my will." The same learned judge went further in the case of *In the Goods of Martin*, L. R. 1 P. & D. 380. The words used by the testator appear in terms to limit the operation of his will to the event of his death occurring during his stay on the floating hospital ship to which he was about to be removed for convalescence. The will was held not to be conditional, though it may be with some hesitation, as it was directed that before the grant issued the Queen's Proctor and persons interested should be cited. Here, certainly, there is a defined period. But I think this case may be regarded as an instance of the second test I have above suggested. The defined period is just the time that would elapse, if it did elapse, before the testator's recovery—in other words, was identical with the period of the danger which constituted the reason for his disposing of his property. There is a further statement in the will that he had no kindred or family, and therefore left his money to an asylum, which may, perhaps, have been considered by the court to point to the will being intended to operate unconditionally. In the case of *In the Goods of Porter*, 18 W. R. 231, L. R. 2 P. & D. 22, Lord Penzance, though reluctantly, and suggesting that the will might be propounded, held that the provision as to the disposition of the property showed that the will was intended to be conditional. The testator, who was about to join his regiment in China, used the following language in his will: "Being obliged to leave England to join my regiment in China, and not having time to make a will, I leave this paper containing my wishes and desires. Should anything unfortunately happen to me while abroad, I wish"—but he proceeded to add, "anything that I may be in possession of at that time or anything appertaining to me hereafter to be equally divided." Lord Penzance held that the earlier words quoted would have left the case within *Dobson's case* and *Martin's case*, but that the later words "at that time" made the will conditional, notwithstanding the further words, "or anything appertaining to me hereafter," which his lordship appears to have thought referred to property coming to the testator after his death—that is, a reversionary interest. It is not necessary to criticize this decision. I would only remark that this case illustrates both the criteria I have indicated above. The nature of the disposition was held to point to the will being conditional, although the period during which it was expressed to operate, being the period of the testator's danger, would not have made it so. It is not, I think, easy to reconcile the decision of *In the Goods of Robinson*, 19 W. R. 135, L. R. 2 P. & D. 171, with those in *Martin's case* and *Porter's case*, though by the same learned judge, nor with the case to be mentioned presently of *In the Goods of Mayd*. The words were: "This is the last will and testament of me, George Twizell Robinson, that in case anything should happen to me during the remainder of the voyage from hence to Sicily and back to London." It was held that this will was conditional. I presume because it was considered that there was no ambiguity. It was suggested by Sir Walter Phillimore that the fact that the will in the case last mentioned, and that to be next mentioned were (as in the present instance) wills not executed under the provisions of the Wills Act, but were valid under the 11th section, at least aided the conclusion that they were conditional. But no such principle appears in the arguments or decisions, and I confess I do not see that the form of execution, or the reason for adopting that form, point one way rather than the other. In *Lindsay* v. *Lindsay*, L. R. 2 P. & D. 459, 21 W. R. Dig. 290, Lord Penzance held that a mariner's will commencing, "Instructions to be followed if I die at sea or abroad," was conditional. Probably these words were considered unambiguous, and it is also to be observed that a period beyond that of sea voyage is contemplated. *In the Goods of Hugo*, 25 W. R. 396, 2 P. D. 73, decided by Lord Hannen in 1877, the will was clearly unambiguous. It was to operate in the event and only in the event of the testator and his wife dying at one and the same time, by one and the same accident, and from its terms clearly contemplated provisions intended to come into effect on such a contingency. In the last case to be mentioned—that of *In the Goods of Mayd*, 29 W. R. 214, 6 P. D. 17—Lord Hannen supported the authority of the decision in *Porter's case*, and I think gave his sanction to the principle that the period limited as conditional must not be merely that of the danger apprehended. The words were: "On leaving this station for Thargomindah and Melbourne, in case of my death on the way, know all men this is a memorandum of my last will and testament." This was held not to be conditional. It was suggested before me that only *Dobson's* and *Porter's cases* were referred to in argument, and that the decision was, as many of such decisions are, *ex parte*. But the consideration of such cases in the Probate Registry before they come into court deprives such observations to some extent of their weight.

Applying the tests which I have above indicated to the present case, I think that the words "in case of an accident" point only to the reason why the testator desired to make a will. There is no expression of any period to be found in the document within which alone it was to be operative; on the contrary, the request that the will should be kept by his sister till he asked for it appears to me to show that the testator had not in his mind any defined period of time at the expiration of which he intended that his will should cease to be effective. Nor is there anything in the disposition of the property which indicates that it was temporary, or that it did not apply to whatever property the testator might at any time be possessed.

I am of opinion, therefore, that probate should be granted of the document in question.

Motion allowed, costs of all parties to be paid out of the estate.

Solicitors for the applicant, *Moon, Gilks, & Moon.*

Solicitors for the respondents, *Robins, Billing, & Co.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 9.

BOWLER v. BARBERTON DEVELOPMENT SYNDICATE. (a.)

Mayor's Court—Jurisdiction—Part of cause of action arising outside the City—Prohibition.

The defendants contracted with the plaintiffs that on the incorporation of a company which it was proposed to form they would transfer to him shares in the company of the value of £6,000. The proposed company was formed and incorporated. The plaintiff brought an action in the Mayor's Court for specific performance of the contract.

Held, that the Mayor's Court had no jurisdiction, on the ground that the incorporation of the company, which was a part of the cause of action, took place outside the City—viz., at Somerset House.

Appeal from an order of Bruce, J., at chambers, directing that a writ of prohibition should issue to the Mayor's Court of London to restrain further proceedings in an action.

The action was brought on the equity side of the Mayor's Court for the specific performance of a contract, or in the alternative for damages.

By the contract in question, which was under seal and dated the 23rd of October, 1895, the defendants agreed with the plaintiff that, in consideration of services to be rendered by the plaintiff in the formation of a company, which was intended to be formed for the purpose of acquiring certain mining claims situate in the South African Republic and to be called the Sheba Alliance (Limited), the defendants would, on the incorporation of the company, transfer to the plaintiff fully-paid shares in the company of the nominal value of £6,000. The Sheba Alliance (Limited) was subsequently formed and incorporated.

The defendants applied for a writ of prohibition on the ground that the Mayor's Court had no jurisdiction to entertain the action. They contended, *inter alia*, that, as this was not an action in which the debt or damage did not exceed £50, within section 12 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), it was necessary that every part of the cause of action should have arisen within the City of London; and that it would be essential for the plaintiff to prove, as part of his cause of action, that the Sheba Alliance (Limited) had been incorporated as a company, which incorporation had in fact taken place outside the City of London—viz., at Somerset House.

Bruce, J., having granted a writ of prohibition, the plaintiff appealed.

Scarlett, for the plaintiff.

H. Reed, Q.C., and *Arthur May*, for the defendants.

The following cases were cited: *Mayor, &c., of London* v. *Cox*, 16 W. R. 44, L. R. 2 E. & I. 239; *Cooke* v. *Gill*, 21 W. R. 334, L. R. 8 C. P. 107.

Cur. adv. vult.

Dec 9.—The judgment of the court was read by

RIGBY, L.J.—This is an appeal from an order of Bruce, J., ordering a writ of prohibition to issue to the Mayor and Aldermen of the City of London to prohibit them from proceeding further in an action pending in the Mayor's Court. The action is brought by the plaintiff, Bowler, by bill of complaint on the equity side of the Mayor's Court for the specific performance of a contract under seal, or in the alternative for damages. Damages could only be granted on its being shown that the court had jurisdiction to grant specific performance. The action is not one for damages for breach of contract. It is clearly not within section 12 of the Act of 20 & 21 Vict. c. clvii., whereby the jurisdiction was extended to cases where the debt or damage claimed in any action does not exceed £50, and the cause of action, either wholly or in part, arises within the jurisdiction. The agreement sued upon is sufficiently stated in the bill of complaint as an agreement to transfer to the plaintiff fully-paid shares of the nominal value of £6,000 in a company to be formed to acquire certain mining claims situate in the South African Republic. No court of equity could grant specific performance of such an agreement unless it were shown that the company had in fact been formed. As damages are only claimed, and could only be given by a court of equity acting as such, in lieu of specific performance, it follows that proof of the formation of the company must be a material and essential part of the claim both for specific performance and damages. Accordingly, the plaintiff alleges in paragraph 4 of his bill of complaint that a company called the Sheba Alliance (Limited) has been formed to acquire the claims. There can be no doubt that the meaning of this allegation is that a company has been formed by registration with limited liability under the Companies Acts. If the formation of the company were traversed, the material and essential fact of its formation could not be proved to have taken place within the jurisdiction. In other words, the whole cause of action did not arise within the City. On this ground of itself the writ ought to be granted. It is unnecessary to consider any other grounds which may exist for granting the writ, and as the case was not fully argued on either side, all such grounds may be left for decision in some case in which it may be necessary to decide them. The appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Roberts & Wrightson.*

Solicitors for the defendants, *Thomson & Co.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Chan. Div. (Lord Russell of Killowen, C.J., and Lindley and A. L. Smith, L.JJ.) — Nov. 26.

In re STEPHENSON.

DONALDSON v. BAMBER. (a.)

Will—Construction—Latent ambiguity.

A testator by his will devised and bequeathed his residuary estate "unto the children of the deceased son (named Bamber) of my father's sister, share and share alike." The sister had three sons who predeceased the testator, all of whom left children.

Held (reversing Kekewich, J.), *that the gift was void for uncertainty.*

Hare v Cartridge, 13 *Sim.* 165, *commented on and distinguished.*

Appeal of the defendant, F. Freshney, representing the next-of-kin of the testator, from Kekewich, J.

By his will dated the 23rd of March, 1896, the testator, Robert Stephenson, appointed the plaintiff

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Henry Donaldson, his sole executor, and, after certain pecuniary and specific bequests, he proceeded as follows: "And as to all the rest, residue, and remainder of my real and personal estate I give, devise, and bequeath the same unto the children of the deceased son (named Bamber) of my father's sister, share and share alike."

The testator's paternal aunt, Rebecca Stephenson, married William Bamber, and had issue four sons, one of whom died young, and the other three had all married and had families. They all predeceased the testator, and the question arose whether the children of any one or of all of them were entitled to the residuary estate, or whether there was an intestacy.

Kekewich, J., held that the children of the three deceased sons named Bamber of the testator's father's sister living at the date of the testator's will and at his death were entitled in equal shares *per capita* as tenants in common.

The next-of-kin (who were entitled in the event of an intestacy) appealed.

Warrington, Q.C., and *George Cave*, for the appellants.—Where there are two descriptions, and one is essential and the other descriptive, the court has rejected the stated numeral. Here it is impossible to distinguish between the sons, and the court cannot read the plural for the singular number. It follows that the testator died intestate as to his residuary estate.

Bramwell Davis, Q.C., and *W. F. Webster*, for the legatees.—Where there is an obvious mistake in the number on the face of the will the court will rectify it: *Lee* v. *Pain*, 4 Hare 249; *Hare* v. *Cartridge*, 13 Sim. 165. [LINDLEY, L.J.—The decision in *Hare* v. *Cartridge* seems opposed to all the other authorities on the subject.] Here there are three persons who accurately answer the description. There is an equivocation, and evidence of intention is admissible: *Garvey* v. *Hibbert*, 19 Ves. 125; *Newman* v. *Piercey*, 25 W. R. 37, 4 Ch. D. 41; *Daniell* v. *Daniell*, 3 De G. & Sm. 337; *McKechnie* v. *Vaughan*, 21 W. R. 399, L. R. 15 Eq. 289; *Harrison* v. *Harrison*, 1 Russ. & My. 71.

They also referred to *Mellor* v. *Daintree*, 33 Ch. D. 198, 35 W. R. Dig. 223, and Jarman on Wills, 5th ed., II., p. 1048.

Warrington, Q.C., in reply.—The true principle is, if from the will an indication can be got of the intention of the testator to benefit a particular class, but a mistake has been made in the number of the class, then the number may be disregarded and the gift will go to the class; but that is not this case. There is no case where son has been altered to sons. There is no obvious mistake here, and the court will not interfere.

Lord RUSSELL OF KILLOWEN, C.J.—The question in this case is whether the residuary gift in the will of the testator, Robert Stephenson, dated the 23rd of March, 1896, is effective or void for uncertainty. If effective according to the construction sought to be placed upon it by the respondent it goes to the children of each of the deceased sons of the testator's father's sister, Rebecca Bamber, and if void for uncertainty it goes for distribution according to the statute amongst the testator's next-of-kin. We have to determine what the testator's intention was; but we are to gather that intention from what he has said in his will, giving effect as far as possible to each word he has used; we are not to make a will for him but to express his intention gathered from what he has said. There may be cases in which the court will supplement the evidence to be derived from the terms of the will itself by extrinsic evidence to throw light upon the testator's intention; and these cases may be described as belonging to two classes. First, there may be evidence of surrounding circumstances which will help the court in view of these extrinsic facts to come at what the testator meant; for instance, the illustration I have already suggested, if in this case extrinsic evidence had been forthcoming to show that he knew that only one son was dead, that might be a circumstance to be taken into consideration in construing the language of the will. But that is not the case here. Another case is that in which evidence of intention may be given; but that is limited as I gather in the way pointed out by Wigram, V.C., in the seventh proposition in his book on "Extrinsic Evidence in the Interpretation of Wills."

Proposition 6 is: "Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases) will be void for uncertainty." And proposition 7 is: "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose."

In my judgment the facts in this case do not bring it within the principle enunciated in that proposition. These are the facts. After some other dispositions the testator proceeds: "And as to all the rest, residue, and remainder of my real and personal estate I give, devise, and bequeath the same unto the children of the deceased son (named Bamber) of my father's sister, share and share alike." That is to say, he bequeaths his residue to the children of a deceased cousin of his own. What does that mean? As a matter of fact at the time when the will was made there were three deceased sons of his father's sister, and the evidence establishes the fact that he was aware that there were three. How is it to be construed? Kekewich, J., has construed it in a very singular way. He has first of all transposed the words "named Bamber," the qualification of the "deceased son," and made them the qualification of the "children" so as to make it "children named Bamber"; and then he has proceeded to change the word "son" into "sons" so that it will read "the children named Bamber of the deceased sons."

In my judgment that is making a new will. On the face of it there is no apparent ambiguity at all. The ambiguity arises when it is sought to apply the language to the facts.

There were three deceased sons, each of whom had children, and the question is whether this can be supported as a gift to the children of all the sons. I think it cannot. The cases have gone a very long way, and have been so long established that they cannot be now disturbed; but I think they have gone as far as is desirable, and I am not disposed to extend them any further. It is said that this case is within the principle of a number of cases, which establish the proposition that wherever there is an enumeration of persons who are to be benefited, and that enumeration is wrong in fact, the court can eliminate the number. In my opinion that is stating the rule much too widely. It must be limited to cases where the court as a matter of construction arrives at the conclusion that the testator intended a certain class to be benefited. If there has been an incorrect enumeration of the persons composing that

class, the court can reject it. The proposition goes no further than that. That is not this case. If this had been a devise and bequest to the "son of my father's sister," if there had been three sons living at the time of the will so made, and in the absence of extrinsic evidence—although I do not suggest that evidence would cure the defect—could the court hold that he meant the sister's "sons"? The court would be bound to say that it was uncertain and void. Further, it is said that there is one case which is in point here: *Hare* v. *Cartridge*. I do not stop to point out that text-book writers in referring to this case have appended to it the observation that the current of authority is against it. It is true that it cannot be treated as overruled. Therefore I will proceed to an examination of that case. The testator in that case bequeathed his residue to his first cousins, the children of his father's brother of the name of Cartridge. It turned out in fact that there were two brothers, and not only one brother. The court came to the conclusion that, seeing there was a manifest intention in the first part of the will to leave the property to his first cousins, it would be right to read it as a gift to his first cousins bearing the name of Cartridge. I think that was a strong thing to do. I do not think I should have concurred in that decision, but there was a clear intention to benefit a class, and that is enough to show that it was essentially a different case from the present one. This is a case in which the court cannot say there is no uncertainty. There is uncertainty which cannot be removed by any legal evidence; the result is that the bequest is void for uncertainty, and must go to the next-of-kin.

LINDLEY, L.J.—I am of the same opinion. When we look at the will and the facts we see the difficulty of arriving at any conclusion as to what the testator really meant. [His lordship read the residuary bequest, and continued:—] There were three deceased sons by name Bamber, and we are asked to say that the bequest ought to be read as a bequest of the residue to the children of all three sons. That would be an uncommonly strong thing to do. The evidence does not warrant us to say he meant one son more than another. Parol evidence would be admissible for that. We are asked to say that *the* deceased son means *all* the deceased sons. How can that result be arrived at? It cannot be by any process of common-sense. If it can be arrived at at all it is only by compulsion of the authorities. Let us see how far they drive us to that conclusion. They only hold that under such circumstances as I am about to suppose the court may eliminate an inaccurate enumeration if there is otherwise a clear gift to a class. That is, that if the court comes to the conclusion upon the true construction of the will that the testator intends the gift for the benefit of the whole of the class, you are not to defeat that intention because he has made a mistake in the number; you may reject the inaccurate enumeration. If you reject the inaccurate enumeration here, there is nothing left. We are asked to put in something, and to say that—there being no inaccurate enumeration—to say that the bequest of the children of "the" son means a bequest to the children of three sons. There is no manifest gift to a whole class, and we cannot do it. In *Hare* v. *Cartridge* there was language which assisted the court in coming to the conclusion at which it arrived, but we have no such words here. If we had here the words "to my cousins," *Hare* v. *Cartridge* might be in point, though I do not say whether it is right or wrong, but as it is we do not come within its authority. Kekewich, J., has fallen into the error of attaching the words "named Bamber" to the wrong antecedent.

A. L. SMITH, L.J.—The only question before us is whether this bequest is void for uncertainty. [His lordship read it, and proceeded:—] To whom did the residuary estate go? If there had been one son it would go to his children; but there were three sons. I answer the question by saying that it is impossible to say to whom it is to go. The testator has not said to whom it is to go, and why should the court say so for him? It is said that where there is a gift to a class, and the class is wrongly numbered—for instance, if five is put for six or eight for nine—that, inasmuch as it is the intention of the testator to benefit the class as a whole, the court will reject the number and allow the whole class to share the bequest. I think, on the cases, that there is such a rule, and it appears to me that in *Newman* v. *Piercey* Sir G. Jessel, M.R., pointed out that the rule that the court strikes out an inaccurate number is limited to cases where the testator makes the bequest to all the class. All these cases are in reality cases of striking out something from a will, but here we are not asked to strike out anything, but to say that when he devised and bequeathed his residue to the children of the deceased son he meant to say the children of the deceased sons, who happen to be three. I cannot find anything to authorize us to add anything to the will. There are cases which authorize striking out. I think that this bequest is void for uncertainty, and that Kekewich, J., was wrong in holding that he could make a will and say what the testator meant.

Appeal allowed.

Solicitors, *Bridges, Sawtell, Heywood, & Co.; Purkis & Co.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 24, 25; Nov. 6.

PITT PITTS v. GEORGE & CO. (a.)

Copyright—Work first published abroad—Copies lawfully printed in country where work first published—Importation into United Kingdom for sale or hire—Copyright Act, 1842 (5 & 6 *Vict.* c. 45), *ss.* 2, 15, 17—*International Copyright Act,* 1844 (7 & 8 *Vict.* c. 12), *ss.* 2, 3, 10.

Section 10 *of the International Copyright Act,* 1844, *does not prohibit the importation into the United Kingdom for sale or hire of copies of a copyright work lawfully printed in the country where the work was first published. That section, however, is not a complete code on the subject; and sections* 15 *and* 17 *of the Copyright Act,* 1842, *read together with section* 3 *of the Act of* 1844, *do prohibit such importation, unless it take place with the authority of the owner of the copyright. The owner of the English copyright in a German piece of music is therefore entitled to an injunction to restrain the importation into this country, for sale or hire, of copies lawfully printed in Germany.*

Decision of Kekewich, J., *reversed* (Lopes, L.J., *dissenting*).

Appeal from Kekewich, J.

The English copyright in *La Fileuse*, a piece of music by the well-known composer, Joachim Raff, had been assigned to the plaintiff. *La Fileuse* was first printed and published at Leipzig in 1870, and

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

was then offered for sale at Leipzig and other places on the Continent. In October, 1875, the defendant imported into England, for sale here, fourteen copies, lawfully printed at Leipzig, which he had bought at Brussels. The plaintiff thereupon commenced an action against the defendant, claiming damages and an injunction. Kekewich, J., dismissed the action, and the plaintiff appealed.

Cozens-Hardy, Q.C., and *Ingpen*, for the appeal, referred to the International Copyright Act, 1844, ss. 2, 3, 10, and to the Copyright Act, 1842, ss. 15, 17. "Unlawfully printing" means printing without the consent in writing of the proprietor. [They were stopped.]

Scrutton, for the defendant.—Section 10 of the Act of 1844 is a complete code on the subject of the importation of books, &c., first published abroad. If section 15 of the Act of 1842 is to be construed as is argued on the other side, section 17 is superfluous. Section 15 applies to books printed in the British dominions, section 17 to those printed elsewhere.

He also referred to 49 & 50 Vict. c. 33, s. 2, subsection 3; section 4; *Hanfstaengl* v. *American Tobacco Co.*, 43 W. R. 261, [1895] 1 Q. B. 347.

Cozens-Hardy, Q.C., replied.

Cur. adv. vult.

Nov. 6.—LINDLEY, L.J., read the following judgment: The plaintiff is the assignee of the English copyright in a German piece of music, published at Leipzig; and he seeks to restrain the defendant from importing into this country for sale here copies of the piece of music lawfully printed in Leipzig, and sold to the defendant in Brussels. The title of the plaintiff is admitted; and it is conceded that although he has not registered his assignment that circumstance is immaterial, having regard to the International Copyright Act, 1886, and to the decision in *Hanfstaengl* v. *American Tobacco Co.*, 43 W. R. 261, [1895] 1 Q. B. 347. It is further conceded that the question turns on the statutes relating to copyright in books, and not on the statutes relating to the performance of musical compositions or dramatic pieces. Kekewich, J., decided that the defendant was not infringing the plaintiffs' rights; and from that decision the plaintiff has appealed.

The case turns on the true construction of sections 2, 11, 13, 15, and 17 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), and of sections 2, 3, and 10 of the International Copyright Act, 1844 (7 & 8 Vict. c. 12). The Copyright Act, 1842, has no reference to copyright in foreign works under any International Copyright Act. It contains, however, two sections for the protection of copyright in other books—viz., sections 15 and 17. Section 15 gives a remedy by action on the case for (1) Printing in any part of the British dominions for sale or exportation any book in which there is copyright, without the consent in writing of the proprietor of the copyright; (2) importing for sale or hire any such book so unlawfully printed; (3) selling, publishing, or exposing for sale or hire any such book known to have been so unlawfully printed or imported; (4) possessing for sale or hire any such book known to have been so unlawfully printed or imported. The section is so worded as apparently not to hit the importation of copies printed in foreign countries. This result is due to the use of the expressions "such book" and "so having been unlawfully printed," which occur after the clause which prohibits printing. I understand these expressions to mean as follows: "Such book" means any book in which there is copyright under the Act. "So having been unlawfully printed" means printed in any part of the British dominions without the written consent of the proprietor of the copyright. Section 17, however, goes further as regards the importation of printed books first composed or written or printed and published in the United Kingdom. If there is copyright in such books, the importation of copies into any part of the British dominions for sale or hire, except by the proprietor of the copyright, or by someone authorized by him, is absolutely prohibited wherever such copies may be printed, and all such copies may be seized and destroyed by the officers of Customs or Excise. Penalties, moreover, are inflicted on the importers, on persons who sell, publish, expose for sale, or let for hire copies known by them to have been unlawfully imported. This section, however, is confined entirely to printed books first composed or written, or printed and published, in the United Kingdom. It does not apply to other books. Neither of these sections prohibits importation for private use, but only importation for sale or hire; neither of them, moreover, is framed with a view to protect copyright in books first published in foreign countries, nor would the language of these sections be applicable to such books unless made so by some other statute. Neither of these sections, moreover, alludes to any remedy by way of injunction. But, having regard to well-settled principles of courts of equity, there can be no doubt that an injunction would be granted to protect the owner of copyright conferred by the Act, and to restrain an infringement of either section.

I pass now to the International Copyright Act, 1844 (7 & 8 Vict. c. 12). The statute replaced an earlier International Copyright Act of 1838 (1 & 2 Vict. c. 59), which was found insufficient for the purpose of enabling the Crown to confer on the authors of works first published in foreign countries copyright to the same extent, and with the same remedies for infringements, as the authors of works first published in this country enjoyed under our own Copyright Acts. The preamble of the Act of 1844 alludes to the defect, and its main object is to remedy it. Accordingly section 2 enables the Crown to confer on the authors of books first published in foreign countries the privilege of copyright therein; and section 3 enacts that persons on whom such privilege is conferred shall be entitled to the benefit of the Act of 5 & 6 Vict. c. 45, in the same manner as if such books had been first published in the United Kingdom. The language of this section is very important. It enacts "that, in case any such order"—*i.e.*, Order in Council—"shall apply to books, all and singular, the enactment of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the copyright in books first published in this country shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply and be in force in respect to the books to which such order shall extend and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the United Kingdom"; subject to certain exceptions, which are not material. This section, unless controlled by section 10, requires the court, in effect, and so far as possible, to apply sections 15 and 17 of 5 & 6 Vict. c. 45 to books first published in foreign countries. But before attempting to do this it is necessary to consider section 10 of the Act of 1844, and to ascertain to what extent, if at all, it modifies section 3 or excludes the application of section 15 and 17 of the Act of 5 & 6 Vict. c. 45. Section 10 enacts "that all copies of books wherein there shall be any subsisting copyright under or by virtue of this Act,

or of any Order in Council made in pursuance thereof, printed or reprinted in any foreign country, except that in which such books were first published, shall be and the same are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing, and if imported contrary to this prohibition the same and the importers thereof shall be subject to the enactments in force relating to goods prohibited to be imported by any Act relating to the Customs, and as respects any such copies so prohibited to be imported, and also as respects any copies unlawfully printed in any place whatsoever, of any books wherein there shall be any subsisting copyright as aforesaid, any person who shall in any part of the British dominions import such prohibited or unlawfully printed copies, or who, knowing such copies to be so unlawfully imported or unlawfully printed, shall sell, publish, or expose for sale or hire, or shall cause to be sold, published, or exposed for sale or hire, or have in his possession for sale or hire, any such copies so unlawfully imported or unlawfully printed, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought and prosecuted in the same courts and in the same manner and with the like restrictions upon the proceedings of the defendant as are respectively prescribed in the said Copyright Amendment Act with relation to actions thereby authorized to be brought by proprietors of copyright against persons importing or selling books unlawfully printed in the British dominions."

It will be observed that the section expressly excepts from its operation the importation of copies made in the country in which the copyright book was first published. This exception is quite new, and the reason for it is not stated. Moreover, the express prohibition against importation does not extend to copies printed in any part of the British dominions. Such copies are, however, included in the second part of the section, which gives a remedy by action in respect of the importation of books unlawfully printed anywhere. The consequence appears to be that the Custom House officers cannot, under section 10, seize any copies of a foreign book in which there is copyright under the Act of 1844, unless such copies have been printed in some foreign country other than that in which the book was first printed. Copies printed in that country or in any part of the British dominions cannot be so seized under the section in question. The reason for this is difficult to discover. The power of seizing copies wrongfully imported for sale or hire, under section 17 of 5 and 6 Vict. c. 45, extends to copies printed anywhere abroad. Again, in framing section 10, the Legislature in prohibiting importation has drawn no distinction between importation for sale or hire and importation for other purposes. The distinction drawn is between importation with the consent of the proprietor of the copyright and importation without such consent. This was, no doubt, deemed an improvement. But why section 10 was framed as it is, and why, if intended to qualify and cut down the effect of section 3, those two sections should be left as they are, I confess I am unable to discover. But, however difficult it may be to account for the language in which section 10 is expressed, it is not difficult to interpret that language as it stands. Reading it in its plain, literal sense, the present case is expressly excepted from the operation of the section, for the importation complained of is of copies not only printed, but also lawfully printed, in the country in which the copyright work was first published. So that the present case is not covered either by the first part of the section, which prohibits importation, or by the second part, which gives a remedy by action. We are thus thrown back on sections 15 and 17 of 5 & 6 Vict. c. 45, with a direction (see section 3 of the Act of 1844) to apply them to a case to which their language is apparently inapplicable, and with a statement (see the preamble) that the object is to confer on the owners of copyright in foreign works greater rights than could have been conferred upon them under the earlier International Copyright Act, and similar in all respects to those enjoyed by British authors. The work here in question must be deemed to have been first published in this country, and the plaintiff must be treated as if he were the owner of the copyright in this country in such work. Section 3 of the Act of 1844 clearly requires these assumptions to be made. Section 3 does not say "first printed and published"; but I do not attach any importance to this verbal criticism. To attribute importance to it would nullify section 3. I take "published" in section 3 to include printing for publication. These assumptions appear to me necessarily to involve as consequences that the expressions "such book" and "so having been unlawfully printed," which occur in sections 15 and 17 of 5 & 6 Vict. c. 45, must be applied to the work, the copyright in which belongs to the plaintiff.

I have already pointed out that this could not be their meaning in the statute 5 & 6 Vict. c. 45. Even if section 15 cannot be held to apply, owing to its language being restricted to printing in the British dominions, section 17 can, for, as already pointed out, its scope is wider. To hold that neither section applies is to hold that section 3 of the Act of 1844 is absolutely nugatory, and in obedience to this section the difficulties in applying sections 15 and 17 of 5 & 6 Vict. c. 45 to this case must be got over. The alternative is to hold that the plaintiff has no remedy for a manifest injury, and that Parliament failed in 1844 to give effect to its declared intention.

Mr. Scrutton, in his very able argument, almost persuaded me that this was so. His contention was that section 10 was intended to be a code containing a complete enumeration of the remedies available for an infringement of copyright in foreign works, and that it was inconsistent with sections 15 and 17 of 5 & 6 Vict. c. 45, if applied to such copyright. I confess I was much struck with this contention; but I cannot adopt it. Section 10 is certainly not a complete code, for in the face of section 3 it cannot be regarded as impliedly depriving the proprietors of copyright under the Act of 1844 of any of the rights which that section and the statute there referred to confer upon them. The truth is that, when closely examined, section 10 will be found not to cover the whole ground covered by section 3 and the incorporated sections 15 and 17 of 5 & 6 Vict. c. 45. What, then, is the true inference from the express exception in section 10? Is it to be inferred that the foreigner entitled to copyright in this country is liable to have that copyright infringed by an importer of books printed in his own country; or is the inference to be that, as regards such books, he is entitled to the same protection as a British author would have under the Act of 1842? The latter inference is most in accordance with legal principles and good sense, and is the only inference which is consistent with the preamble and section 3 of the Act of 1844. If the defendant's contention were correct, it would follow that a foreign author could assign his English copyright and import and sell copies of his work here in competition with his own assignee, unless prevented from so doing by express agreement. Such a state

of our law would not be very creditable, and I am glad to find that the court is not driven to hold the law to be so unsatisfactory, nor to hold that, owing to a blunder in drafting, the Legislature has conspicuously failed to attain its declared and manifest object. One other point was urged which requires notice. The defendant is the purchaser of the books he has imported, and it is contended that he has a right to dispose of those books as he likes, without any interference from the owner of the foreign copyright or from the plaintiff, who claim under him. The right, however, of the defendant to use in this country the books which he has bought abroad depends on the law of this country, and not on the law of the place of sale. The copyright in this country confers upon the plaintiff rights here which no contract of sale abroad by other persons can deprive him of. Even if the defendant had bought his copies direct from the proprietor of the foreign copyright, the defendant would be in no better position as against the plaintiff than such proprietor himself; and for reasons already given he could not justify what the defendant claims the right to do.

The appeal must be allowed, with costs here and below. An injunction must be granted to restrain further importations for sale or hire without the consent of the proprietor, and there must be an inquiry as to the damages sustained by the proprietor by reason of the importation for sale or hire of such copies before the date of this judgment.

LOPES, L.J., read the following judgment: It is with great diffidence that I differ from my brothers in this case, who are much more familiar than I am with these Copyright Acts; but after careful consideration I have arrived at the same conclusion as Kekewich, J., in the court below. The piece of music in question was first published in Leipzig, and the plaintiff is the assignee of the English copyright in this German piece of music. Copies of the piece of music printed in Leipzig, and sold to the defendant in Brussels, have been imported into this country for sale here. The plaintiff seeks to restrain the defendant from such importation. Whether he can do so depends upon certain provisions in the Copyright Acts, which are by no means clear. Sections 15 and 17 of 5 & 6 Vict. c. 45 have been relied on. I cannot discover how the prohibition contained in section 15 can apply to the importation of books printed in foreign countries in which an English author has no copyright. This section applies to the British dominions only. Nor can I see how section 17 applies to a case like the present. It is directed against the importation of foreign copies of copyright works first composed or written or printed in the United Kingdom. This piece of music was first published in a foreign country—viz., in Germany. We must now look at the 7 & 8 Vict. c. 12, and the important section is section 10. This section deals with copies of books ("book" by the interpretation section including sheets of music), wherein there shall be any copyright subsisting under this Act or any Order in Council made in pursuance thereof, but printed or reprinted in any foreign country. If there was nothing more, this section would cover the present case; but there occur in this section these important words, "except that in which such books were first published." I am unable to disregard this exception, which, in my judgment, was inserted to meet a case like the present. It is said that this exception is to be disregarded, because of the provisions of section 3 of the same Act. The question is whether anything in this section is so repugnant as to the exception contained in section 10 as to render it inoperative. I think they may be read together, section 3 dealing with foreign countries not being countries where such books were first published, and section 10 excepting countries where the books were first published. It is said that this imposes a great hardship on the plaintiff and assignees circumstanced in the same way as the plaintiff. That may be so, but we have to construe the Acts of Parliament, and the plaintiff might have protected himself by an express covenant.

I think the appeal ought to be dismissed.

RIGBY, L.J., read the following judgment: This case was argued only on the construction of the two Acts of 1842 and 1844, as modified, with reference to registration, by section 4 of the Act of 1886. It seems necessary, however, to refer to other Acts for the purpose of arriving at a clear view of the whole scheme of copyright law at any given time. The material sections of the Acts are singularly involved in their provisions owing, no doubt, partly to the difficulty of getting through Parliament any Bill extending the rights of authors, and partly to the fact that provisions for the protection of copyright were confused with provisions for the protection of revenue, as will hereafter appear.

The Copyright Amendment Act of 1842 (5 & 6 Vict. c. 45), whether by section 15 or by section 17, provides only against importation for sale or hire. A book lawfully printed abroad might, so far as this Act is concerned, be lawfully imported by the owner of it for his own private use, though not for sale or hire.

The statute of 1709 (8 Anne c. 19) gave copyright only in Great Britain, and made no distinction between copies imported for sale and other copies imported. Section 7 of the Act, however, provided that nothing in the Act should prevent the importation of books in any foreign language printed beyond the seas.

The distinction between importation for sale and other importations was in 1735 introduced, as I think for the first time, into an Act for the protection of copyright in engravings (8 Geo. 2, c. 13); but the Act which seems to have afforded the basis for section 17 of the Act of 1842 is the Act of 1739 (12 Geo. 2, c. 36). This was not a copyright statute at all, but a revenue Act founded on the consideration that the duty on paper imported for printing books exceeded the duty on printed books. The statute was not required for the protection of copyright in books which was fully effectuated as to importations by the statute of 1709. The prohibition extended to books in which there was no copyright, if only there had been a printing of them within twenty years. The printing was in that Act the very thing aimed at, whilst in Copyright Acts the protection of the owner of the copyright is the important point. The title to copyright depends generally, not upon first composition or first printing, but after first publication in the United Kingdom.

The International Copyright Act of 1838 (1 & 2 Vict. c. 59), repealed by the Act of 1844, by section 1 empowered her Majesty by Order in Council to direct that the authors of books to be published in any foreign country, or their executors, administrators, and assigns, should have the sole liberty of printing and reprinting such books within the United Kingdom and every other part of the British dominions. Section 8 enacted that if any person in the United Kingdom or any other part of the British dominions should print, reprint, or import for sale—there is no doubt the word means imported from a foreign country for sale—any book to which the Order in Council should extend without the consent of the author or other proprietor of the copyright first had and obtained in writing, every offender should be

liable to a special action on the case at the suit of the author or other proprietor of the copyright.

It is manifest that the copyright here spoken of is the British International Copyright, and it is to be observed that importations from foreign countries may be prohibited, and that no exception is made of books imported from the foreign country where they were first published. On the other hand the importation of books otherwise than for sale, as, for instance, for hire or for the private use of the importer, was not struck at. The Copyright Amendment Act of 1842 (5 & 6 Vict. c. 12), like the Act of 1838, extended the copyright to the whole of the British dominions. Section 15 of this Act is *in pari materiâ* with section 8 of the Act of 1838. Its operation is extended as to imports by adding to the words "for sale" the words "or hire"; but as to the importations which it is aimed against we should expect to find them to be the same in both sections, and I have been unable to see any reason why there should be any difference in this respect between the two sections. Section 17 of the Act, as before suggested and as a comparison of the wording shows, is evidently based on section 1 of the Act of 1739, adding to the words "for sale" the words "or hire." Probably in both sections the words "or hire" are introduced because of the development of the circulating library system.

Comparing, therefore, the Act of 1838 with that of 1842, the first-named Act authorized at least the same amount of protection from imported books to be given to copyright under that Act which was given to copyright for books first published in the United Kingdom by the later Act, except that importation for hire was not prohibited by it.

Neither Act prevented the importation from foreign countries of books for the private use of the importer. It is, however, material to note that by an Act to amend the laws relating to the Customs (5 & 6 Vict. c. 47), which came into operation a few days after the Copyright Amendment Act, and must have been before Parliament whilst the last-mentioned Act was under consideration, on a recital in section 23 great abuse had prevailed with respect to the introduction into this country for private use of works reprinted abroad to the great injury to the authors thereof and of others, it was by section 24 enacted that from and after the 1st of April, 1843, all books wherein the copyright should be subsisting first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, should be and the same were thereby absolutely prohibited to be, imported into the United Kingdom. It seems, therefore, that there was no substantial departure as to importations from the policy of the Act of 1709. We have then to approach the consideration of the International Copyright Act of 1844 with the knowledge that provision was made against importation for sale or hire in the Copyright Amendment Act of 1842, and for absolute prohibition of importations, even for private use in the later Act of the same session, whilst the International Copyright Act of 1838 was clearly imperfect in both respects. We should expect, therefore, that adequate though not necessarily identical provision would be contained in the Act of 1844 with reference to both subjects; and in my judgment such provision is made accordingly as to books imported for sale or hire by section 3, and as to books absolutely prohibited by section 10.

I proceed to deal with the suggested interpretation of the Act of 1844 which would make section 10 a complete code as to importations, and exclude altogether the operation of sections 15 and 17 of the Act of 1842. If section 10 contains the whole law on the subject, it is obvious that the proprietor of copyright under this later Act (supposing him for the moment to be a different person from the owner of the copyright in the country where the book was first published) would be in so much worse a position than the owner of copyright in a book first published in the United Kingdom that the two rights would be essentially different, though the object of the Acts was to make them as far as possible the same.

Take, for instance, the case before us of a book first published in Germany. The proprietor of copyright in the British dominions would indeed have, as to all countries but Germany, the right of preventing importation for private use in more sweeping terms than those contained in section 24 of the Act 5 & 6 Vict. c. 47.

But, in exchange for this comparatively unimportant advantage, he would have to submit to an unlimited importation of books lawfully printed in any part of Germany itself, the country in which it would be most likely that the book would be printed on a large scale.

The very person through whom he derived title might, so far as the copyright law is concerned, import and sell of many of the books as he could find a market for, or set up circulating libraries like Mudie's for the diffusion throughout her Majesty's dominions of the very book as to which he had parted with copyright in those dominions, and what he could do any other person could do who got hold of books lawfully printed in Germany.

Under conditions of trade favourable to books made in Germany the copyright in the British dominions under the Act would be absolutely worthless, and the beneficial object of the Act of 1844 entirely frustrated. This consideration affords, in my opinion, a very strong presumption against the suggested construction which would make section 10 of the Act of 1844 an entire code with reference to importations from abroad. It is, however, said that by appropriate covenants with the owner of the original copyright the assignee may be protected. The suggestion, of course, involves the assumption that the copyright law itself has altogether failed to afford adequate protection. But the possibility of actual protection being given by covenants is by no means clear. The British Legislature is supposed to say to every person everywhere, "You may import for any purpose the books to which our British International Copyright extends if only you go to Germany for them and see that they are lawfully printed there.

The proprietor of the original copyright might indeed covenant not himself to introduce into the British dominions any of the books, but how can he effectually provide against the acts of other persons. He might enter into a warranty that no other person should import books from Germany, so as to render himself liable to any damages that might be proved to arise; but the actual importation he would be for the most part unable to prevent. It is by no means certain that in every country to which an Order in Council may extend there must be any law preventing printing for exportation of copyright books. There is no evidence of any such law in Germany: it never existed here until 1842.

It is unnecessary, however, in my judgment, further to consider the construction of the Act, on the assumption that it is left open to us to construe it in this manner if we please. The preamble of the Act makes it plain that the repeal of the Act of 1838 was intended, not for the purpose of limiting, but for the purpose of increasing the powers of her Majesty as to remedies for infringement of copyright under the Act, and to make them as effectual as those given by the existing law for the protection of home copyright. This, in my judgment, is sufficient to make it incum-

bent on the courts to construe the Act, if it can reasonably be done, so as to avoid the great injury to proprietors of copyright above pointed out. Now, section 3 of the Act, in what seems to me quite clear and unambiguous language, provides that all and singular the enactments of the Act of 1842 (including, of course, section 15 and 17, unless their language is clearly inapplicable), shall apply to the books to which the Order in Council shall extend, and which have been registered as thereinafter mentioned, in such and the same manner as if such books were first published in the United Kingdom.

Registration is now rendered unnecessary by the Act of 1886, and the exceptions in section 3 are for the present purpose irrelevant, though it may be observed that the power reserved to her Majesty by Order in Council to make exceptions would, if it were found necessary, suffice to obviate any inconvenience arising from the very sweeping terms in which the enactments of the Copyright Act of 1842 are applied to, and in effect made part of, the Act of 1844.

Assuming them to be so applied, the only question remaining is whether they, or one of them, govern the present case.

I wish to do full justice to Mr. Scrutton's able argument, which for a time went far toward convincing me that section 15 of the Act of 1842 deals only with books unlawfully printed within the British dominions.

One point relied upon by him was that if section 15 applied to books printed outside the British dominions there would be no need for section 17. But section 17 gives remedies altogether different from the action by the proprietor of the copyright given by section 15. It may well be that the remedies were to be cumulative in the cases where the two sections overlap; and if so the argument that they should be construed so as not to overlap fails.

Then Mr. Scrutton said that the literal interpretation of section 15 is in favour of the construction which would confine its operation to books printed within the British dominions. The result would be that the Act gives no action for damages to the proprietor of copyright in case of books imported from foreign countries, and this is a conclusion not to be arrived at without something approaching necessity. There may be some foundation for saying that as a matter of strict grammar and on a rigidly literal interpretation of the words of the section which precede the phrase "so having been unlawfully printed," the unlawfulness is made to depend upon the place of printing as well as on the want of consent of the proprietor, with the result that, so far as that part of the section is concerned the phrase would not be satisfied without reading into it both elements of unlawfulness.

But the section is to be read and interpreted as one entire section, and as we proceed we find reasons for declining to limit the section in the way proposed. First, we may ask what is the meaning of speaking of importation into any place in her Majesty's dominions from points beyond the sea. In the Act of 1709 the expression beyond the seas clearly refers to all places, foreign waters included, not within the United Kingdom, and I think the natural meaning of the words "parts beyond the sea" in section 15 of the Act of 1842 includes foreign waters generally. The phrase may not be strictly accurate, but in the sense which I attribute to it it is very intelligible. It would be strange indeed if the phrase were to be construed literally as not referring to importation by land, and still stranger if that literal interpretation were further limited by confining the words to transfer from one part of her Majesty's dominions to another. For what conceivable reason can we suppose the Legislature to have had for distinguishing a transfer between New Zealand and Australia from a transfer between one Australian colony and another, or, what may be a more striking case, a transfer between England and Ireland from a transfer between England and Scotland or Wales?

Secondly, as we go on in the section, an offence is made to depend on "knowing such book"—*i.e.*, a book in which there shall be subsisting copyright, "to have been so unlawfully printed or imported," and lower down we find the words "so unlawfully printed or imported without such consent as aforesaid"; twice over, therefore, in the section, we have the word "imported," separated by the disjunctive "or" from the words "so unlawfully printed," and it seems to me almost impossible to treat the word "imported," in those phrases as involving unlawful printing within her Majesty's dominions. If they cannot be so treated neither ought the word "import" in the earlier part of the section to be so treated.

Thirdly, another concession seems to my mind very important—viz., that on the limited construction of the section contended for the words as to importation constitute in themselves no offence unless the offence of unlawfully printing within the Queen's dominions is also committed to the knowledge of the importer, which is equivalent to saying that they have no effect whatever as to the substantive rights of the proprietor of the copyright, and might be struck out of the section altogether without affecting those substantive rights. It is, to say the least, very doubtful whether there could be any case in which they would be necessary for the purpose even of enabling the action given by the section to be tried in the place of importation, but, however that may be, I think it impossible that they should have been introduced as they stand for such a limited purpose only. I have considered at great, and it may be at undue, length the construction of section 15 on account of the grave consequences which the limited construction contended for might have upon the rights of all owners of British copyrights, whether in respect of books first published in the United Kingdom or under the International Copyright Acts. The result, in my judgment, is that it applies to books imported for sale or hire from foreign countries, including those imported from what may be called the country of origin, though the latter are expressly excepted from the absolute prohibition of section 10 of the Act of 1844. Having arrived at this conclusion with reference to section 15, I do not think it necessary to endeavour to construe section 17. The extraordinary language of that section, derived as it is from a statute having a totally different object, and clumsily adapted to a case of copyright, renders it exceedingly difficult to ascertain precisely the meaning and policy of the enactment.

I will only say that I am not satisfied that the plaintiff's right to prevent the importations complained of might not be derived from section 17 in connection with section 3 of the Act of 1844, if it were necessary to fall back upon those sections.

It will follow, of course, that the appeal should be allowed, with the consequences indicated by Lindley, L.J.

Appeal allowed.

Solicitors, *W. M. Tilson; Mann & Taylor.*

High Court of Justice.

Chan. Div. } Stirling, J. } Nov. 25, 26; Dec. 16.

STILL v. WEBB. (a.)

Solicitor—Remuneration—Sale carried out by underlease—Solicitors' Remuneration Act, 1881 (45 & 46 *Vict. c.* 44)—*General Order under Solicitors' Remuneration Act, Schedule* 1, *part* 1, *part* 2.

In the case of a sale carried out by means of an underlease the solicitor cannot claim to be remunerated according to the scale under Schedule 1, *part* 2, *of the General Order made under the Solicitors' Remuneration Act. If any scale applies it must be the scale under Schedule* 1, *part* 1.

But, quære, *whether the scale applies at all to such a case.*

Summons.

This case gave rise to the question whether a sale of leasehold property which had been effected by means of an underlease could properly be charged with costs under Schedule 1, part 2, of the Solicitors' Remuneration Act.

The facts were as follow:

The testator in the action, Wm. Webb, left his estate among his four children, giving each child a life interest, with remainder to the children of that child.

In 1894 certain questions arose as to the construction of the will. An originating summons was taken out, the questions in dispute were decided, and certain costs were allowed which the plaintiffs were authorized to raise by sale or mortgage of certain leasehold property of the testator, and it was declared that these costs were payable out of *corpus*.

The plaintiffs, who were solicitors, in order to raise these costs caused certain leasehold property in Rotherhithe to be put up for sale by auction in two lots.

Lot 2 was described as being held upon lease with other property for ninety years from the 29th of September, 1860, and it was stated that an underlease would be granted for the whole of the unexpired term, less the last three days, at an apportioned ground-rent of £2 per annum.

The property was sold subject to conditions which provided (clause 4) as follows: "The title to lot 1 shall commence with an indenture of lease, dated the 3rd day of June, 1862, under which the property is held. The title to lot 2 shall commence with an indenture of lease, dated the 12th day of May, 1864, under which this and other property is held, and on the completion of the purchase the vendors will grant, and the purchaser shall accept, an underlease of the property so purchased by him for the whole of the unexpired term under the said lease, less the last three days thereof, at an apportioned ground-rent of £2."

The sale took place, and as regards lot 2 was carried into effect by means of an underlease as mentioned in the conditions.

In October, 1895, two accounts were sent by the plaintiffs to Mr. Chapman, the solicitor who acted for the persons interested in the property, the subject-matter of the originating summons to the extent of one moiety. One of these accounts was an account of income payable to the tenants for life of two-fourths of the estate, the other was an account of the proceeds of sale.

Objections were raised by Mr. Chapman to two items in the second account.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The first was an item of £4 4s., being a fee paid to certain estate agents for the valuation of the property with a view to the sale. This was objected to as being excessive.

The second was an item of £15 15s., being the remuneration claimed by the plaintiffs for the sale of the property, and was arrived at thus:

"Costs of sale of lot 1 according to the Solicitors' Remuneration Act, for which the consideration money amounted to £250, £5.

"Costs of sale of lot 2, which was by way of underlease at a ground-rent of £2, and the consideration money amounted to £200, being £5 in respect of the said rent and £5 in respect of the consideration according to said Act, £10.

Then there were 5s. for stamps and 10s. for the plan.

The objection to this item was that the costs of sale of lot 2 ought to have been the same as those of lot 1—namely, £5.

The plaintiffs not seeing their way to yield to the objection, Mr. Chapman commenced two proceedings in the Lord Mayor's Court, claiming payment by the plaintiffs of the sums due to his clients, the tenants for life of two-fourths of the estate, for income, and over and above that a proportionate part of these excessive demands. Then the plaintiffs took out the present summons, asking that the objections raised by Mr. Chapman might be adjudicated on. The actions in the Lord Mayor's Court were by agreement stayed till the decision of the present summons.

Howard Wright, for the summons.—The sum of £10 is arrived at by treating this as a lease at a premium. The remuneration, therefore, is governed by rule 5 on p. 354 of the Annual Practice, vol. 2. *In re Hellard & Bewes,* 44 W. R. 475, [1896] 2 Ch. 229, is an authority in my favour.

He also referred to the Annual Practice, vol. 2, pp. 347, 353, and rule 8 at p. 350.

Upjohn, contrâ.—This contention is in fact that you can charge a larger sum on a sale for £200 than you can on a sale for £250. According to this reasoning a mortgage by demise would be paid for twice over, as being a lease for a long term at less than a rack-rent. [STIRLING, J.—If you look at part 2 of Schedule 1 to the Solicitors' Remuneration Act, you find that only applies to lessor and lessee.] You have a lessor and lessee in the case of a mortgage by demise. I submit that the words sales and purchases mean sales and purchases however carried out. If this is a lease they ought to come against the lessee for their costs.

He referred to the Annual Practice, vol. 2, pp. 333, 334, 344, 347, 353, 354; *In re Horn & Francis, ante,* p. 72.

Howard Wright replied.

Dec. 14.—STIRLING, J., stated the facts, and continued: It is to be observed that the plaintiffs claim to be remunerated according to the scale under the Solicitors' Remuneration Act. The contention on behalf of the respondents, who are tenants for life of two-fourths of the property in question, and the children, who are interested in the *corpus* is that according to the scale the plaintiffs are not entitled to £10 but only to £5. The plaintiffs rely on Schedule 1, part 2, to the Solicitors' Remuneration Act which begins thus: "First Scale.—Scale of charges as to leases, or agreements for leases, at rack-rent (otherwise than a mining lease, or a lease for building purposes, or agreement for the same)." I may pass over that scale and come to the second scale, which is as follows: "Scale of charges as to conveyances in fee or for any other freehold estate reserving rent

or building leases reserving rent, or other long leases not at rack-rent (except mining leases), or agreements for the same respectively." Then there are certain rules applicable to part 2 of Schedule 1, of which rule 5 is as follows [His lordship read the rule, and continued:—] Now, if that rule governs this case, then according to the decision of North, J., in *In re Hellard & Bewes*, the plaintiffs' have claimed the correct sum, but it is disputed by the respondents that that rule applies at all, and in my judgment the respondents are right. It is true that the rule is headed: "Rules applicable to part 2 of Schedule 1 as to all leases or conveyances at a rent, or agreements for the same, other than mining leases or agreement therefor." But, in my opinion, that heading does not extend the application of part 2 of Schedule 1, but only applies to leases and conveyances in fee or for any other freehold estate reserving rent. Can this transaction be treated as a conveyance within the meaning of that rule? It is not a case of a conveyance in fee or for any freehold interest, but it is said that it is a lease. Now, in fact, it is an underlease, but the transaction was not a lease. It was a sale carried out by a well-known conveyancing expedient to avoid an apportionment of rent, about which there might be a difficulty with the superior landlord. In my judgment, therefore, the rule relied on by the plaintiffs does not apply. Then what rule does apply? If there is anything in the rules which entitles the plaintiffs to the scale-charge, it must be part 1 of Schedule 1, which applies to sales and purchases as well as mortgages and extends to leaseholds. But there remains in my mind a doubt whether the scale is applicable at all, and whether the transaction does not fall within rule 2 (c) of the General Order, as being "business, the remuneration for which is not hereinbefore or in Schedule 1 heretofore provided for," in which case the method of remuneration would be by bill of costs under the old system as altered by Schedule 2. But that would be a departure from the bill of costs tendered here by the plaintiffs, and in my judgment this litigation has not been attended with such benefit to the estate that it ought to be continued any longer. If I have to decide, therefore, whether under the scale the sum of £10 is rightly charged, I must say I think not. [His lordship then dealt with the question whether the surveyor's fee was excessive and, after stating that he had come to the conclusion that it was not, continued:] The result is that on one item the respondents succeed, on the other they fail. I now come to the question of costs. Each party succeeds and each party fails to a certain extent. The whole benefit to the respondent from this litigation is the sum of 50s. I think it deplorable that these two small items should have been litigated to this extent, and I am not disposed to make any order beyond what I am compelled to. The only order which I make as to costs is that the plaintiffs are to have their costs as between solicitor and client of so much of the summons as relates to the valuers' fee out of the moiety of the estate in which the respondents are interested.

Judgment according.

Solicitor, *Trower, Freeling, & Parkin; R. Chapman.*

Chan. Div. Stirling, J. } Nov. 28.

NELSON v. THE ANGLO-AMERICAN LAND CO. (a.)

Company—Register of mortgages—Right of creditor to inspect and take copies—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

A creditor of a company registered under the Companies Act, 1862, *is entitled not only to inspect, but also to take copies of, the register of mortgages of the company kept in pursuance of section* 43 *of that Act.*

Semble, *should the addresses of the mortgagees have been also registered, these too can be copied.*

Mutter *v.* Eastern, &c., Railway Co., 36 *W. R.* 401, 38 *Ch. D.* 92, *considered.*

This was a motion by the plaintiff in the action asking that the defendant company might be restrained from preventing him from inspecting the register of mortgages kept by the company in pursuance of section 43 of the Companies Act, 1862.

The facts, which are fully stated in the judgment of Stirling, J., were not disputed, the question in dispute between the parties being whether the plaintiff was or was not entitled to take copies of such register.

Buckley, Q.C., and *Younger*, for the plaintiffs.—Section 32 of the Act of 1862 gives to shareholders a right not only to inspect but also to require copies of the register of shareholders. Section 43 does not in terms mention copies, but we submit that the right to take copies is impliedly conferred where a right to inspect is given, and Chitty, J., and the Court of Appeal so held in *Mutter* v. *Eastern and Midlands Railway Co.*, 36 W. R. 401, 38 Ch. D. 92, a decision upon similar sections of the Companies Clauses Acts, 1845 and 1863.

Hastings, Q.C., and *A. James*, for the defendants.—*Mutter's case* is clearly distinguishable, for the section there considered requires that the register shall set forth the names and address of the mortgagees. The difference in the language of sections 25 and 43 of the Act of 1862 shows that the Legislature did not intend mortgagees to have the right to take copies. The section being a penal one must be construed strictly.

STIRLING, J.—The short question which is at issue between the plaintiff and defendant company in this case is whether the plaintiff—who admittedly is entitled to inspect the register kept by the company under section 43 of the Companies Act, 1862—is also entitled to take copies of such portions as he may desire of such register. Now, the circumstances which give rise to the question are very short and simple.

It appears that the plaintiff was a holder of a debenture the principal money of which fell due in 1894. The defendant company were unable to pay off the debenture and in February, 1895, they made a scheme under the Joint Stock Companies Acts by virtue of which the plaintiff's money became payable by instalments. During the course of the present year, 1896, the plaintiff appears to have become dissatisfied with the position of the company and he was desirous of obtaining information as to the holders of the other debentures of the company, and with that object he sought inspection of the register kept under section 43 and he also proceeded to take copies of portions thereof. This was objected to and this action was brought. The only sections of the Act of 1862 that are material are sections 43 and 25. [His

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

lordship read the sections.] Now, it is no doubt matter of observation that the register of mortgagees and incumbrances, which is directed to be kept under section 43, provides that the company shall enter the names and does not provide for the entry of the addresses or occupations, whereas the register of shareholders is required to contain the addresses and occupations as well as the names.

Then I have to consider what is the law applicable to the subject. That has been considered in a case which arose under the Companies Clauses Acts, 1845 and 1863, and there it has been held that the right of inspection and perusal includes the right to take copies. That was so decided both by Chitty, J., and the Court of Appeal in the case of *Mutter* v. *Eastern and Midlands Railway Co.* I don't propose to go through the whole of the judgment. The general effect of the judgment of the Court of Appeal is that a right of inspection *primâ facie* carries with it a right to take copies, unless you can see that the right to take copies was not intended to be given.

It is obvious that a right to inspect without any right to take copies would be of very small assistance to the person inspecting the register. These registers are not short and the person inspecting would have to rely on his memory. The decision in *Mutter* v. *Eastern and Midlands Railway Co.* is no doubt upon a different statute, but it shows the general way in which the court regards rights of inspection. But it may be that in the present case there is something which would exclude the right to take copies. Now, what is it that is relied on here as excluding the right? It is said that section 43 does not require the addresses to be inserted. The same point was raised in *Mutter* v. *Eastern and Midlands Railway Co.* and there Lindley, L.J., pointed out that section 36 of the Act of 1845, which enables judgment creditors to inspect the register of shareholders, would be practically useless if it were construed strictly, and so as not to include a right to take copies. What the reason may be for the difference in the language of the two sections I cannot say. But is this enough to prevent me from saying that a copy is not to be taken by the person inspecting the register? I think not.

I assume that the company have confined themselves to keeping the register in strict compliance with section 43, and that the register contains "in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge." The object of that, it is said, is to enable the person inspecting to make himself acquainted with the property charged. It seems to me that *primâ facie* the person inspecting would be entitled to take a copy of that information, and whatever his object in taking a copy, I don't see that that is to preclude him from exercising his legal right, whether or not the register contains the addresses as well as the names of the mortgagees; but if it does, and the company have thought fit to keep the register in that way, I certainly do not hold that they can prevent him from taking a copy of anything that may be registered there.

Another argument was also used. It was said that the decision of the Court of Appeal proceeded on the ground that there was no penalty imposed by section 28 of the Act of 1863. [His lordship read the passage on p. 106, 38 C. D., beginning, "Bearing in mind," &c., down to "intended to be excluded."] What the lord justice seems to me to be dealing with, there is the true construction of the Act of Parliament, and he is considering this question—does the circumstance that in section 119 of the Act of 1845 a right to take copies is expressly conferred, and a penalty imposed if copies are not allowed to be taken negative the right, under section 28 of the Act of 1863, to take copies? And his lordship came to the conclusion that it did not.

Here it is made penal to refuse inspection, though nothing is said about taking copies. But it seems to me that here again the existence of a penalty does not negative the right to take copies as incident to inspection. On the whole I come to the conclusion that there is nothing to negative the right of the plaintiff to take copies of this register. There must be an injunction to restrain the company from preventing the plaintiff from inspecting the register in accordance with the provisions of the Act of 1862.

Solicitors, *Henry Smith; Dale, Newman, & Hood.*

Chan. Div. } Nov. 26.
Stirling, J. }

In re LEVER.
CORDWELL *v.* LEVER. (*a.*)

Local government—Public health—Tenant for life—Remainderman—Expense of sanitary repairs—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 11, 117, 121.

The expenses of sanitary repairs ordered by the local authority under the Public Health (London) Act, 1891, *are payable out of* corpus, *and are not borne by the tenant for life.*

Summons.

This summons dealt with certain questions arising under the will of George Lever, but the only one which requires reporting was whether the costs of certain sanitary repairs of some leasehold houses forming part of the testator's estate were to be paid by the tenant for life or out of capital. The repairs in question had been ordered by the local authorities under the Public Health (London) Act, 1891.

Notice requiring them to be executed had been sent to the occupiers of the houses, to the trustees, and to the trustees' agent.

The work had been carried out, and the cost thereof paid by the trustees.

Stokes, for one of the trustees, and *D. Cowan*, for the other trustee, took no part in the argument.

Grosvenor Woods, Q.C. and *Metcalfe*, for the tenant for life.—We submit that the costs of these repairs should be raised out of the general estate. *R. Baring*, 41 W. R. 87, [1893] 1 Ch. 61. This is a liability which falls upon the trustees under the covenants in the lease, and should be borne by them.

Graham Hastings, Q.C., and *Dunham*, for the remaindermen.—We call attention to the formal order under which these repairs have been done. If the work is not executed by the owner, the authorities can do it and charge the cost on the house under section 116 of the Public Health (London) Act, 1891. In all the cases cited there was payment by the trustees, and it was held that there was no obligation on the tenant for life to repay. *Re Tucker*, 43 W. R. 581, [1895] 2 Ch. 408, shows that the liability is between the tenant for life and the remaindermen thrown on the tenant for life.

Grosvenor Woods, Q.C., in reply.—[STIRLING, J. referred to section 121 of the Public Health Act.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

This is the same as an obligation existing at the time of the testator's death.

He referred to sections 11 and 162 of the Public Health Act.

STIRLING, J., after referring to the first question raised by the summons, continued: The second question is of a different kind. It appears that under the Public Health Act, 1891, the local authorities gave notice to the owner or occupier of certain leasehold houses forming part of the testator's estate, and in particular to the agent who received the rents of these houses on behalf of the trustees calling on them to do certain works. The work has been done, and the question now is, how the trustees are to be repaid the sums expended on this work. So far as I have been able to ascertain from the clauses of the Public Health Act, 1891, to which my attention has been called in the course of the argument, the position is this: The Act throws the obligation to effect these works on the owner of the property, and if he does not perform this obligation, then the local authorities may execute the works themselves, and the costs may be recovered from the occupier, but the occupier is to be at liberty to deduct them from the rent to be paid by him to the owner, so that ultimately the incidence of these costs falls on the owner.

Now, in this case who is the owner? The owner, as defined by the Act, is the person in receipt of the rack-rents. That person in the present instance is the trustees, and therefore the trustees are bound by virtue of being the person in receipt of the rack-rent, and payment of these costs falls on them as trustees under this will. Of course they are entitled to an indemnity; and the question is whether that indemnity is to fall on the tenant for life, or to be paid out of *corpus*? I can see nothing either in the frame of this will or in the general law which throws the costs of this indemnity on the tenant for life. The case that has been referred to as proving that sanitary expenses do not fall on *corpus* seems to me to be of a different description altogether. That was the law as to improvements under the Settled Land Acts, but as regards ordinary repairs the costs must be borne in the ordinary way.

The result therefore is that the costs and expenses are to be paid in the first instance by the trustees, and are to be repaid to the trustees out of *corpus*.

Declaration accordingly.

Solicitors, *George Cordwell*; *R. K. Metcalfe*; *Gasquet & Metcalfe*; *F. G. Cordwell.*

Q. B. Div. (Hawkins, J.) — Oct. 31; Nov. 28.

APPLEYARD *v.* LAMBETH VESTRY. (*a.*)

Metropolis management—Drain or sewer—Combined drain constructed before 1848—*Liability of vestry to repair—Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250—*Metropolis Management Act,* 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

The plaintiff was the owner of a group or block of houses which were drained by a combined operation into a public sewer. This drainage was constructed prior to 1848, *and was therefore not constructed by the order or with the sanction of the Metropolitan Commissioners of Sewers or of the vestry. The drainage becoming defective, the plaintiff sought to compel the vestry to repair it, on the ground that it was a sewer vested in them.*

Held, that the sewage conduct pipe was not a "drain" within the meaning of section 250 *of the Metropolis Management Act,* 1855, *nor within the meaning of section* 112 *of the Metropolis Management Act,* 1862, *but was a "sewer" within the meaning of the said section* 250 *of the Act of* 1855, *and that it was therefore repairable by the vestry under the provisions contained in sections* 68 *and* 69 *of that Act.*

This action was tried by Hawkins, J., without a jury. The plaintiff claimed against the defendants a *mandamus* commanding them, pursuant to sections 69, 71, and 72 of the Metropolis Management Act, 1855, and other Acts to repair, cleanse, and maintain certain pipes or sewers, and also a declaration that such pipes or sewers are "sewers" within the meaning of the said Acts and vested in the defendants.

McCall, Q.C., and *Morton Smith*, for the plaintiff.

Tindal Atkinson, Q.C., and *Muir Mackenzie*, for the defendants.

Cur. adv. vult.

The facts of the case and the arguments of counsel sufficiently appear in the following written judgment.

Nov. 28.—HAWKINS, J., read the following judgment: This action was tried by me without a jury on the 31st of October, 1896. The endorsement on the writ, which was issued on the 9th of May in the same year, claimed against the defendants a *mandamus* commanding them pursuant to sections 69, 71, and 72 of the Metropolis Management Act, 1855, and other Acts hereafter referred to, to repair, cleanse, and maintain the pipes or sewers which carry the drainage of Nos. 85, 87, 89, and 91, York-road, Lambeth, in the county of Surrey, "from the point at which the drainage of more than one house is received into such sewers up to the point of discharge into the main sewer in York-road." The endorsement also claims a declaration that such pipes or sewers are "sewers" within the meaning of the said Acts and vested in the defendants. There were no other pleadings.

I find the facts to be as follows: On the 20th of December, 1838, one Saunders, the freeholder, granted a building lease to Messrs. Grissell & Peto of a piece of land in the York-road, Lambeth. On this piece of land Messrs. Grissell & Peto erected the four houses adjoining each other, Nos. 85, 87, 89, and 91, York-road, which were finished and occupied in the year 1839 or 1840, each being let to and occupied by a different person as a separate tenement. Each of these houses and at least two others, Nos. 8 and 9, Addington-crescent, the property of a different owner, were, and still are, drained by pipes laid for draining the whole six houses by a combined operation, Nos. 85 and 87, York-road, and 8 and 9, Addington-crescent draining into a branch pipe about 9in. internal diameter. This pipe discharges its contents into another brick-barrel drain, about 12in. internal diameter, into which the drainage of Nos. 89 and 91 is first drained. The whole drainage of the six houses is then conveyed for a distance of 48ft. to 50ft. through the barrel drain down to and into and is carried away by the main sewer which runs along York-road at right angles with the barrel drain. The whole of this drainage system, with the exception of so much as is contiguous to Nos. 8 and 9, Addington-crescent, was constructed on the land of the owner of the four houses in York-road until the barrel drain reaches the York-road, and it was so constructed at the same time as the houses were built; indeed, it was formally admitted by the defendants that "the present system of combined drainage of the said houses has existed from the date of the erection of the said

(a) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

houses." The land so leased to Grissell & Peto, with the said houses built thereon, is now vested in the plaintiff for a term which will not expire until Christmas, 1923.

On the 28th of November, 1895, the sanitary inspector of the vestry served on the plaintiff a notice that the drainage was defective, and on the 13th of January, 1896, a further notice to reconstruct it in accordance with the bye-laws of the vestry. The drainage was, in fact, defective, and required to be remade. The plaintiff denied his liability, contending that the vestry were themselves liable, and on the 20th of March, by notice in writing, he required the vestry (the defendants) to do the necessary work. They declined to do so. Thereupon this action was commenced. There is no reason to doubt that the drainage as it was constructed in 1838 is the same as exists at the present time. Whether it was then legally so constructed or not does not seem to me to be material; there was really no evidence upon the subject; but, if I am at liberty to presume anything, I should say it was legally so, for in October, 1838, the then drainage authority sanctioned the drainage of the barrel drain into the main sewer, and no objection has ever been made to it since—now fifty-eight years. It was common ground that the liability to repair or reconstruct depends upon the solution of the question whether the sewage conduit (to give it a neutral term) is at the present day a "drain" repairable by the private owner, or a "sewer" repairable by the vestry, under the provisions of the Metropolis Management Acts, 1855 and 1862. I need not discuss the sections of those Acts relating to the repair of "drains" by private owners; for it is agreed that, if the conduit in question is shown to be a "sewer" within the meaning of section 250 of the Act of 1855, the vestry is responsible for its repair, their liability to repair it having been imposed on them by sections 68 and 69 of the same Act.

By section 68 it is enacted that all sewers vested in the Metropolitan Commissioners of Sewers shall become vested in the vestry in the parish, and by section 69 the vestry are to repair and maintain the sewers so vested in them. That this (if a sewer) was vested in the Metropolitan Commissioners of Sewers under section 7 of the Metropolitan Commissioners of Sewers Act, 1848, was unquestioned. The 250th section of the Act of 1855 very clearly defines what shall be deemed to be "sewers" and what "drains" for the purposes of that Act. It enacts that the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as it is in that section, applies. Now, the interpretation given to the word "drain" is as follows: The word "drain" shall mean and include any drain of, and used for the drainage of, one building only, "or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool, or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed; and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." The Act of 1862 (which by section 110 is to be read with the Act of 1855 as one Act) by section 112 extends this interpretation to "any drain for draining a group or block of houses by a combined operation laid or constructed before the 1st of January, 1856, pursuant to the order or direction, or with the sanction or approval of the Metropolitan Commissioners of Sewers." There is no pretence for saying that the conduit in question is a drain used for the drainage of one building only, but it is a drain for draining a group or block of houses by a combined operation, and it would have fallen within the interpretation given to the word "drain" if, having been laid and constructed before the 1st of January, 1856, it had been so by the order or direction, or with the sanction or approval of the Metropolitan Commissioners of Sewers, or since that time of the vestry. I find, however, no trace or evidence of any such order, sanction, or approval of either of these bodies, and I find as a fact that none ever existed.

It was suggested, but not much pressed, that I might presume it had the sanction of the local sewer authorities for Surrey and Kent, who certainly did not object; but this is immaterial, for the definitive clause of the Metropolis Management Act, 1855, requires the order or approval of either the Metropolitan Commissioners of Sewers, who had no existence until 1848 (11 & 12 Vict. c. 112), or the vestry, who took over the powers and jurisdiction of those commissioners in 1855. The local commissioners of sewers for Surrey and Kent, who had jurisdiction in those counties when the houses were built, were a totally distinct body whose existence terminated when the Metropolitan Commissioners were constituted by the Act of 1848. I find, for the reasons above mentioned, that the conduit in question is a "sewer" repairable by the vestry. I do not think it necessary to discuss the cases cited to me—*Kershaw* v. *Taylor*, 44 W. R. 28, [1895] 2 Q. B. 208 and 471; *Vestry of St. Leonards* v. *Phelan*, 44 W. R. 427, [1896] 1 Q. B. 533; and *Reg.* v. *St. Matthew, Bethnal Green*, 44 W. R. 559, 697 [1896] 2 Q. B. 95, 319—for they confirm the view I have taken, and there is not a word to be found in either of them militating against that view.

My judgment is for the plaintiff for the *mandamus* and declaration as prayed for, with costs.

Judgment for plaintiff.

Solicitors for the plaintiff, *Venn & Woodcock.*

Solicitors for the defendant, *Miller, Smith, & Bell.*

Q. B. Div.
(Hawkins, Cave, and Wright, JJ.)

Nov. 14.

FRANCIS (*Appellant*) v. METCALFE (*Respondent*). (a.)

Election law—Registration—Parliament—Franchise—Old lodger claim—Omission of part of declaration—Mistake—Power of amendment—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict.* c. 26), *s.* 28, *sub-section* 2.

Where an old lodger, whose name was on the existing register, sends in within the proper time for old lodger claims a claim in respect of the same lodgings, but by mistake omits to state in the declaration of the claim, that he is on the register of electors in respect of the same lodgings, and that he desires to have his name inserted on the old lodger list, the revising barrister has power to correct the mistake by inserting in the declaration the omitted statement.

Case stated by the revising barrister for the borough of the Tower Hamlets.

At a court held for the revision of the lists of voters for the St. George Division of the borough of the Tower Hamlets, on the 18th and 23rd days of September, 1896, it appeared that James Avery and James Beavers and eighty-six other persons had been

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

placed by the overseers on the old lodger list for the St. George Division of the borough.

At the hearing of the objections hereinafter mentioned it was proved that James Avery and James Beavers were old lodgers, and were on the register then in force as lodgers in respect of the same qualifications as were stated in their claims; that they desired to be entered on the list in respect of the same lodgings, and that they accordingly sent notices of their claims to the overseers on the 25th day of July, 1896, and the overseers accepted such claims, and inserted their names on the old lodger list, which was duly published by the overseers.

It was also proved that the claims were made on printed forms supplied to the claimants by one of the local political agents. Each such claim was in the following form:

"To the overseers of the parish of St. George-in-the-East.—I claim to have my name inserted in the list of electors in your parish for the borough of the Tower Hamlets, St. George Division, in respect of the qualification named below"; then, after the description of the qualification, came the following declaration: "I hereby declare that I have during the twelve calendar months immediately preceding the 15th day of July in this year occupied as sole tenant and resided in the above-mentioned lodgings, and that those lodgings are of a yearly value, if let unfurnished, of ten pounds and upwards." Such claim was duly signed, dated, and attested, but the declaration omitted to state that the claimant was on the register of electors for the parliamentary borough in respect of the same lodgings, and desired to have his name inserted in the old lodger list. The statutory form prescribed for claims by lodgers, whether old or new lodgers, is Form H, No. 2, in the Registration Order, 1895. According to that form, in the case of an old lodger claim, the declaration should contain the following statement: "And I hereby declare that I am on the register of electors for the said division (or county) in respect of the same lodgings as above mentioned, and I desire to have my name inserted on the old lodger list." In the case of a new lodger claim that part of the declaration is to be omitted. Form H, No. 2, has further a note appended to it, as follows: "If the claimant is on the register and desires to have his name inserted in the old lodgers list . . . he must send in his claim on or before the 25th day of July. In any other case he must send it in (to the overseers) after the last day of July and on or before the 20th August.

It was further proved that the local agent applied to his office for forms of lodger claims for the purpose of supplying them to James Avery and the other claimants; but that as his application did not specify whether old or new lodger forms were required, the forms sent to him were those used for new lodgers, from which the said final declaration is omitted; and it was also proved that the local agent supplied the forms so sent to him to the claimants without noticing the omission of such declaration, and under the impression that they were in the correct form for old lodger claims.

At the sitting of the court on the 18th of September the appellant who was on the list of voters, gave notice in writing that he objected to the claims on the ground that they were bad as old lodger claims by reason of the omission of the aforesaid final declaration, and were bad as new lodger claims by reason of their having been delivered to the overseers before the last day of July, 1896.

These objections were overruled by the revising barrister, who was of opinion that if the claims were to be treated as old lodger claims he had power to amend them by inserting the final declaration on the authority of *Ainsley* v. *Nicholson*, 24 Q. B. D. 144, 38 W. R. Dig. 74, and *Reg.* v. *McKellar*, 41 W. R. 142, [1893] 1 Q. B. 121, as he was satisfied on the evidence that the claimants were on the existing register of electors in respect of the same lodgings as they claimed for, and that they were desirous of having their names inserted in the old lodger list, and intended to claim to be on that list; and, in his opinion, the omission of that part of the declaration was caused solely by a mistake on the part of the political agents; and he accordingly treated the claims as if they had been so amended, and refused to remove the claimants' names from the list. He also held that if he had not power so to amend them the claims would be good as new lodger claims, as he considered they were not invalidated as such by reason of the instructions contained in the note to Form H, No. 2, in the Registration Order, 1895, to the effect that new lodger claims are to be sent in after the last day in July, having been disregarded, and he thought the present case distinguishable from *Whitwell* v. *Clerk of the Peace for the North Riding of Yorkshire*, Fox's Registration Cases, vol. 1, p. 152 (1889), as in that case an old lodger claim was not forwarded to the overseers in time for publication and was not published by them; and further, it seemed to him that there was no express provision by Act of Parliament as to the time for sending in new lodger claims, as is the case with old lodgers under section 22 of 41 & 42 Vict. c. 26.

He therefore held that the claimants were entitled to be on the lodger list, and he refused to remove them therefrom. If the revising barrister was wrong in this respect, the names are to be erased from the list.

S. H. Day, for the appellant.—There is no authority for making the amendment in such a case as this. The lodger franchise was first conferred by section 4 of 30 & 31 Vict. c. 102, and that section makes the claiming to be registered a part of the qualification. The claim to be registered is an essential part of the qualification for the lodger franchise: *Hersant* v. *Halse*, 35 W. R. 503, 18 Q. B. D. 412. All the statutory forms previous to 1895, contained this final declaration, and the form now in use contains the same declaration to be made by an old lodger claiming in respect of the same lodgings. The attestation and declaration are essential parts of the claim, and if the declaration be omitted the revising barrister has no power to amend, as we see by the cases of *Jones* v. *Kent*, 37 W. R. 303, 22 Q. B. D. 204, and *Smith* v. *Chandler*, 37 W. R. 351, 22 Q. B. D. 208. [HAWKINS, J.—The claimant signed this claim believing, by mistake, that it was a proper old lodger claim, and the revising barrister has held that it was a mistake. According to the decision in *Reg.* v. *McKellar*, and the judgment of Lord Coleridge, C.J., in *Ainsley* v. *Nicholson*, there was power to correct the mistake.] The power to amend a claim is given by section 28, sub-section 2, of the Parliamentary and Municipal Registration Act, 1878; but that does not give power to make such an amendment as this.

Raven, for the respondent, was not called upon.

HAWKINS, J.—I think the two cases referred to by the revising barrister are conclusive as authorities on the question; but apart from those cases, I should have come to the same conclusion. The claim and declaration form one thing, and the revising barrister therefore had power to correct the mistake in the declaration as being a mistake in the claim. As to the mistake itself, I have no shadow of doubt but that it was a mistake which the revising barrister had power to amend.

CAVE, J.—I am of the same opinion. The case is quite unarguable.

WRIGHT, J.—I am of the same opinion.

Appeal dismissed. Leave to appeal refused.

Solicitors for the appellant, *Lewis & Lewis.*

Solicitors for the respondent, *Gasquet & Metcalfe.*

Q. B. Div.)
(Day and Lawrance, JJ.) } Aug. 10, 11, 1896.

In re AN ARBITRATION BETWEEN MORGAN AND ANOTHER (*Claimants*) AND THE LONDON AND NORTH-WESTERN RAILWAY CO. (*Respondents*). (*a.*)

Compensation—Land let at low rent for public park—Proviso for re-entry if land compulsorily taken—Land taken by company—Principle of compensation.

The claimants, who were lessees of a piece of land, demised the land for the remainder of their term less one day, to a corporation at a low rent upon condition that the land should be laid out and kept as a public park. The lease contained a proviso that if the land were taken compulsorily under the powers of an Act of Parliament it should be lawful for the lessor to re-enter and re-possess the land as of his former estate. Part of the land was taken by a railway company under statutory powers, but the lessor did not re-enter upon the land taken.

Held, that the claimants were entitled to receive as compensation the full commercial value of their interest in the land considered as freed from the lease, and not merely the capitalized value of the nominal rent paid to them by the corporation under the lease.

Award in the form of a special case stated by an arbitrator.

The claim was under the Lands Clauses Consolidation Act to recover compensation for land taken and damages for severance. The sole question now was as to the principle upon which the compensation was to be computed in respect of the land taken.

In 1822 the Corporation of Swansea demised thirty-eight acres of land for ninety-nine years to the claimants' predecessor in title, from the 29th of September, 1821, at a yearly rental of £9 2s. This land was, and still is, "burrows"—that is, sand by the seashore just above high-watermark. Part of it has been used for building purposes and upwards of 2,000 houses, part of the town of Swansea, have been built upon a part of the burrows. A part of the thirty-eight acres, consisting of one acre and thirty-two perches, is the land taken, and the apportioned rent payable by the claimants to their lessors for it is 5s. 10d. per annum.

By underleases in 1877 and 1889 the claimants re-let eleven acres and sixteen perches—part of the thirty-eight acres—to the corporation for the whole of their term less one day upon an improved rental amounting to nearly £5 per acre. These underleases contained, amongst other covenants, a proviso that the corporation would lay out the demised premises as an esplanade and public promenade for the use of the people of Swansea, and would keep the same so laid out in good and sufficient repair and order for the term granted, and also a proviso that "in case the demised premises or any part thereof should be required or taken by a railway or other public company under the power or authority of an Act of Parliament, then and in such case it should be lawful for the lessors into and upon so much of the said premises thereby demised as was so required to re-enter, and the said premises to have again and re-possess as of their former estate, the rents therein before reserved being reduced in proportion to the quantity of land taken."

In 1891 the London and North-Western Railway Co., acting under powers conferred on them by an Act of Parliament, gave notice to treat for, and in 1892 they entered into possession of the land taken, by consent of the corporation and of the claimants, and constructed sidings, yards, &c., upon the same.

The claimants did not actually re-enter or re-possess themselves of any part of the land so demised by them, and the corporation continues in possession of all the land demised under the underleases (except the one acre and thirty-two perches taken from them by the company), and still uses the same as a public esplanade in accordance with the provisions of the underleases.

On behalf of the company it was contended that as the claimants had parted with their term except for one day, the value of the claimants' leasehold interest in the land taken was the amount of reserved rent which would be lost to them during the residue of the term—that is to say, the sum of about £5 per annum capitalized for the residue of the term (about twenty-eight and three-quarter years), together with the value of one day's reversion, and that the taking of the land by the company under the Act did not enable the claimants to treat it for the purposes of compensation as available to them for general purposes of profit during the twenty-eight and three-quarter year stills to run, as though the underleases had ceased to exist so far as the land taken was concerned.

On behalf of the claimants it was contended that as the railway company had taken part of the land under the authority of there Act of Parliament, the claimants were entitled to treat the land so taken as in hand free from the underleases, and to receive as compensation the sum for which such land might be expected to let for commercial purposes during the remainder of the term.

The question for the court was whether the compensation for the land taken should be determined upon the principle contended for by the company, in which case the arbitrator fixed the amount of the compensation at £182 10s.; or upon the principle contended for by the claimants, in which case the arbitrator fixed the compensation at £735.

Channell, Q.C., and *Glascodine*, for the claimants, were stopped by the court.

J. G. Pease (*H. D. Greene, Q.C.*, and *C. A. Russell* with him), for the company, in support of the above contentions, cited *Stebbing* v. *The Metropolitan Board of Works*, 19 W. R. 73, L. R. 6 Q. B. 37; and *Penny* v. *Penny*, 16 W. R. 671, L. R. 5 Eq. 227.

Channell, Q.C., in reply.

DAY, J.—This case has given me a considerable amount of trouble, probably from the conciseness with which the case is stated by the arbitrator, and from the difficulty I have had in ascertaining what the facts really were. The £5 per acre under the underleases may or may not have been the rack-rent of these eleven acres at that time. No information was given to us in the special case as to whether it was rack-rent or not, but it seems not improbable that it was not the true rack-rent for the period for which the underleases were granted. But in these underleases very peculiar stipulations were introduced, one of which certainly would not have been applicable to the circumstances existing at the date of the original lease of 1822. First of all, there was a stipulation as to the laying out of the park by the corporation, and

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

to this stipulation I attach a great deal of importance. The corporation were to take these eleven acres of land and pay £5 per acre, and keep it as a public promenade and park. The land was let to the corporation, not for the purpose of their making any profit, but for the purpose of their holding it for the benefit of the inhabitants, who were to have the use of it. The corporation were to be benefited by having a large space of land unoccupied and not built upon, but the land would be unprofitable in their hands in any sense except as being a benefit to the public. These eleven acres were a part only of the land which the claimants' predecessor took from the corporation in 1822, and the corporation were to hold this part for the whole term (less one day) during which the claimants were interested in the other land which they held under the lease of 1822. Laying out this land as an esplanade and park would no doubt be beneficial to the other land of the claimants, and if by letting it to the corporation at £5 per acre, which possibly at that time was considerably under the rack-rent, the claimants could benefit their other land, they were acting wisely in so letting it to the corporation, and that may have been the reason for entering into the stipulation as to re-entry. The result of this stipulation was, that if any portion of the eleven acres was required and taken by a railway company, then the claimants were to be at liberty to re-enter upon that portion, and the rental of the residue of the land, all of which had been laid out as a park and was still held by the corporation, was to be diminished in proportion.

As to the question of the re-entry, I am inclined to adopt the view put forward by Mr. Channell that it does not mean a formal re-entry, but simply that the interest of the corporation in the land was to cease, and that the claimants were to be considered as the persons entitled to the land and to all profits of the land. The claimants gave up their land to the corporation in consideration not only of £5 a year per acre, but also of the corporation constructing a park on the land, thereby improving the claimants' other property, and it is not unreasonable that the claimants should say to the corporation: "I let you this land for a park; you will not be able to get compensation from anyone who takes the land for a railway company, but it is only fair and reasonable that I, who have made a sacrifice in so letting it, should be able to say to any person who comes in to take the land, that the land is mine, and that I can sell for the fair market price of the land." That substantially is the claimants' contention, and I think that it is right. The company gave this notice to treat, and this notice at once put an end to the right of the parties to interfere with the land or to add to its value. The land is to be sold as of the value it was at the time the notice to treat was given, and the question we have to determine is, What was its value at that time? The notice put an end to the underlease so far as the land was concerned which was comprised in the notice. The right of the claimants, however, who were the only persons who could sell, remained. They were the only persons who could sell and who had a title to sell, and they have been dealt with by the company as the persons who had a right to sell. The land was not taken as land belonging to the corporation, but it is rightly dealt with as land belonging to the claimants, and the company have recognized their title to sell the land by giving them notice to treat. What are they entitled to sell? Are they entitled to sell the land as "land taken as in hand and free from the underleases," to use the expression in the special case? The very object of the provision in the underleases was to enable the claimants to sell the land as in hand and free from the underleases. The land is to be in hand from the underleases, and therefore, in point of terms, the condition is fulfilled. The land has become in hand and free from the underleases, and the claimants are the persons who alone can sell the land and who alone can make title to the company. We have now to deal with the interest they have in the land. The commercial value of the land is found by the arbitrator to be £735. The land has evidently increased in value to a very considerable amount. Who is entitled to that increase? The persons who succeeded in getting clear of the underleases, the persons owning and selling the land and who alone can make a title to the land—namely, the claimants. They have the land free and are entitled to sell the land as free land, and they sell it accordingly.

The case was very properly distinguished by Mr. Channell from the case of *Stebbing* v. *The Metropolitan Board of Works*, which had reference to land taken for a burial ground, which land, therefore, was permanently taken out of the market. Here the stipulation was that the letting of the land for public purposes for £5 an acre should not prejudice the lessors, and that they should not be bound to take merely the capitalized value of the £5 a year, but that they should be entitled to get the fair commercial value of the land. It seems to me that the contention of the claimants is right, and that they are entitled to recover under the award the sum of £735. I have not arrived at this conclusion without difficulty and hesitation, but upon the whole my opinion is that the claimants are entitled to sell the land and to be paid for it the full commercial value—namely, the £735, which has been assessed by the arbitrator. I think, therefore, our judgment should be for the claimants.

Lawrance, J.—I am entirely of the same opinion.

Judgment for the claimants, with costs.

Solicitors for the claimants, *Beor & Plant*, Swansea.

Solicitor for the respondents, *C. H. Mason.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 9.

Darlow v. Bland. (a.)

Bill of sale—Consideration—True statement—Consideration under £30—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 12.

A bill of sale was expressed to be given in consideration of the sum of £13 12*s. then owing by the grantors under a promissory note, and of* £16 8*s. then paid to the grantors, making together the sum of* £30, *the receipt of which the grantors acknowledged.*

The promissory note, which was given in consideration of an advance of £10, *was for* £14 3*s.* 4*d. payable by weekly instalments of* 11*s.* 4*d. each, the whole balance to become payable on default in payment of any instalment. At the date when the bill of sale was given the first instalment of* 11*s.* 4*d. had been paid, and the second instalment was not yet due. The sum of* £16 8*s. was in fact paid on the execution of the bill of sale.*

Held, that the bill of sale was void, on the grounds— (1) *that it did not truly set forth the consideration for*

(a.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

which it was given within the meaning of section 8 *of the Bills of Sale Act*, 1882; (2) *that it was given in consideration of a sum under* £30 *within the meaning of section* 12.

Application for judgment or a new trial in an action tried in the Court of Passage, Liverpool.

On the 31st of December, 1895, the plaintiff, Elizabeth Darlow, advanced the sum of £10 to George Topham and Priscilla Topham, two of the defendants, and received a promissory note signed by the three defendants, Annie Amelia Bland, George Topham, and Priscilla Topham, for £14 3s. 4d., payable by weekly instalments of 11s. 4d. each. On default in payment of any instalment the whole balance was to become payable.

The first instalment was duly paid, but on the 13th of January, 1896, before the second instalment became due, the Tophams, not being in a position to pay the second instalment, applied to the plaintiff for a further advance.

The plaintiff made a further advance of £16 8s. on the security of a bill of sale given to her by the Tophams on the same day.

The bill of sale was expressed to be given "in consideration of the sum of £13 12s. now owing by George Topham and Priscilla Topham under a promissory note dated the 31st of December, 1895, and of £16 8s. now paid to George Topham and Priscilla Topham, making together the sum of £30, the receipt of which the said George Topham and Priscilla Topham hereby acknowledge."

The plaintiff having brought this action on the promissory note, a counter-claim was set up to recover damages from the plaintiff for having wrongfully broken and entered on the Tophams' premises, which the plaintiff justified under the bill of sale.

Judgment was given at the trial for the plaintiff.

The defendants appealed, and contended, *inter alia*, that they were entitled to judgment on the counter-claim, on the ground that the bill of sale was bad—(1) because it did not truly set forth the consideration for which it was given within the meaning of section 8 of the Bills of Sale Act, 1882; and (2) because it was given in consideration of a sum under £30 within the meaning of section 12 of that Act.

F. Dodd, for the defendants.

Loehnis, for the plaintiff.

Cur. adv. vult.

Dec. 9.—LOPES, L.J., read the following judgment: Several points were raised in this case, but it is only necessary to consider the point arising on the validity of the bill of sale.

The Bills of Sale Act, 1882, requires by section 8 that every bill of sale like the present "shall truly set forth the consideration for which it is given." It is said that this bill of sale does not comply with that requirement. I am clearly of opinion that it does not. This bill of sale purports to be given "in consideration of the sum of £13 12s. now owing by George Topham and Priscilla Topham under a promissory note dated the 31st of December, 1895, and of £16 8s. now paid to George Topham and Priscilla Topham, making together the sum of £30, the receipt of which the said George Topham and Priscilla Topham hereby acknowledge." All that was actually paid was £26 8s., being £16 8s. on the execution of the bill of sale, and £10, the consideration for the promissory note, but the receipt of the full sum of £30 is acknowledged. This is not in accordance with the facts, and is untrue, because £26 8s. was all that was really received. Section 9 of the Act of 1882 provides that a bill of sale like the present is to be void unless made in accordance with the form in the schedule. The form says, "in consideration of the sum of £—— now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges," contemplating a then existing debt then payable. But the consideration here is not truly stated. £30 was not received. The £13 12s. was not then payable, and only a portion of it—namely, £10—was received. If a bill of sale like this was held to be good, it would be rendering nugatory the provision contained in section 12 of the Act, which says: "Every bill of sale made or given in consideration of any sum under £30 shall be void." How can it be said that this bill of sale was not given for a sum under £30? It was given for £26 8s., and when the grantors acknowledged the receipt of £30 (which I can only understand as £30 in cash) they said that which was untrue. On the ground that the consideration was not truly stated, and also on the ground that the bill of sale was given for a sum under £30, I think it is bad.

RIGBY, L.J., read the following judgment: The only question on this appeal which was left for decision by the court was the validity of the counter-claim of the defendants, Topham and wife, for damages occasioned by the plaintiff's taking and converting goods and chattels of the same defendants. The plaintiff justified the taking and conversion of the goods as done under the authority of a bill of sale dated the 13th of January, 1896; and the point to be determined is whether that was a valid bill of sale. If it was, the judgment entered for the plaintiff on the counter-claim will stand; if it was not, judgment on the counter-claim must be given for Topham and wife for £40, the amount of damage ascertained by the jury. The bill of sale is said to be void—(1) because it did not truly set forth the consideration for which it was given within the meaning of section 8 of the Bills of Sale Act, 1878, Amendment Act, 1882; and (2) because it was made or given in consideration of a sum under £30 within the meaning of section 12 of the same Act. As, however, the consideration appearing on the face of the bill of sale is £30, the second objection cannot arise unless the first is determined in favour of the defendants; but the smallest excess in the statement of the consideration will make section 12 applicable.

The bill of sale purports to be given "in consideration of the sum of £13 12s. now owing by George Topham and Priscilla Topham under a promissory note dated the 31st of December, 1895, and of £16 8s. now paid to George Topham and Priscilla Topham, making together the sum of £30, the receipt of which the said George Topham and Priscilla Topham hereby acknowledge." It is not disputed that the £16 8s. was actually paid over on the execution of the bill of sale, and the truth of the statement as to the £13 12s. forming part of the consideration is alone in dispute, and depends upon the facts in respect to that sum, which are as follows.

On the 31st of December, 1895, the counter-claiming defendants and the other defendant, Mrs. Bland, gave to the plaintiff a promissory note, of which the following is a copy:—

"Liverpool. December 31, 1895. £14 3s. 4d. For value received we jointly and severally and each respectively as principals promise to pay to Elizabeth Darlow or order the sum of fourteen pounds three shillings and fourpence by instalments of eleven shillings and fourpence on Monday, the 6th day of January, 1896, and the like sum of 11s. 4d. on each and every succeeding Monday for twenty-four further weeks, and, in case default be made in payment of any one or part of the said instalments we jointly and severally promise to pay on demand the whole balance then remaining unpaid of the first-named

sum, together with interest thereon at and after the rate of one halfpenny per shilling per week from the date of such default, until payment thereof.—ANNIE AMELIA BLAND, GEORGE TOPHAM, PRISCILLA TOPHAM."

The actual consideration paid for the promissory note was £10 only. Notwithstanding the fact that the defendant Bland expressly contracts as principal, it is said that as between her and the other defendants she was a surety only, and that the whole sum af £10 was in fact received by the counter-claiming defendants; but no question depending upon that allegation is now before the court. The first instalment of 11s. 4d. payable under the promissory note was duly paid. As the makers of the note were entitled to the usual days of grace in respect of each instalment, the second instalment did not become in fact due and payable until January 16, 1896. Therefore, on January 13, the only liability of the counter-claiming defendants to the plaintiff was to pay the future instalments as they fell due. The sum of £13 12s. not being actually due, the acknowledgment of the receipt of the full sum of £30 appearing in the bill of sale was not in accordance with the facts. From no point of view could it be said that more than £10 had been received prior to the date of the bill of sale, and, taking into account the £16 8s. paid at the time of execution, the whole amount actually received was £26 8s. only, a sum not sufficient to avoid the operation of section 12 of the Act. Again, there was no intention to release the counter-claiming defendants, or the other defendant Bland, from their liability under the promissory note. In fact, in this action the plaintiff has recovered on the promissory note the sum of £13 12s. against all three defendants. There could therefore have been no agreement to treat the £13 12s. as a present advance in lieu of the sum or sums payable on the note, if the existence of such an agreement in fact would have been sufficient without being mentioned in the bill of sale. The cases under the Act of 1878 established the principle that if the consideration is stated in a manner which may be considered to amount substantially to an accurate representation of the real facts, it is stated with sufficient truth to satisfy the requirements of the Act: per Fry, L.J., in *Ex parte Johnson*, 32 W. R. 693, 26 Ch. D. 338, a case relied upon by the learned judge in the court below; or in the words of the Master of the Rolls in *Credit Co.* v. *Pott*, 29 W. R. 326, 6 Q. B. D. 295, cited by Bowen, L.J., in the same case of *Ex parte Johnson*, it is sufficient if the facts are accurately stated either as to their legal effect or as to their mercantile and business effect, though they may not be stated with strict accuracy. But here the consideration is not stated accurately either as to its legal effect or as to its mercantile and business effect, for there is a substantial difference from each point of view between a present advance of a sum of money and a liability to pay the same sum by instalments at future dates. It was suggested that the payments to be made in future under the promissory note were present debts, though payable in future, and that there was no substantial inaccuracy in saying that the whole amount of the instalments was "now owing," whatever might have been the effect of saying that they were due as well as owing. But when, as here, the question is as to the present value in money of the obligation to pay, it is both in a legal and in a business point of view altogether misleading to take the debt at its full amount as now owing, the present value being obviously less than the whole sum payable *in futuro*. This point appears to be covered, if authority is required, by the decision of Lopes, L.J., affirmed by the Court of Appeal, in *Cochrane* v. *Moore*, 38 W. R. 588, 25 Q. B. D. 57. There the consideration for a bill of sale dated the 26th of July, 1888, purported to be a sum of £7,575, then owing by Benzon to Cochrane, and a further sum of £2,425, then paid by Cochrane to Benzon, making together £10,000. In fact, at the date of the bill of sale, Benzon was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September for sums amounting together to £8,300. It was said that by an agreement arrived at at the time this £8,300 due in future was to be taken between the parties as represented by the sum of £7,575. But it was held that, if the agreement existed, it ought to have been stated in the bill of sale, and, that not having been done, the document was void as not truly stating the consideration for which it was given. There was in that case a present liability for £8,300, payable in future, and, independently of any agreement, it would, according to the argument, have been right to say £8,300 and *a fortiori* £7,575 was now owing.

Lord ESHER, M.R., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Bell, Brodrick, & Sons*, for *Cecil B. Taylor*, Liverpool.

Solicitors for the defendants, *Ridsdale & Sons*, for *H. Davies*, Liverpool.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 2.

ENGELHART v. FARRANT & CO. AND LIPTON. (a.)

Master and servant—Negligence of servant—Effective cause of injury—Intervention of wrongful act by third party.

The defendant, who was a grocer, kept a van which he sent out with a man to drive and a boy to deliver goods at the customers' houses. The boy was expressly forbidden to drive. The driver negligently left the van for a short time in charge of the boy, who drove the van for a few yards in order to turn it round, and while so doing injured the plaintiff's trap.

Held, that the driver's negligence in leaving the van in charge of the boy was an effective cause of the injury, and that the defendant was liable for that negligence.

Appeal from the judgment of a Divisional Court on an appeal from a county court.

This was an action to recover damages for injuries caused to the plaintiff's trap by the negligence of the defendant's servants. The defendant Lipton, who was a grocer, kept a van which he used for the purpose of delivering goods to his customers. The defendants Farrant & Co. supplied him with a horse and a driver, named Mears. Lipton himself provided a boy, named Tucker, to deliver the parcels at the customers' houses. Tucker was expressly forbidden to drive, and Mears was expressly directed never to leave the van. In the course of one of their rounds Mears stopped the van outside his house, and went in to get some oil for a lamp which Tucker used inside the van, and during his absence he left Tucker in charge of the van. Tucker, thinking he would save time if he turned the van round, drove about fifty yards along the road to a point where there was more room for turning, and there turned, and

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

while he was coming back he ran into the plaintiff's trap and caused the injuries complained of.

The county court judge held that there was negligence on the part of both Mears and Tucker, but he thought that the negligence of Tucker, and not that of Mears, was the proximate cause of the injury. He gave judgment for the plaintiff against Lipton, and judgment for the defendants Farrant & Co.

The defendant Lipton appealed to the Queen's Bench Division. Grantham and Wright, JJ., affirmed the decision of the county court judge.

Lipton appealed to the Court of Appeal. On the hearing of the appeal the case was treated on the footing that both Mears and Tucker were in the service of Lipton.

J. A. Foote, for the defendant Lipton.—Lipton is not liable for the negligence of Mears, for Mears's negligence was not the proximate cause of the injury. It was not the natural result of his leaving Tucker with the van that Tucker should attempt to drive the van: *Mann* v. *Ward*, 8 Times L. R. 699. Neither is Lipton liable for the negligence of Tucker, for it was not within the scope of Tucker's authority to drive the van, and he was expressly forbidden to do so.

W. Howland Roberts, for the plaintiff.—First, the defendant is liable for the negligence of Mears, notwithstanding the intervention of a wrongful act by Tucker: *Clark* v. *Chambers*, 26 W. R. 613, 3 Q. B. D. 327; *The Bernina*, 35 W. R. 314, 12 P. D. 58. Secondly, he is liable for the act of Tucker alone; for the driving of the van by Tucker was an act done by him in the course of his employment and for his master's benefit: *Burns* v. *Poulsom*, 22 W. R. 20, L. R. 8 C. P. 563.

Cur. adv. vult.

Dec. 2.—Lord ESHER, M.R.—I am of opinion that the decision of the county court judge and of the Divisional Court is right. The case depends on the doctrines which have been established as to the liability of an employer for the negligent acts of his servant. There is no doubt about the law; the difficulty always lies in applying the law to the particular facts of each case. The defendant, who was a tradesman, had a cart which he used for delivering goods at his customers' houses. The cart was sent out with a man named Mears to drive it and a boy named Tucker to deliver the parcels out of the cart. It was Tucker's duty to tell Mears to what address to drive, and Mears was then to drive to that address. Mears was intrusted with the duty of driving; Tucker was not intrusted with that duty, it was no part of his duty to drive at all. But they both went out to take part in the same object—viz., the delivery of the parcels to the customers, which was thus the joint work of both. The fact that Tucker was expressly forbidden to drive is immaterial; it is sufficient that it was no part of his duty to drive. In my opinion it is also immaterial that Mears was expressly told not to leave the cart. Now, on the day of the accident it became necessary to get some fresh oil for a lamp which Tucker used inside the cart. Mears thereupon drove to his own house, but instead of letting Tucker go in to fetch the oil, as he ought to have done, he went in himself, and he left the cart in charge of the boy, who, it must be taken, he knew could not drive. The county court judge found as a fact that Mears was negligent in so doing. The boy then, not for his own pleasure, but with intent to carry on his master's business, and so as to save time, turned the cart round. I am of opinion that the defendant is liable for the negligence of Mears, if the negligence of Mears was an effective cause of the injury to the plaintiff which followed. It said that the mere fact of the boy driving the cart in disobedience to his orders relieved the defendant from liability, even although Mears was negligent. That argument cannot be supported. If a stranger interferes and by a wrongful act contributes to the accident, it does not follow that the defendant is not liable, if the negligence of his servant is an effective cause of the accident. As there was no jury in this case, we have no power, as the Divisional Court had, to draw inferences of fact, and I think that when Mears left the cart in charge of the boy he did a dangerous thing, which was an effective cause of what subsequently happened. As to the case of *Mann* v. *Ward*, I have some doubt whether it can have been correctly reported. In my opinion the defendant here must be held to be liable, not for the negligence of the boy, but for the negligence of Mears.

LOPES, L.J., read the following judgment: The interposition of the negligence of another person between what I will call the primary negligence and the accident makes this case difficult. There must be negligence and negligence causing the injury. Mears was the driver of Lipton, and for any negligence of his causing injury Lipton would be liable. Mears left the cart and horse in the street unattended. For this, if nothing more had taken place, Lipton would be liable, provided it caused the mischief; for it was negligence on the part of Mears, who was the servant of Lipton. Mears had been cautioned not to leave the cart and horse unattended, and on a previous occasion has been censured for so doing. But there was a boy aged seventeen also in the cart, who was also in the employ of Lipton. This boy, called Tucker, had nothing to do with the driving. Whilst Mears was away, the reins, which had been placed in a hook, intended to hold them when the driver was not using them, were taken from the hook by Tucker, and he proceeded to drive the cart some little way along the street for the purpose of turning it, and in so doing came into collision with another carriage and caused the injury complained of. The negligence of Mears was not disputed, but it was said that his negligence did not cause, but the negligent driving of Tucker did cause, the mischief. The boy Tucker had been prohibited from driving, and his driving was a direct act of disobedience on his part. In these circumstances the question is, was it the negligence of Mears or of Tucker which caused the accident? It was contended that nothing done in the way of driving by Tucker could make the master, Lipton, liable, because Tucker was not acting within the scope of his authority, had nothing to do with the driving, and in fact was acting in disobedience to the prohibition he had received. I think this is right. With regard to Mears, it was said he did not cause the mischief, and could not make Lipton liable, and that the mischief was caused by the intervention of another person—viz., Tucker, for whom Lipton, so far as driving was concerned, was not responsible. After careful consideration I have come to the conclusion that Mears's negligence was the effective cause of the mischief, and that Lipton is liable. Tindal, C.J., in *Illidge* v. *Goodwin*, 5 C. & P. 190, said: "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." It was Mears's blameable carelessness which induced the boy Tucker to do what he did; it was that carelessness which was the real moving and effective cause of the mischief, and I believe that is the inference which any jury would draw from the facts of this case. If Tucker had not been in the cart, and Mears had left the cart unattended, and the horse had moved on, and an injury had been caused to a passer-by, or if a passer-

by had jumped into the cart and driven it and injured some person by negligent driving, Lipton would have been liable. Again, if Mears had asked a passer-by to stand at the head of the horse while was absent, and the passer-by had left the horse, and the horse had gone on, and injury had been caused to any person, Lipton would be liable. His carelessness in not anticipating what might not unreasonably happen would have been the real and effective cause of the mischief. In this case Mears practically was leaving the horse and cart unattended. He knew Tucker was ordered not to interfere with the driving; he ought therefore to have anticipated that some casualty might happen, and it was his imprudence in this respect which caused the mischief. *Mann* v. *Ward* is a very peculiar case, and is only reported in 8 Times L. R. 699. I doubt if it is fully reported. It must be regarded as a decision on the very peculiar facts of the case, and is one, if correctly reported, at which I should not myself have arrived. It is impossible to reconcile the various decisions with regard to negligence, and the reason is that fact and law are so mixed up in them that they are frequently decisions rather on the facts than the law, and the variety of facts involved is infinite. The appeal must be dismissed.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Wood, Bigg, & Nash*, for *Kitsons, Mackenzie, & Hext*, Torquay.

Solicitors for the defendant, *Prior, Church, & Adams*, for *T. C. Lindop*, Torquay.

From Chan. Div.
(Lord Russell of Killowen, C.J., and Lindley and A. L. Smith, L.JJ.) } Nov. 20, 28.

In re ROBINSON.
WRIGHT *v.* TUGWELL. (*a.*)

Ecclesiastical law—Use of black gown in pulpit—Conditional bequest of money—Legality.

It is not illegal for a clergyman of the Church of England to wear the black gown while preaching; and a condition requiring him to do so attached to a bequest of property for his benefit is not an illegal or impossible condition.

Appeal by the Rev. S. A. Selwyn from North, J.

Mrs. Frances Rebecca Robinson, by her will dated the 31st of January, 1889, bequeathed a sum of £1,500 to endow a proposed church at Bournemouth. It was expressed to be "an abiding condition that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal"; and any incumbent appointed to the church was required to sign this condition. On compliance, but only on compliance, with these requirements the income was to be paid to the incumbent. The testatrix died shortly after the date of her will.

In November, 1891, when the proposed church had been completed, the question of the legal validity of the condition was brought before North, J., who decided (40 W. R. 137, [1892] 1 Ch. 95) that the condition was valid, and directed that the fund should remain in court in order that the income might be paid to the incumbent of the church only so long as he complied with the condition.

Liberty was reserved to the incumbent for the time being to apply for payment. The Rev. Sydney Augustus Selwyn, having been appointed incumbent, applied by summons for an order that the income should be paid out to him so long as he should remain incumbent. He admitted that he had not worn, and did not intend to wear, the black gown when preaching, and that he had not signed the condition in that behalf; but he contended that the condition was contrary to the rules of the ecclesiastical law, and invalid.

North, J., was of opinion that his previous order, already mentioned, precluded the applicant from disputing the legality of the condition, and refused to make any order on the summons.

Mr. Selwyn appealed.

Dibdin, for the appeal.—The condition is impossible, and therefore the gift is absolute: Jarman on Wills, (5th ed.) vol. 2, pp. 850, 852. Secondly, the black gown is now an illegal vestment: *Ridsdale* v. *Clifton*, 2 P. D. 276, 310, 316, 321, 25 W. R. Dig. 104. Preaching is a public ministration. In Cripps on the Church and Clergy the passage at p. 706 of the 5th ed., stating that the surplice is not "a proper habit for the preacher," is omitted in the 6th ed.

He also referred to the Act of Uniformity, 1662 (1 Eliz. c. 2), s. 25; the Thirty-nine Articles, Art. 23; *Elphinstone* v. *Purchas*, L. R. 3 A. & E. 66, 91, 18 W. R. Ecc. Dig. 26; Prideaux's Churchwardens' Guide, 15th ed., p. 447 (16th ed., p. 393); and Dale's Legal Ritual (1871), Introd., p. 12.

B. Fossett Lock, for the respondents.—North, J.'s, decision in 1891 makes the present question *res judicata*: see *Serrao* v. *Noel*, 15 Q. B. D. 549, 559, 34 W. R. Dig. 70. The passage relied on in the judgment in *Ridsdale* v. *Clifton* does not deal with the law as it was after the Act of Uniformity of 1662. Preaching is not a "ministration."

He referred to the Thirty-nine Articles, Arts. 23 and 26; the 36th Injunction of Elizabeth; section 2 of the Brawling Act, 1860 (23 & 24 Vict. c. 32); the judgment of Willes, J., in *Cope* v. *Barber*, 20 W. R. 885, L. R. 7 C. P. 393; Cardwell's Documentary Annals of the Church of England, vol. 1, pp. 329, 336; the 30th Injunction of 1559 (in Sparrow's Collection of the Articles, &c.); the 45th-57th, 58th, and 74th Canons of 1603 (in Sparrow); the Canons of 1571 (in Cardwell's Synodalia, vol. 1, p. 126); the case of Bishop Wren, who was impeached and sent to the Tower for (*inter alia*) trying to enforce the use of the surplice in the pulpit (4 State Trials, 27, 32); and *Elphinstone* v. *Purchas*.

Dibdin replied.

Cur. adv. vult.

Nov. 28.—A. L. SMITH, L.J., stated the facts, and continued: I do not doubt that North, J., arrived at a right conclusion when he held that the condition about wearing the black gown in the pulpit was not an impossible condition, and that it was a continuing condition. I have nothing more to say as to this. It is now argued on behalf of Mr. Selwyn that the condition is illegal; that it is illegal for a clergyman of the Church of England to wear a black gown in the pulpit when preaching. I think North, J., held that it was not, but we gave Mr. Dibdin, although out of time, leave to argue this point for Mr. Selwyn. The point when taken struck me as novel, for it is impossible to shut out from one's recollection the time when to preach in a black gown was the rule, and not the exception, in the Church of England, and also the many bitter strifes which have taken place, not as to whether the use of the black gown in the pulpit was illegal, but whether the use of what have been called ritualistic vestments, which it was said trenched upon the ordained simplicity of the vesture

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

of the clergy when officiating in the Church of England, could be lawfully used. Mr. Dibdin insisted that the use of the black gown in the pulpit was illegal; but he had to admit that until the present application no case could be found in the books in which any objection to the use of the black gown in the pulpit as being illegal had been made. No statute, no rubric, no advertisement, no injunction, and no canon could he point to which enacted or prescribed that to preach in the black gown was prohibited, and therefore illegal; and he had also to admit that for a period of three centuries, from 5 Edw. VI., A.D. 1551-2, down to a comparatively recent date, there had been a contemporaneous and continual user of the black gown in the pulpit by clergymen of the Church of England when preaching. He, however, asserted that the judgment of the Privy Council, delivered by Lord Cairns in 1877 in the case of *Ridsdale* v. *Clifton*, had held the black gown to be illegal, which assertion, remembering the history of the time, struck me as remarkable. Now, what was it that the Privy Council were adjudicating upon in *Ridsdale* v. *Clifton*? It was, so far as regards the question of vestments, whether the wearing during the service of the Holy Communion of vestments known as an alb and a chasuble was lawful. Throughout the whole of the case, which was most elaborately argued, and equally elaborately adjudicated upon, there is not even an allusion to the black gown, nor to what a clergyman was or was not to wear in the pulpit when preaching.

Mr. Dibdin has seized upon a passage in the judgment (at p. 321 of the report) in which it is said: "Reading, then, as their lordships consider they are bound to do, the order as to vestures in the Book of Advertisements into the 25th section of 1 Eliz. c. 2, and omitting (for the sake of brevity) all reference to hoods, it will appear that the section, from the year 1566 to 1662, had the same operation in law as if it had been expressed in these words: Provided always that such ornaments of the Church and of the ministers thereof shall be retained and be in use as were in the Church of England by authority of Parliament in the second year of King Edward VI., except that the surplice shall be used by the ministers of the Church at all times of their public ministrations, and the alb, vestment, or tunicle shall not be used, nor shall a cope be used except at the administration of the Holy Communion in cathedral or collegiate churches." The Advertisement which I understand Lord Cairns was alluding to was: "Every minister saying any public prayers, or ministering the sacraments or other rites of the Church shall wear a comely surplice with sleeves, to be provided at the charge of the parish": see p. 316 of the judgment. It is obvious that the Advertisement does not embrace the time of preaching, but only the saying of public prayers and ministering the sacraments or other rites. The passage in the judgment relied upon was not aimed at preaching in the pulpit. It had reference to the saying of public prayers and ministering the sacraments and other rites, and to those alone. It is wholly incorrect to say that either the judgment in *Ridsdale* v. *Clifton* or the passage relied upon has decided that the use of the black gown in the pulpit was illegal. It was not even discussed, much less adjudicated upon.

It was then argued that although the Privy Council in *Ridsdale* v. *Clifton* might have been dealing, not with preaching in the pulpit, but only with the saying of public prayers and the ministration of the sacraments and other rites, yet, as preaching a sermon from the pulpit was part of the order in the Prayer Book of the administration of the Lord's Supper or Holy Communion, consequently it was part of the ministration of the sacrament of the Lord's Supper, and thus came within the decision of *Ridsdale* v. *Clifton*. It was said that in the order of the administration of the Lord's Supper or Holy Communion in the Prayer Book there would be found after the Nicene Creed this rubric: "Then shall follow the sermon or one of the homilies already set forth, or hereafter to be set forth by authority," and that as during that part of the Communion Service ending with the Nicene Creed a surplice was to be worn, and nothing was said as to changing it for the black gown when the clergyman went into the pulpit to preach, to do so was illegal, as also to take off the black gown and resume the surplice, if and when the sacrament of the Lord's Supper happened to be afterwards administered.

It is erroneous to describe preaching a sermon as part of ministering the sacrament of the Lord's Supper. If it is, then everyone of the congregation, confirmed or unconfirmed, who attends evening service or any other service in which no part of the Communion Service is read, if he remains for the sermon, takes part in the ministration of the sacrament of the Lord's Supper; which, with all respect to Mr. Dibdin's argument, appears to me to be absurd. It was then said that the 23rd Article of Religion, under the heading of "Ministering to the Congregation," joins the office of public preaching and ministering the sacraments together, but I fail to see that this article shows that public preaching forms any part of the ministering of the sacraments. This article only deals with who may preach and who may minister the sacraments—*i.e.*, that the clergyman who does the one or the other must be lawfully called and sent to execute the same. No authority has been cited, nor do I believe any can be, to show that preaching is part of ministering the sacrament of the Lord's Supper, and in my judgment it is not.

Neither can preaching be regarded as one of the "other rites of the Church," which are the words in the Advertisements of Queen Elizabeth, and in Canon 58 of 1603-4. What the exact meaning of the word "rite" is has not been decided; but the usage of three hundred years is enough to show that, whatever the word means, preaching in a black gown, which seems to have been the ordinary clerical dress, cannot be an infringement of the regulations requiring the use of a surplice in "ministering the sacraments and other rites of the Church."

The passage in the judgment of the Privy Council in *Hebbert* v. *Purchas*, 19 W. R. 898, L. R. 3 P. C. 605, to the effect that a minister's proper vestment is a surplice, has no reference to preaching, but only to sacraments and other solemn religious services, with which alone the court was concerned. The absence in the rubric of any words directing a change of vestment between the ante-communion service and the administration of the Lord's Supper merely shows that to preach in a surplice is not unlawful, not that to preach in a black gown is unlawful. Moreover, how does this argument apply to sermons after evening service when there is no Communion?

There is a passage in the judgment of Sir Robert Phillimore in *Elphinstone* v. *Purchas* [1870], in which the learned judge, when dealing with what effect an admitted disuse of certain ornaments for many centuries should have, when considering whether the ornament is lawful or not, says: "In truth, however, the argument is bad from the vice of proving a great deal too much. The same argument would make the copes in cathedrals unlawful, which it is admitted they are not; the use of the surplice in preaching unlawful, which is the proper dress; and, *è converso*, would establish the legality of the black gown, which

has no warrant in law." This is the only passage which Mr. Dibdin, with all his research, has been able to produce relative to the alleged illegality of the black gown.

In the first place it is but the *dictum* of the learned judge; he had no point as to the legality or illegality of the black gown in the pulpit before him. Secondly, the view taken by the learned judge in *Elphinstone* v. *Purchas*, both as regards usage and the effect of the advertisements, was dissented from by the Privy Council, both on appeal from his decision in *Hebbert* v. *Purchas*, and afterwards in *Ridsdale* v. *Clifton*. In both of these cases great importance was attached to long usage. In the third place, where is the illegality of wearing the black gown to be found? The learned judge says that it has no warrant in law; for the *dictum* was delivered seven years before the judgment in *Ridsdale* v. *Clifton*, now relied upon for the establishment of its illegality.

The "warrant in law" for the black gown is constant user for centuries. Inasmuch as no positive law exists, and no objection against the legality of the use of the black gown in the pulpit, which has ranged over three hundred years, can be found, and there is no decision that its use is illegal, I agree with what I understand North, J., to have held, that its use is not illegal. Consequently the appeal must be dismissed with costs.

The application before us does not raise the question whether a scheme can properly be sanctioned by the court, dispensing with the performance of the condition of preaching in a black gown, or of any other of the conditions imposed by the testatrix. The court therefore expresses no opinion upon the point.

THE LORD CHIEF JUSTICE OF ENGLAND and LINDLEY, L.J., agree in this judgment.

Appeal dismissed.

Solicitors, *West, King, Adams, & Co.*, for *Preston & Francis*, Bournemouth; *Bridgman & Willcocks*.

High Court of Justice.

Chan. Div. } Chitty, J. } Dec. 5, 8, 16.

WYNNE v. TEMPEST. (a.)

Practice—Parties—Third party procedure—R. S. C., 1883, *ord.* 16, *r.* 48—*Breach of trust—Claim to follow trust money—Indemnity.*

In an action to make the defendant liable for breach of trust by him and his deceased co-trustee, T. G. T., who was a solicitor, the defendant alleged that the trust money sought to be recovered was paid to the deceased as a member of the firm of solicitors acting for the trustees, and obtained an order for leave to serve a third party notice under ord. 16, *r.* 48, *on the surviving members of the firm.*

The notice claimed indemnity from them against the plaintiff's claim on the ground that the firm became liable for the misapplication of the money by T. G. T. On an application to discharge the order,

Held, that the defendant's right (if any) to recover from the applicants a sum equal to the lost trust fund was not a right depending on his liability in the action, but an independent right, and therefore that the notice was not a claim for indemnity within ord. 16, *r.* 48, *and must be discharged.*

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Motion.

The above action was for a declaration that the defendant was liable to pay, and for payment by him to the plaintiff of a certain sum directed to be raised by a deed poll dated the 30th of August, 1883, out of certain funds, subject to the trusts of the will of one Thomas Mason and of a certain indenture of settlement, together with interest thereon at the rate of 5 per cent. per annum, and the defendant was sued as surviving trustee of the said will and settlement. The defendant claimed to be indemnified by the applicants against liability in the said action, and they had been served with a third party notice pursuant to an order of court obtained upon the application of the defendant under ord. 16, r. 48.

It appeared that the proceeds of sale of certain stock appropriated to meet the sum to be raised under the deed poll were paid to Thomas Greenwood Teale, one of the trustees of the said will and settlement, who was then carrying on business as a solicitor in partnership with the applicants, but had since died, and it was alleged that Teale received the money as the solicitor acting for the trustees, and paid it into the firm's account, with the result that all the partners in the firm became liable for it.

This account would seem to have been kept in Teale's name. After his death the bank was, as the result of an action between the applicants and the bank, allowed to set off a credit balance on this account against an over-draft of larger amount upon another account in Teale's name in their books.

This was a motion on behalf of the persons brought in as third parties to discharge the order pursuant to which they had been brought in.

Byrne, Q.C., and *Danckwerts*, for the applicants.—The order is wrong. The defendant has no right to indemnity from the applicants within the meaning of order 16. There is no express contract to indemnify, and nothing in the circumstances or the position of the parties from which such a contract can be implied. They referred to *Mara* v. *Browne*, 44 W. R. 330, [1896] 1 Ch. 199; *Birmingham and District Land Co.* v. *London and North-Western Railway Co.*, 35 W. R. 173, 34 Ch. D. 261, p. 271; *Baxter* v. *France*, 43 W. R. 341, [1895] 1 Q. B. 591; *The "Jacob Christensen,"* [1895] P. 281, 43 W. R. Dig. 143; *Constantine* v. *Warden*, 44 W. R. 162; and *Robertson* v. *Armstrong*, 28 Beav. 123, 9 W. R. Ch. Dig. 88.

Levett, Q.C., and *Stewart Smith*, for the defendant.—The applicants are liable to make good to the defendant the loss caused by their late partner's misappropriating trust money: *Dundonald* v. *Masterman*, 17 W. R. 548, L. R. 7 Eq. 504, p. 516, Partnership Act, 1890, ss. 11, 12, and that is the loss that will be incurred by the defendant if the plaintiff succeeds in this action. The defendant, therefore, has a right to be indemnified by the applicants against such loss, and the order is right.

MacSwinney, for the plaintiff.

Byrne, replied.

CHITTY, J.—The claim of the defendant to bring the third parties before the court in this action under ord. 16, r. 48, is founded on an alleged right of indemnity; there is no question of contribution. In the action it is sought to make the defendant liable for an alleged breach of trust by him and his deceased co-trustee.

A right to indemnity may arise under an express or implied contract, or by reason of an obligation resulting from the relation of the parties. Such an obligation arises in equity from the relation of the parties where two trustees are liable for a breach of trust, and one has applied the trust fund to his own

use; in that case the trustee who has so misapplied the fund is liable to indemnify his co-trustee, so where a man has requested another to hold as trustee for him shares upon which there is a liability for calls or the like the trustee is entitled to an indemnity, not merely out of the trust property, but by the *cestui que trust* personally. I give these two cases merely by way of illustration.

Now, the right of indemnity claimed by the defendant does not arise from an express or implied contract, but, if it arises at all, it is founded upon some obligation of the nature above stated. The defendant's case is that the trust money was paid to the late Thomas Greenwood Teale as a member of the firm of solicitors, of whom the third parties are the survivors, and that the late Thomas Greenwood Teale was acting within the scope of his apparent authority as partner in receiving the money, and, consequently, that the firm became liable. On this head reference was made by the defendant's counsel to the 11th and 12th sections of the Partnership Act, 1890. Further, it was said that the money was traced into an account at the bank in the name of Thomas Greenwood Teale, which was, in fact, the firm's account, although (as has been decided in an action between the third parties and the bank) the bank, who had no notice of the trust, were entitled to deal with the account as the account of Thomas G. Teale only.

In substance, the claim of the defendant is to follow the trust money into the hands of the firm, who had notice of the trust; and the money having been lost or misapplied to charge the surviving partners with the amount. It is obvious that this is not a claim to indemnify the defendant against the plaintiff's claim in the action.

The right of the defendant (if it exists) to recover from the surviving partners a sum equal to the lost trust fund is not a right depending on the liability of the defendant in the action; it is an independent right. It may be tested thus: if the plaintiffs failed in the action, would the defendant's claim against the third parties be thereby defeated? It is clear that it would not. If the surviving partners are liable to the defendant, he could, whether he failed or succeeded in the action, pursue his remedy against the surviving partners; as surviving trustee, he could sue them for the purpose of getting in a sum of money which, when received by him, would form part of the trust fund in his hands. To such an action the circumstance that he was not personally liable to his *cestius que trustent* would constitute no defence; it would be immaterial.

For these reasons I hold that the third party notice is not within ord. 16, r. 48, and must be discharged.

Solicitors for the applicants, *Vincent & Vincent; Williamson, Hill, & Co.*

Solicitors for the defendant, *Witham, Roskell, Munster, & Weld.*

Solicitors for the plaintiff, *Perkins & Weston.*

Chan. Div. } Stirling, J. } Nov. 24; Dec. 16.

WOOD v. MIDDLETON. (a.)

Practice—County court—Service out of the jurisdiction—Transfer of action to High Court—County Courts Act, 1888, *ss.* 67, 68, 164—*County Court Rules*, 1889, *ord.* 51, *r.* 23—*Judicature Act*, 1875, *s.* 17—*Ord.* 11, *rr.* 1 (d), 2.

Service in an action commenced in the county court having been effected out of the jurisdiction,

Held, that such service was authorized by ord. 51, *r.* 23, *of the County Court Rules*, 1889, *and that though such rule was wider than the corresponding High Court rule it was, nevertheless, a rule which might lawfully be made by the proper authorities under section* 164 *of the County Courts Act*, 1888, *and that, therefore, no objection to the jurisdiction could be raised in the county court.*

But the action having been transferred to the High Court,

Held, that the person served ought to have an opportunity of raising the objection that it could not have been lawfully entertained there.

This was a summons for a further and better answer to interrogatories.

Two questions were raised. First, as to the power of a county court to order service out of the jurisdiction; and secondly, whether, assuming that the county court had the power, the objection could be taken on the action being transferred to the High Court.

The circumstances which gave rise to these questions were as follow:

The present action was commenced by a summons issued from the County Court of Cumberland on the 27th of February, 1896, and by it the trial was fixed for the 15th of April.

From the claim filed it appeared that the plaintiff claimed £100 from the defendant, who was sued as the trustee by representation of R. Hartley, deceased.

The defendant was described as resident in Scotland, and consequently out of the jurisdiction.

The substance of the case was that R. Hartley, whose will was sought to be administered, bequeathed a legacy of £100 to the plaintiff, payable on his attaining twenty-one, and with directions for payment in the meantime, and appointed one Middleton his sole executor and trustee.

The testator died in 1879.

Middleton proved the will, and invested the legacy in what was alleged to be an improper investment. Middleton died in 1886, having appointed the defendant and another person his executors. Both proved the will, and the defendant was the surviving executor.

The plaintiff attained twenty-one in March, 1892, and claimed a declaration that the investment by Middleton was a breach of trust, and that the defendant was liable to make good the loss sustained, and administration of the personal estate.

On the 26th of February, 1896, an affidavit was made by the plaintiff's solicitor, from which it appeared that the defendant had formerly resided in Cumberland, but had lately removed to a residence in Scotland. Correspondence ensued between the parties, and the solicitors in Scotland of the defendant offered to accept service of any processes issued in the Scotch courts. The defendant's solicitor swore he believed that the defendant resided in Scotland. Upon this affidavit the registrar on the 27th of February, 1896, gave liberty to serve the defendant there, and she was served accordingly.

On the 19th of March another order of the county court gave leave to the plaintiff to deliver interrogatories. These were answered on the 2nd of April, but before answering the defendant's solicitor gave notice that the defendant objected to the jurisdiction. This objection raised two grounds: first, that the action was beyond the limit of the county court; second, that the processes were served in Scotland, out of the jurisdiction.

On the 11th of April notice was given by the plain

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

tiff's solicitor of a motion that on the 15th of April, the date of the trial, the court would be moved for a further and better answer to interrogatories. That came on on the 15th of April, when the defendant raised these two objections.

The county court judge being satisfied that the estate exceeded £500 made an order transferring the action to the High Court, and decided nothing as to the second objection.

The present summons, asking for a further and better answer to the interrogatories, was taken out on the 11th of May.

H. Terrell, for the summons.—Leave to serve was properly given under ord. 51, r. 23, of the County Court Rules, 1889. Section 68 of the County Court Act, which authorizes the transfer to the High Court, does not vitiate these proceedings.

J. Sharpe, contra.—We have never acquiesced in the previous proceedings. If the county court judge had authority to deal with the summons he had no authority to send the case here.

He referred to *Jackson* v. *Beaumont*, 3 W. R. 521, 11 Exch. 300; *Rein* v. *Stein*, [1892] 1 Q. B. 753, 40 W. R. Dig. 192; *Firth* v. *De las Rivas*, 41 W. R. 493, [1893] 1 Q. B. 768.

Terrell replied.

Cur. adv. vult.

Dec. 16.—STIRLING, J., stated the facts and continued: Now, the jurisdiction of the county court depends on the County Courts Acts, 1888. [His lordship read sections 67 and 68 of that Act, and continued:—] Section 164 provides for the framing of rules with regard to service out of the jurisdiction. [His lordship read the section, and continued:—] To put it shortly, that section confers on the authorities who frame rules in the county courts the same power as exists with reference to procedure and practice in the High Court. Now, the power to make rules in the High Court is governed by section 17 of the Judicature Act, 1885, and the material portion of that section is as follows. [His lordship read the section, and continued:—] Under that power rules were made with which we are all familiar, including order 11, which deals with service out of the jurisdiction. As regards the case in question, that would be regulated by rule 1 (*d*) of order 11. [His lordship read the rule, and continued:—] Then we have rule 2 of the same order, which deals with service in Scotland and Ireland. [His lordship read the rule, and continued:—] Such are the rules framed for the High Court, and there are therefore two matters in which that rule imposes limitations on the jurisdiction of the High Court—namely, in the first place, service is only permitted where the testator dies domiciled within the jurisdiction; and secondly, a discretion has to be exercised. Now, what rules have been made by the authorities of the county courts? The important rule is ord. 51, r. 23, of the rules of 1889. [His lordship read the rule, and continued:—] On the face of it, that is a different rule from that which prevails in the High Court, but can I say that this rule is beyond the powers of the proper authorities to make under section 164 of the County Court Acts, 1888? That power extends to "all matters of procedure or practice, or relating to or concerning the effect or operation in law of any procedure or practice in any case within the cognizance of the county courts, as to which Rules of the Supreme Court have been or might lawfully be made for cases within the cognizance of the Supreme Court." If it had been limited to cases in which rules had been made, no doubt this rule would be *ultra vires*, but the power extends to rules which might lawfully be mad and I cannot say that such a rule might not lawfully have been made in reference to cases within the cognizance of the High Court. I come therefore to the conclusion that the rule is within the powers of the framers of the rules for the county courts to make, and, being such, that it authorizes the service which has been effected. I conclude therefore that the objection to the jurisdiction could not have been effectually raised if the matter had remained in the county court. But now comes this peculiar state of things. The court has decided that this was an action beyond county court limits, and therefore ought not to have been brought in the county court, and there is no evidence which satisfies me that the action as originally brought would have been entertained there. It would be an extraordinary thing if a person who wrongfully commences an action in the county court could transfer it to and prosecute it in the High Court, when it could not have been entertained there originally. In my judgment, when the action has been transferred to the High Court, the defendant, having all along objected to the jurisdiction, ought to have an opportunity of raising the objection that this action is one which could not have brought in the High Court. A question has been raised whether the defendant, by submitting to answer, has not waived her objection to the jurisdiction. No case of such waiver arose while the action was in the county court, nor could it have been entertained there. There has been no such waiver here as to deprive the defendant of liberty to show that the matter ought not to be prosecuted in the High Court as being one in which the High Court has no jurisdiction. I think, therefore, that the present summons should stand over in order that such an opportunity may be given, but I desire to suggest that this next step should be as inexpensive as possible, and I also desire to warn the defendant, if she thinks the case is one which she would succeed on the merits, that on the materials before me I am very far from being satisfied that such is the case.

Solicitors, *Andrew, Wood, & Co.*, for *H. J. Whiteside*, Whitehaven; *Helder, Roberts, Son, & Co.*, for *Brockbank, Helder, & Co.*, Whitehaven.

Chan. Div. } Nov. 24; Dec. 10.
Stirling, J. }

MURRAY v. EPSOM LOCAL BOARD. (*a.*)

Local government—Member having personal interest in subject-matter of proceedings—Local Government Act, 1894, *s.* 46.

The fact that one of the members of a public body has a personal interest in the subject-matter of the proceedings will not vitiate the acts of such body unless it be sitting in a judicial capacity.

A local board fulfilling the duties cast on them by the Local Government Act, 1894, *s.* 26 (1), *is not sitting in a judicial capacity.*

This was an application by summons on the part of the defendants to strike out certain paragraphs of the statement of claim, and incidentally raised the question whether the proceedings of a public body are vitiated by reason of one of its members having an interest in the subject-matter of the proceedings.

The action related to a footpath in the defendants' district known as Madan's-walk. The plaintiffs were the owners of property adjoining this path, on the opposite side of which was land belonging to a Mr.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law

Langlands, who was a member of the board. The path had been always used as a public footway, but recently Mr. Langlands had, with a view to developing his property as a building estate, cut a road through his land into Madan's-walk, a portion of which he had widened out so as to admit of vehicular traffic, for which it had never before been used. The plaintiffs objected to this as calculated to destroy the privacy of their property, and brought an action against Mr. Langlands, in which they obtained an injunction restraining him from using that half of the walk which abutted upon their property for carts or vehicles, or otherwise than as a public footway. The result, however, of Mr. Langlands' new road was to throw open a portion of Madan's-walk, so that the public were enabled to use it for vehicular traffic, and in order to stop this the plaintiffs erected posts upon their half of the walk, which posts Mr. Langlands proceeded to pull down. This resulted in a second action, in which Mr. Langlands was restrained by the court from interfering with any erection placed by the plaintiffs on their moiety of Madan's-walk, not being an obstruction of the public footway. The plaintiffs then sought to induce the present defendants, the Epsom Local Board, to exercise their powers for the protection of Madan's-walk as a public footpath, and on the board declining to interfere the plaintiffs erected further posts, which the board caused to be removed, and the plaintiffs brought this action against the board, claiming a declaration that they were entitled to erect the posts in question, and an injunction to restrain the board from preventing them from erecting the same. In their statement of claim the plaintiffs alleged, *inter alia*, that Mr. Langlands was a very active and influential member of the board; that throughout the negotiations which took place between the plaintiffs and the board with regard to the prevention of the user of Madan's-walk by the public for vehicles, and in all the board had done in reference thereto, Mr. Langlands had taken an active part, and had endeavoured to prevent the board from doing any act which would hinder Madan's-walk from being used for vehicular traffic; that in so doing he had acted with a view to his own private interest and advantage, and not with a view to the proper discharge by the board of their public duties; and that, in consequence of Mr. Langlands' influence on the board, the plaintiffs had not succeeded in inducing the board to take any steps for the protection of the footway. These were the allegations which the defendants now sought to have struck out as irrelevant to the issue of the case.

Buckley, Q.C., and *W. C. Dare*, for the summons.

G. Hastings, Q.C., and S. Dickinson, contra.—[STIRLING, J., referred to *Corporation of Bradford* v. *Pickles*, 44 W. R. 190, [1895] A. C. 587.] The case of a public body is different: Public Health Act, 1875, sched. 1, r. 64; Local Government Act, 1894, s. 46. These sections show that the Legislature is very careful that a local body shall not act under the influence of any one of its members, and if it does the court will interfere. [STIRLING, J.—The issue is whether the board are interfering with your private rights and not with the rights of the public.] The principle laid down in *The Aberdeen Railway Co.* v. *Blackie Bros.*, 1 Macq. 461, applies here, though that was a case of a contract.

Buckley, Q.C., in reply, referred to *Imperial Mercantile Credit Association* v. *Coleman*, 19 W. R. 481, L. R. 6 Ch. App. 558. The sections of the Acts cited would only deprive the member of his seat and would not vitiate the proceedings.

Cur. adv. vult.

10th Dec.—STIRLING, J., after stating the facts, continued: It is alleged that Mr. Langlands has influence with the board, and has used it with a view to his own private interest and advantage, and not with a view to the proper discharge by the board of their public duties, and that in consequence the plaintiffs have not succeeded in inducing the board to take steps for the protection of the footway. It is not alleged that the members of the board, other than Mr. Langlands, have been guilty of malpractice, or that his influence over them has been acquired by illegitimate means, or even that they have surrendered their judgment to him or acted as his tools. It is consistent with the plaintiffs' allegations that all the members of the board, other than Mr. Langlands, do in good faith believe that their acts are entirely in accordance with the due discharge by them of their public duties. It is contended, however that the Acts of the board are vitiated by reason of Mr. Langlands being present at the meetings when the plaintiffs' applications were discussed, being allowed to speak and use his influence with the board, and succeeding in inducing the board to take his view.

It was admitted that no direct authority in support of this contention is to be found either in the statutes or general law.

Schedule 1, r. 64 of the Public Health Act, 1875, provides that a member of a local board who "in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, or of any work done under the authority of this Act in or for the district shall . . . cease to be such member, and his office as such shall thereupon become vacant." A similar provision is found in section 46 of the Local Government Act, 1894. These provisions, however, do not extend to the simple case of a member having a personal interest in a matter which comes before the board; and even if it did, the effect of this rule is not to vitiate the acts of the board, but to deprive the member of his seat. It is said, however, that this is not the only effect; and it is argued that in the case provided for by those rules and enactment the validity of the contract would be affected. In support of this argument the case of *Aberdeen Railway Co.* v. *Blackie Bros.* was cited. It was there held that a concontract entered into between the company and a firm of which one of the directors was a partner could not be enforced against the company, and was voidable at the option of the company. If, however, the company, or the directors, after a full disclosure of the interest of the contracting director, chose to affirm the contract, I apprehend that it would be binding. At all events the case is no authority for the proposition that the existence of such an interest, disclosed or undisclosed, vitiates the resolution of the board.

There is, indeed, an extensive class of cases in which it has been held that the presence of a person having a pecuniary interest at a meeting of a public body vitiates its proceedings—viz., where that body is acting judicially: see, for example, *Reg.* v. *London County Council*, 40 W. R. 285, [1892] 1 Q. B. 190. In the present case the defendants in the matters complained of were acting as surveyors of highways (see section 144 of Public Health Act, 1875, and the Local Government Act, 1894, s. 26, sub-section 1), and performing the duties cast on them, and there is no authority for saying that the Acts of the board in that capacity are judicial in any sense, and, indeed, the authorities point the other way. The position of highway authorities in reference to the removal of obstructions to highways was much considered in the case of *Reynolds* v. *Urban District Council of Presteign*, 44 W. R. 479, [1896] 1 Q. B. at p. 609.

These observations show that the question at issue between the plaintiffs and the defendants must be, whether the posts erected by the plaintiffs constituted an obstruction to the public right of way which existed over Madan's-walk? If they did, then the court will not interfere in their favour; if they did not, then the court will. It seems to me that to this, the real issue, the allegations in paragraphs 16 and 17 are irrelevant, and that those paragraphs ought to be struck out.

Judgment accordingly.

Solicitors, *Murray, Hutchins, Stirling, & Murray; Letts Brothers*, for *George White*, Epsom.

Q. B. Div.
(Wills and Wright, JJ.) Dec. 11.

BILLING *v.* PREBBLE. (*a.*)

Metropolis—Public health—Unsound meat—Sale or exposure for sale—Seizure subsequent to sale—Purchase by a customer—Liability of seller to penalty—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-sections* 2, 3.

The respondent, a meat salesman, to whom meat had been consigned to sell on commission, sold a portion of it to H. While the meat was on H.'s premises it was seized and condemned by a magistrate under the Public Health (London) Act, 1891, *s.* 47, *as being diseased and unfit for the food of man.*

The respondent was summoned under sub-section 2 *of section* 47 *of the Act, and it was proved that the meat was unsound at the time of the sale to H. The alderman before whom the summons was heard dismissed it.*

Held, that the summons was rightly dismissed, and that the summons ought to have been drawn under sub-section 3.

Case stated by an alderman of the City of London.

The Public Health (London) Act, 1891, s. 47 (2), provides for the seizure and destruction of unsound food, and enacts that "the person to whom the same belongs, or did belong, at the time of sale or exposure for sale or of preparation for sale, or in whose possession or on whose premises the same was found," shall be liable to the fine and imprisonment therein prescribed. Sub-section 3 enacts that "where it is shown that any article liable to be seized under this section and found in the possession of any person was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned under this section, the person who so sold the same shall be liable to the fine and imprisonment above mentioned, unless he proves that at the time he sold the said article he did not know and had no reason to believe that it was in such condition.

On the 5th of August a summons was issued against the respondent under sub-section 3, charging him that he was unlawfully the person who sold to one J. Harrington, for the food of man, articles unfit for the food of man. On the case being called on, the appellant stated, through his solicitor, that he desired to proceed under sub-section 2 and not under sub-section 3, and that the summons was drawn under sub-section 3 by mistake. He accordingly offered no evidence on that summons, and it was withdrawn by permission.

On the 6th of August a second summons was obtained, which was under sub-section 2. It charged the respondent that, being the person to whom the same did belong at the time of sale or exposure for sale, he did expose for sale and sell to one J. Harrington two sides of pork unfit for the food of man.

It was proved that on the 6th of July the two sides of pork were seized by the inspector upon the premises of J. Harrington, and that they were subsequently condemned and destroyed. The meat had been purchased on the same day by Harrington from the respondent, who was a meat salesman occupying premises in the Central Meat Market. It was proved and found by the alderman who heard the summons that the meat was unsound at the time of the sale, and that the respondent knew or had reason to believe that it was unsound. The meat was consigned to the respondent by a farmer in Lincolnshire as part of a large consignment which the respondent was to sell on behalf of the farmer on the terms of receiving a commission upon the sales, and accounting to the farmer for the price obtained, less such commission.

The contention of the appellant was that the meat "belonged" to the respondent at the time of sale within the meaning of sub-section 2, the respondent on the other hand contending that it did not so belong to him. The alderman dismissed the summons on the ground that the meat did not "belong" to the respondent within sub-section 2. He further held that sub-section 3 created a distinct offence, and as the summons was under sub-section 2 and not under sub-section 3, he refused to convict on that ground also.

Lush Wilson, Q.C. (*Courthope Munroe* with him), for the appellant.—The alderman ought to have convicted the respondent under sub-section 2. Sub-section 3 did not create a distinct offence, it was enacted to meet the case of *Vinter* v. *Hind*, 31 W. R. 198, 10 Q. B. D. 63, a case which arose under section 117 of the Public Health Act, 1875. If the facts brought the case within sub-section 3 the alderman ought to have convicted the respondent notwithstanding the first summons was withdrawn.

Channell, Q.C. (*R. D. Muir* with him), for the respondent.—The meat never at any time belonged to the respondent. It did not, at any rate, belong to him at any time sufficient to satisfy the Act. The prosecution could not succeed under sub-section 2. The summons ought to have been framed under sub-section 3: *Reg.* v. *Dennis*, 42 W. R. 586, [1894] 2 Q. B. 458.

WILLS, J.—I am of opinion that the appeal must be dismissed. The matter was really before the alderman under sub-section 2. It turned out at the end of the case that the appellant might have proceeded with more advantage under sub-section 3, but he had not done so, and he had intentionally withdrawn that summons and ceased to make any complaint under sub-section 3.

I will not say that there may not be jurisdiction possibly under these circumstances still to turn the summons back to one under the other sub-section, but I do not think it is a course of procedure we ought to encourage; and I do not think it is one, except under very exceptional circumstances, to be resorted to. But there was not evidence that the complaint under sub-section 3 was ever renewed. The object of the appellant seems to have been to get a decision upon the word "belonged" in sub-section 2. I think, therefore, that there was no complaint before the alderman upon which he had jurisdiction to act under sub-section 3, and I think that it would have been quite an erroneous exercise of discretion, if he had any, to alter the summons.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

That, therefore, calls on us to say whether there is a case under sub-section 2. Now, under sub-section 2 the only question that is proposed to us is as to the meaning of the word "belonged," and I certainly should be very sorry to say one single word which would give countenance to the view urged by the respondent that a meat salesman who has meat entrusted to him for the purpose of selling on commission is not a person to whom the meat belongs. The thing has not been argued, and therefore I do not give any decision upon it, but it strikes one at first sight that it is an unreasonable limitation to the enactment.

But supposing that question ought to be decided in favour of the appellant, can we send the case back to the magistrate to convict when we see that it is not a complaint under sub-section 2 at all, and that under sub-section 2 no offence has been committed? I think not. I think you cannot send back a case to the magistrate where it is plain upon the facts of the case that a conviction ought not to take place. I think that has been the common practice, not that the court encourages anybody to raise new points that have not been raised before, but if in the course of the discussion of the case it becomes free from doubt that no conviction ought to have taken place, it is consonant with my recollection of the practice that the case will not be sent back for conviction, which it would be if we simply sent it back answering the question raised by the appellant as to the meaning of the word "belonged."

As to the applicability of sub-section 2 and sub-section 3, I entertain no doubt myself that sub-section 2 is an enlarged edition of the enactment in section 117 of the Public Health Act, 1875, but I do not think it was intended to alter the general applicability of the limitation laid down in *Vinter* v. *Hind*, and I think that sub-section 3 was inserted for the very purpose of meeting such a case as that which has now arisen. That is the view which was taken by three members at least of the Court of Criminal Appeal in the case which has been cited, and it seems to me to be consonant with the language of the two sections.

WRIGHT, J.—I am of the same opinion. I think the second sub-section substantially points to people to whom the thing belonged or who had possession of it at the time which may be shortly described as the time of condemnation. That is not exactly right, but it is impossible to say exactly what the section does mean. And sub-section 3, I agree, was really for the purpose of dealing with other people who had previously sold the thing.

I entertain no doubt that sub-section 3 is applicable against a factor for sale. I entertain no doubt about that whatever, and I have very little doubt that sub-section 2 is applicable against a factor for sale.

Solicitor for the appellant, *Matthew H. Hale.*

Solicitors for the respondent, *Prebble & Hall.*

Q. B. Div.
(Grantham and Wright, JJ.) Nov. 10.

Ex parte KIPPINS. (*a.*)

Metropolis — Hackney carriage — Railway station — "Place"—Whether railway station is a "place"— London Hackney Carriage Act, 1853 (16 *&* 17 *Vict.* c. 33), *s.* 17, *sub-section* 2.

Section 17 *of the London Hackney Carriage Act,* 1853, *imposes a penalty upon the driver of any hackney carriage who refuses to drive to any "place within the limits of the Act" to which he shall be required to drive any person hiring or intending to hire such carriage.*

Held, that a railway station is a "place" within the meaning of this section, and that the driver of a hackney carriage who refuses to drive the person hiring such carriage into a railway station, within the limits of the Act, is liable to the penalty.

Application for a *mandamus* to Mr. Curtis Bennett, metropolitan police magistrate, commanding him to state a case for the opinion of the High Court.

An information was preferred against Joseph Kippins, the driver of a hackney carriage, charging him with having, on the 29th of October, 1896, in a thoroughfare within the metropolitan police district, unlawfully refused to drive a person hiring such carriage to a certain place within the limits of the London Hackney Carriage Act, 1853—to wit, Euston Station.

On the 29th of October the complainant engaged the defendant, who was the driver of a hackney carriage, and told him to drive to Euston Station. The defendant drove the complainant from Chalk Farm to the gates of Euston Station, and was then requested by the complainant to go inside the station. The defendant refused to go inside the station, although one of the servants of the railway company told the defendant that he was at liberty to go inside the station. The complainant then got out without the defendant having gone inside the station. The defendant had driven close up to the gates of the station and within a few feet of the premises of the company.

Before the magistrate an objection was taken for the defendant that the railway station was not a "place" within the meaning of section 17 of the London Hackney Carriage Act, 1853, and that therefore the defendant could not be convicted. The magistrate overruled the objection, and convicted the defendant, and fined him in a sum of 40s. and costs, or in default to one month's imprisonment; and he refused to state a case as to whether the railway station was a "place" within the meaning of the Act.

Section 17 of the London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33) provides: "The driver of any hackney carriage who shall commit any of the following offences within the limits of this Act, shall be liable to a penalty not exceeding forty shillings for each offence, or in default of payment to imprisonment for any time not exceeding one calendar month; . . . (2) Every driver of a hackney carriage who shall refuse to drive such carriage to any place within the limits of this Act, not exceeding six miles, to which he shall be required to drive any person hiring or intending to hire such carriage. . . ."

Roskill, in support of the motion.—The magistrate was wrong in convicting the defendant, and he ought to have stated a case. The railway station was not a "place" within the meaning of the section. It was the private property of the railway company the public had no right of access to the station and cabs could not ply for hire there, and it therefore does not come within the section as a "place": *Case* v. *Storey*, 17 W. R. 802, L. R. 4 Eq. 319; *Skinner* v. *Usher*, 20 W. R. 659, L. R. 7 Q. B. 423.

GRANTHAM, J.—I am of opinion that a rule ought not to be granted in this case, as the point is clear. The cases cited for the purpose of showing that railway station is not a "place" were decided on other statutes. In *Case* v. *Storey* the question was whether a hackney carriage, whilst on the premises

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

of a railway company by their leave for the accommodation of passengers, was plying for hire in "a street or place" within section 35 of 1 & 2 Will. 4, c. 22, and it was held that the words "street or place" in that section must be read in conjunction with section 4 of the Act, which deals with plying for hire in any "public street or road," and that as a railway station could not come under that description it was not a street or place within section 35. After that came the case of *Clarke* v. *Stanford*, 19 W. R. 846, L. R. 6 Q. B. 357, which is a direct authority upon the point and against this application. The court there held that a hackney carriage on the premises of a railway company for the conveyance of the passengers of the railway was plying for hire within the limits of the Act. Cockburn, C.J., said: "Where a person has a carriage ready for the conveyance of passengers in a place frequented by the public, he is plying for hire, although the place is private property. . . . The Legislature has omitted the words 'public place,' and this appears to have been done intentionally and advisedly." In the present case the word "public" is also omitted. It seems to me, therefore, that *Clarke* v. *Stanford* is an authority to show that a railway station is a "place" within the meaning of this Act, and that therefore the driver who refuses to drive into the station comes within the section and incurs the penalty. The case of *Skinner* v. *Usher*, which was cited in support of the application, was decided on section 33 of 6 & 7 Vict. c. 86, and it was decided on the ground that the two Acts, 1 & 2 Will. 4, c. 22, and 6 & 7 Vict. c. 86, were to be read together, and that therefore the same meaning was to be put on the word "place" in section 33 of the later Act as was put upon it in section 35 of the earlier Act. The cases, therefore, which have been cited have no application here; but *Clarke* v. *Stanford* does apply, and from that case it is clear that this railway station, although it was private property, was a "place" within the meaning of the Act.

I think, therefore, the magistrate was perfectly right, and that this application must be refused.

WRIGHT, J.—I am of the same opinion. No case has been cited to show that the language of this section ought to be cut down as suggested. It would be unreasonable that a cab-driver could not be compelled to drive into a railway station. I think the meaning is that he must drive to any place, within the limits of the Act, to which he is ordered to drive, if he can get admittance to that place.

Application refused.

Solicitors for applicant, *Pattinson & Brewer*.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) } Nov. 16; Dec. 1.

In re SIMS.

Ex parte SHEFFIELD *v.* PRINCE. (*a*.)

Bankruptcy—Avoidance of voluntary settlement—Right of settlement trustees to surplus after payment of debts in full—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47 (1).

When a voluntary settlement is declared void as against the trustee in bankruptcy under section 47 (1), *such avoidance only operates to the amount of the debts and costs of the bankruptcy, the surplus of the settled property reverts to the trustees of the settlement subject to the trusts thereof.*

Motion by the trustee in the bankruptcy to set aside a voluntary settlement made by the bankrupt within two years of his bankruptcy. The trustees of the settlement opposed the motion, on the ground that the settled property exceeded the total amount of the bankrupt's debts.

Muir Mackenzie, for the trustees of the settlement.—In this case the debts amount to about £1,600, and the settled property amounts to about £16,000, mostly invested in mortgages. I submit that the settlement is good beyond the amount of the debts, and ask for an order limited to payment into court of sufficient money to pay the debts.

Ribton, for the bankrupt.—I oppose such an order, the debtor, not the trustees of the settlement, is entitled to the surplus. The settlement being void, the property reverts to the donor: *Re Farnham* (*No.* 1), [1895] 2 Ch. 799, 44 W. R. Dig. 98; *Sanguinetti* v. *Stuckey's Bank*, 43 W. R. 154, [1895] 1 Ch. 176.

Herbert Reed, Q.C. (*Ashton Cross* with him), for the trustee in bankruptcy.—I insist on my right to an order declaring the settlement void as against my client.

Muir Mackenzie in reply.—The settlement is only void so far as the debts go: *In re Holden, Ex parte The Official Receiver*, 36 W. R. 189, 20 Q. B. D. 43.

Cur. adv. vult.

Dec. 1.—VAUGHAN WILLIAMS, J.—This is an application under section 47 of the Bankruptcy Act, 1883, by the trustee in the bankruptcy asking that a voluntary settlement, executed by the bankrupt upon the 10th of August, 1894, may be declared void. It is not denied that he is entitled to his order, but the question arises, What directions should be given consequential on the order?

Those asked for are, firstly, a declaration that the property comprised in the settlement, subject to the trusts thereof, is now vested in the trustee in bankruptcy; alternatively an order to the trustees of the settlement to execute a deed vesting such settled property in the trustee in bankruptcy so as to enable him to realize it; thirdly, an order to the respondents to hand over the settled property to the trustee in bankruptcy and render an account on oath of the same.

The settlement in question seems to have vested the whole of the settlor's property in trustees and to have been made with the object of protecting the settlor against his own extravagance. He gets a life interest, and an income is provided for his wife and children (if any), but at present he is unmarried.

If the effect of the avoidance of the settlement under section 47 were simply to wipe it out as if it never had been, it would be right for me to make the order asked for by the trustees of the settlement, but I doubt whether the avoidance of a settlement under section 47 has this effect, or that the surplus after payment of the debts would revert to the settlor. There are two cases which look as if they decided that this was the effect. The first is the case of *Sanguinetti* v. *Stuckey's Bank*, where Chitty, J., decided that the effect of such avoidance is to let in a mortgagee on a subsequent mortgage, as if the settlement had never existed. This looks as if the avoidance extinguished the rights of the beneficiaries under the settlement, but if the judgment of Chitty, J., is considered, it will be seen that he is careful to say that the question raised in the case before him was between the

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

trustee in bankruptcy and the mortgagee only, the beneficiaries not being before the court.

The second case is *In re Farnham* (*No.* 1), where the trustee set up against a lunacy prior to the bankruptcy the rights of the bankrupt's wife as a beneficiary. In that case Lindley, L.J., says: "If the settlement is void as against the trustee, it is void altogether. The section does not mean that the property, the subject of the settlement, vests in the trustee by a title which overrides both that of the donor and the donee. The settlement being void the property reverts to the donor, and it is as the donor's property that it vests in the trustee, and must be distributed correctly." In this case again it was not suggested that there was any surplus of the settled property after the payment of the debts, and the question of the beneficiaries' interest was not raised. I do not think, therefore, that either case involves the decision that avoidance under this section goes further than the payment of the bankrupt's debts and the costs of the bankruptcy. If it were not so a settlor could always get rid of a settlement by simply making himself a bankrupt. I am aware that in this case there are no living persons other than the bankrupt having an interest under the trusts of the settlement, but I think it better to deal with the principle generally. I declare the settlement void as against the trustee in bankruptcy, and direct the settlement trustees to hand over the settled property without prejudice to their applying for the surplus. It is not a case where I should order the settlement to be cancelled, as that would give rise to unnecessary complications. I further direct the trustee in bankruptcy not to realise the settled property until the total of the debts and costs has been ascertained, and to give notice to the settlement trustees of the amount.

Solicitors for the trustee in bankruptcy, *Rogers, Hartley, & Bastard.*

Solicitors for the settlement trustees, *Prince & Davis.*

Solicitor for the debtor, *H. Stanley-Jones.*

Q. B. Div.
(Vaughan Williams, J.) Nov. 2.

In re PAINE.
Ex parte REED. (*a.*)

Bankruptcy—Fraudulent preference—Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 48.

B. gave the debtor his accommodation acceptance for £20, which the debtor discounted at his bankers. Within three months of the presentation of the petition the debtor paid in £20 to his bankers to meet the bill.

Held, that the payment was a fraudulent preference of B.; for though he was not actually a creditor at the date of the receiving order, he would have been one had it not been for such payment.

Motion by the trustee in the bankruptcy for a declaration that a certain payment by the bankrupt to his bankers on or about the 17th of April, 1895, for the purpose of providing funds to meet a bill of exchange accepted by the respondent, and for which the respondent was liable to the said bankers, was a fraudulent preference of the respondent.

In the early part of 1895 the respondent Barnard gave the bankrupt his accommodation acceptance for £20, which the bankrupt discounted with his bankers. Upon the 17th of April he paid £20 into his bank to meet the acceptance. Upon the 25th of April he executed a deed of assignment for the benefit of his creditors, and upon this act of bankruptcy a receiving order was made against him upon the 8th of May, and he was adjudicated a bankrupt upon the 13th of May.

His trustee now sought to have the payment of £20 to meet the acceptance declared a fraudulent preference, it having been made within three months of the presentation of the petition.

Muir Mackenzie, for the trustee, stated the facts, and was stopped by the court.

F. C. Willis, for the respondent.—A payment made with a view of preventing a surety from being called upon to pay is not a fraudulent preference: *In re Mills, Ex parte Official Receiver*, 5 Morr. 55, 36 W. R. Dig. 15. There is also the question whether Barnard was really a creditor at the date of the receiving order. [VAUGHAN WILLIAMS, J.—That depends on whether, if he had not been paid, his debt would have been one provable in bankruptcy within section 37 (3) of the Bankruptcy Act, 1883, "Save as aforesaid all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of obligations incurred before the date of the receiving order shall be deemed to be debts provable in the bankruptcy.]

Muir Mackenzie.—Barnard was a creditor and could have proved for his debt: *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 41 W. R. Dig. 16, 193; *Johnston* v. *Salvage Association*, 36 W. R. 56, 19 Q. B. D. 458; *Lacey* v. *Hill*, 21 W. R. 239, L. R. 8 Ch. App. 441.

VAUGHAN WILLIAMS, J.—I have to decide this matter on the proper construction of the Act of Parliament, and I therefore need not trouble about equitable considerations. It is not now contended that at the moment the payment was made Barnard was a creditor in the sense that he would have had a right to judgment or payment of a sum of money to him, irrespective of whether bankruptcy followed.

I have only to decide what is the meaning of the word "creditor" in section 48.

"Every payment made . . . in favour of any creditor . . . with a view of giving such creditor a preference over the other creditors . . . shall be deemed fraudulent and void as against the trustee in the bankruptcy." There is no definition of creditor in section 168, and I have therefore to look at the history of section 48.

The judges decided the cases on which that section was founded in the way they did because it enabled them to deal with payments made in contemplation of bankruptcy, and to secure a rateable administration of the bankrupt's estate amongst those having claims on it. In my judgment when once I have arrived at that conclusion it seems to me that the "creditor" in section 48 must be a person who would be entitled to a share in that distribution. I think the intention of the judges when they invented the doctrine of fraudulent preference, and of the Legislature when it passed section 48, was to prevent the bankrupt giving a preference to a person who but for that preference would have had to come in an rank with the other creditors.

It is not disputed that under section 37 Barnard was a person with a right of proof.

My decision is that you may make a fraudulent preference by a payment to a surety who has not been called upon to pay.

Solicitors for the trustee, *Pritchard & Englefield.*

Solicitors for the respondent, *W. H. Smith & Son.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. } June 24; July 9, 1896.

"THE MARIPOSA." (a.)

Quantum meruit—Contract entered into with shipmaster as agent for passengers—Non-liability of owner of passenger ship—Delay or deviation.

There is no implication of law making the master of a wrecked passenger ship the agent of his owner to enter into a contract on his behalf for the passengers to be carried on in another ship where the passengers sent on have been landed from the wreck at a spot where they are in no danger of losing their lives from exposure or want of food or water, and cannot under their passenger tickets claim any damages for delay or detention.

This was an action instituted on behalf of James and Alexander Allan and others, the owners of the steamships *Sardinian* and *Austrian*, *in personam* against the Ocean Transport Co. (Limited), the owners of the steamship *Mariposa*, to recover salvage remuneration for services rendered in assisting *The Mariposa* and in saving the lives of the passengers of *The Mariposa*, or, in the alternative, for services rendered by the plaintiffs for the defendants at the request of the defendants' agents in the circumstances specified in the statement of claim.

The statement of claim alleged in effect that *The Sardinian*, a steamship of about 4,400 tons gross, belonging to the Allan Line, was, on the 24th of September, 1895, proceeding through the Straits of Belle Isle on a voyage from the United Kingdom when the schooner *Telegram* came alongside her and those on board her informed the master of *The Sardinian*, as the fact was, that *The Mariposa*, with a valuable cargo and thirty-one passengers, and a crew of about eighty-seven in number, had gone ashore in a fog on the coast of Labrador, and the passengers were ashore, but exposed to considerable hardships; that *The Sardinian* then proceeded towards the spot where *The Mariposa* was reported to be ashore, and was met by a boat from *The Mariposa* with a message from the master of *The Mariposa* requesting *The Sardinian* to proceed to a fishing village about five miles off to embark the passengers and crew; that on proceeding along the coast, and on arriving at a place called Forteau Bay, *The Sardinian* anchored, and boats from the shore put on board *The Sardinian* forty-nine persons who had been brought ashore from *The Mariposa*, being twenty-eight of her cabin passengers, two steerage passengers, and nineteen of her crew, and ultimately *The Sardinian*, with these forty-nine persons on board, proceeded on her course and arrived safely at Liverpool; that on the 25th of September last those on board *The Austrian*, another steamship belonging to the Allan Line, of 2,682 tons gross, on a voyage from London to Montreal, perceived *The Mariposa* as she lay stranded and flying signals of distress, and on approaching the wreck was requested by letter from the master of *The Mariposa* to take the remainder of that vessel's crew to Quebec and to communicate with the nearest point requesting salvage assistance to be sent; that accordingly *The Austrian* took on board forty-three persons, of whom two were stowaways and one a passenger, from on board *The Mariposa*, the rest being members of the crew, and conveyed them to Quebec; and that by reason of these services the passengers and crew of *The Mariposa* were saved from considerable hardship and exposure on a desolate coast with very scanty accommodation and were conveyed to their destination in safety and comfort, and the defendants were saved the cost of maintaining their passengers and crew for a long period and of carrying them to their destination, whilst the plaintiffs also expended, at the request of the defendants, in feeding the passengers and crew, money not then nor yet repaid to them.

The Ocean Transport Co. (Limited) appeared as defendants and delivered a defence, alleging, *inter alia*, denials (1) that they were saved the costs either of maintaining the passengers and crew or of carrying them to their destination; (2) that they requested the plaintiffs to expend money as alleged in the statement of claim at all; and (3) that no agreement, express or implied, was made between the plaintiffs and the defendants; and further pleading that if any agreement was made it was an agreement for salvage and salvage remuneration, and not otherwise; that property of the value of £335, and no more, was salved to the plaintiffs, and that a payment of £200 had been made into court in satisfaction of the claim of the plaintiffs in respect of the matters alleged in the statement of claim.

June 24.—The suit was heard before Barnes, J.

It appeared in evidence that the passage tickets of the passengers of *The Mariposa* contained the following clause: "The company is not liable for loss or delay from the act of God, the Queen's enemies, fire, robbers, thieves (whether on board the steamer or not), perils of the seas, rivers, or navigation, accident to any machinery or boilers, default of the company's servants (whether on board the steamer or not), restraints of princes, rulers, or people."

The result of the remainder of the evidence appears from the judgment.

Sir W. Phillimore and *Scrutton*, for the plaintiffs.—The lives of the passengers were saved from some peril and inconvenience by the services of the plaintiffs. Indeed, the case is, in principle, on all fours with that of *The Medina*, 24 W. R. 928, 25 *Ib.* 156, 1 P. D. 272, 2 *Ib.* 5. In that case 550 pilgrims were taken off by a passing steamer from a rock in the Red Sea, where they were safe at the time the services were rendered, but would have been in danger of being drowned if bad weather had set in, and the Court of Appeal held that £1,800 was a proper salvage remuneration to be given to the owners, master, and crew of the salving steamer. But even if life salvage is not strictly due, the master, in making the arrangement he did for the comfort of the passengers, was acting as agent for his owners and for their benefit. The master had a duty cast upon him to forward his owners' interest, quite apart from the legal terms of the passengers' contract with his owners, and acted within the scope of his authority in requesting the assistance of the plaintiffs to prevent the stigma which would have attached to his owners if he had not done his best for the passengers entrusted to his charge.

They referred to *The Alfred*, 5 Asp. Mar. Law Cas. 214, 32 W. R. Dig. 194; *Notara* v. *Henderson*, 20 W. R. 443, L. R. 7 Q. B. 225.

Joseph Walton, Q.C., and *Bateson*, for the defendants.—The defendants submit that the sum tendered is sufficient to recompense the plaintiffs for the salvage service performed in reference to reporting the wreck of *The Mariposa* and for the money actually expended by them, but they contend that no life salvage can be due, the lives of the passengers not having been, in fact, in danger: *Cargo ex Woosung*, *No.* 2, 3 Asp. L. C. 50, 44 L. J. Ad. 45; and that as the defendants were under no liability to the passengers for the consequences of the wreck, the master of *The Mariposa*, in making the agreement under which the passengers

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

of *The Mariposa* were carried on, acted as their agent *ex necessitate*, and not as agent for his owners, who, in accordance with what was said by the Master of the Rolls in *The Renpor*, 31 W. R. 640, 8 P. D. 115, the contract with the passengers being what it was, were under no legal liability to carry them on. In *The Medina* the owners of that vessel were enabled by the action of the plaintiffs to fulfil the contract they had made for the conveyance of the pilgrims and to earn their freight*: Kennedy on Salvage, p. 61. The master of *The Medina*, therefore, did no more than his legal duty in engaging *The Timor* to carry on the pilgrims in that case.

Cur. adv. vult.

July 9.—BARNES, J.—The plaintiffs in this case are the owners of the steamships *Sardinian* and *Austrian*, of the Allan Line of steamers running between England and Canada. The defendants were the owners of the steamship *Mariposa*, a vessel of 5,305 tons gross register, which was running between Montreal and Liverpool as one of the Dominion Line of steamers under an agreement between the defendants and the Mississippi and Dominion Steamship Co. (Limited) for the summer of 1895, under which the defendants received the freights and passage moneys and allowed certain commissions to the other company. On the 24th of September, 1895, *The Mariposa*, on her voyage from Montreal to Liverpool with cargo, twenty-eight cabin passengers, and a crew of eighty-seven hands all told, and two stowaways, ran ashore in a fog on the coast of Labrador, about five miles west of Forteau Bay, in the Straits of Belle Isle, in consequence whereof she became a total loss, materials belonging to the vessel to the value of £335 and some cargo being only saved. Immediately after the accident the passengers and crew were landed, and the passengers went on to and were accommodated at Forteau village. Another vessel of the Dominion Line was expected to pass by in a short time, but the master of *The Mariposa*, being anxious to enable the passengers to get back to Quebec or on to Liverpool as early as possible, sent out a schooner to intercept the plaintiffs' steamer *Sardinian*, which was proceeding through the Straits of Belle Isle on a voyage from Montreal to Liverpool with 190 passengers, cargo, and mails, and a crew of 106 hands all told. At the request of the master of *The Mariposa The Sardinian* proceeded to Forteau Bay and took on board twenty-eight cabin passengers, the two stowaways, and nineteen of the crew of *The Mariposa*. The cabin passengers were provided with first-class, and the others taken on board *The Sardinian* with good, accommodation. They were then safely conveyed by *The Sardinian* to Liverpool, and the costs of their maintenance amounted to £63 14s.

On the 25th of September, 1895, the plaintiffs' steamer *Austrian*, a vessel of 2,682 tons, which was proceeding through the same straits on a voyage from London to Montreal with cargo and a crew of forty-seven hands, passed the wreck, and at the request of the master of *The Mariposa* one passenger and forty-two of the crew of *The Mariposa* were taken by *The Austrian* to Quebec, and also, at the request of the master of *The Mariposa*, a telegram was sent from the telegraph station at Cape Madeline by the master of *The Austrian* to the agent of *The Mariposa* at Quebec to send assistance. I understand that assistance was sent in consequence of this telegram, but that it produced no result. The cost of the maintenance of the said forty-three persons on *The Austrian* was £12 18s. On the same or following day one of the Dominion Line steamers took away the rest of the crew of *The Mariposa*.

The plaintiffs claim for the services rendered to the passengers and crew, either as life salvage or as being rendered by the plaintiffs for the defendants at the request of the defendants' master. They also claim salvage remuneration for taking the message to the telegraph station.

The defendants have paid into court the sum of £200 to meet any claims of the plaintiffs, and it is clear that this sum is sufficient to cover any claim for sending the telegram and for the expenses incurred, even if the latter can be recovered from the defendants, which they deny. It is therefore enough to satisfy all claims of the plaintiffs, unless the plaintiffs are entitled to recover some reward or remuneration for the conveyance of the passengers to Liverpool and Quebec.

First, with regard to the claim for alleged life salvage, ship's materials to the value of £335 were saved, but the passengers and crew were in safety at Forteau Bay, and could get away without difficulty by passing steamers. They were in no danger of starvation, and were merely inconvenienced by the accident. The case of *Cargo ex Woosung* is an authority for holding that no claim for life salvage can be maintained in such circumstances. The plaintiffs, however, contend that the passengers were carried by *The Sardinian* and *Austrian* for the defendants at their request made by their agent, and that therefore the plaintiffs are entitled to reasonable remuneration for this carriage. The defendants contend that the master of *The Mariposa* had no authority from them to make any arrangements on their behalf for the carriage of the passengers. These opposing contentions raise a question of some difficulty which I am forced to decide, as the defendants stand upon their strict rights, although the assistance rendered by the plaintiffs to *The Mariposa's* passengers was generously given in circumstances in which one shipowner may reasonably be expected to assist another and be rewarded for doing so.

The question turns upon the contract under which the passengers were being carried. As to the non-liability of the defendants [the learned judge read the clause in the passengers' contract as set out above, and continued:—] It follows from this that the position in which the passengers were placed by the accident was not a matter for which the defendants could be made liable, and therefore they were not under any obligation to forward the passengers to their destination.

The master gives the reason for sending the passengers on in the following passage from his evidence: "*Q.*—Except to the passengers and crew and to the two stowaways was there any value in the services of *The Sardinian* and *The Austrian* so far as you were concerned? *A.*—No. I do not think there was anything extra done more than any man should do taking people away from a shore like that. It was no use leaving them there. *Q.*—What any shipmaster would do? *A.*—Yes; that is what I say. *Q.*—No benefit to your owners? *A.*—No; not a bit to my owners—not the slightest benefit at all. *Q.*—Why did you make these arrangements for the passengers? *A.*—To ease my own mind in the trouble I was in at the time and the comfort of the passengers instead of letting them stop on this barren shore there in a fishing village. *Q.*—You considered your first duty——? *A.*—Was to look after the passengers and crew and get them away. *Q.*—And it was for them you were acting and making these arrangements? *A.*—Yes. *Q.*—Did you think your owners would pay for these passengers? *A.*—No. I did not think anything

* See the argument of Dr. Deane for the plaintiffs in the Admiralty Division: *The Medina*, 1 P. D. 272, at p. 274.

about it. *Q.*—Or did you intend that they should? *A.*—All I cared about: I told my chief steward to hand all the passenger tickets back to the passengers, and I calculated that the Allan Line would get the money which *The Mariposa* would have had for the passengers. It was a very good thing for her coming along and taking them, because she had not so many herself in the saloon. *Q.*—That is what you thought? *A.*—That is what struck me at the time. *Q.*—You did not expect your owners would pay? *A.*—No, sir."

I am of opinion that the master, doing what he did, was acting for the benefit and on account and as the agent for the passengers, and not of the defendants. The case of *The Medina* was cited by the plaintiffs' counsel, but I have been unable to ascertain upon what terms the pilgrims were being carried, and whether the passage-money was at risk and saved by the services of the salvors. On referring to the pleadings in this case I find that the defendants were ready and willing to pay to the plaintiffs a reasonable amount for their services, and the point discussed before me was not raised. The observations of the Master of the Rolls in the case of *The Renpor* are in favour of the view of the law which I am constrained to adopt. In the passage in the judgment where he says: "But there are two circumstances necessary in order to make an agreement binding on an owner—first, the contract must be made under a necessity; and, secondly, it must be made for his benefit. I do not desire to say anything which may seem cruel, but I must express a doubt whether, if an agreement is made only for the purpose of saving a master and a crew, without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet, as the subject-matter is without benefit to the property of the shipowner, the master has authority to bind the owner to a money payment."

I hold that the defendants are not liable on the agreement alleged to have been made by the master, and therefore I must uphold the tender.

Solicitors for the plaintiffs, *Pritchard & Sons.*

Solicitors for the defendants, *Stokes & Stokes.*

House of Lords.

From C. A. (England). Nov. 16.

SALOMON (*Pauper*) *v.* SALOMON & CO. (LIMITED). (*a.*)

Company—Company incorporated for the benefit of one person — Debentures—Statutory requirements—Preponderance of one shareholder—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 8.

By complying with the requirements of the Companies Act, 1862, *any lawful business may be converted into a limited liability company, and it is immaterial that an overwhelming number of shares are held by one person (the vendor to the company), or that debentures were issued in part payment of the purchase-money, or that the object of incorporation was to prevent the creditors of the company from obtaining more than the statutory liability of the shareholders imposes.*

Decision of the Court of Appeal (*Broderip* v. *Salomon,* 43 *W. R.* 612, [1895] 2 *Ch.* 323) *reversed.*

This was an appeal *in formâ pauperis* by Aron Salomon from an order of the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), reported 43 W. R. 612, [1895] 2 Ch. 323, under the name of *Broderip* v. *Salomon & Co.*, affirming the decision of Vaughan Williams, J. There was also a cross-appeal by the respondents, Salomon & Co. The facts and the whole course of the proceedings are given in the judgments of Lords Watson and Herschell.

Cohen, Q.C., Buckley, Q.C. (*McCall, Q.C.*, and *Muir Mackenzie* with them), for the appellant.—So long as the provisions of the Company Acts are complied with, any person may trade with limited liability. Vaughan Williams, J.'s, judgment involves (1) that the appellant employed the company to carry on this business; (2) that the company was the agent of the appellant. If seven subscribers to the memorandum are registerered as required by the Act, the certificate is conclusive of the incorporation of the company. [Lord DAVEY referred to *In re National Debenture Corporation*, 39 W. R. 707, [1891] 2 Ch. 505.] The legal *persona* so constituted is very different from the founder: see *In re George Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674, at p. 685; *Farrar* v. *Farrars*, 37 W. R. 196, 40 Ch. D. 395. The corporation a different thing from the corporators: *In re Ambrose Lake Tin, &c., Co.*, 28 W. R. 783, 14 Ch. D. 190; *British Seamless Paper Co.*, 29 W. R. 690, 17 Ch. D. 467. In *Reg.* v. *Arnaud*, 9 Q. B. 806, some of the holders of the British steamship were foreigners, still it was an English corporation; see judgment of Denman, C.J. Section 23 of the Companies Act, 1862, defines who are members, and section 48 is a prohibition against carrying on business with less than seven members. The creditors gave credit to the corporation, whose position and circumstances could be ascertained. [The question of fraud is dealt with in their lordships' judgments.]

Farwell, Q.C., and *Theobald*, for the respondents, the limited company known as Salomon & Co.—The corporation had no separate existence. The agreement of the 2nd of August ought to be set aside. The price paid was exorbitant—the vendor, who was in a fiduciary position, did not disclose that he was going to make a profit.

They cited or referred to *North-West Transportation Co.* v. *Beatty*, 36 W. R. 647, 12 App. Cas. 589; *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218; *Farrar* v. *Farrars; Newbiggin* v. *Adams*, 37 W. R. 97, 13 App. Cas. 308.

The House took time for consideration.

Lord HALSBURY, C.—The important question in this case, I am not certain whether it is not the only question, is whether the respondent company was a company at all; whether, in truth, that artificial creation of the Legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has required in that respect (see section 6 of the Companies Act, 1862). I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself. Now, that there were seven actual living persons who held shares in the company has not been doubted. As to the proportionate amounts held by each I will deal presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to any one, and certainly not to these persons themselves, to deny that they were shareholders. I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is a sufficient qualification for each of the signatories. Still less is it possible to contend that the motive of becoming shareholders or of making others become shareholders is a field of inquiry which the statute itself recognizes as legitimate. If they are shareholders they are shareholders for all purposes, and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the *cestui que trusts* of the seventh, whatever might be their rights *inter se*, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities; and dealing with them in their relation to the company, the only relations which I believe the law would sanction would be that they were corporators of the corporate body. I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation of a company that the law should recognize only that artificial existence, quite apart from the motives or conduct of individual corporators. In saying this I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer intrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof, it seems to me impossible to dispute that once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence. I observe that Vaughan Williams, J., held that the business was that of Salomon and of no one else, and that he chose to employ as agent a limited company; and that learned judge proceeded to argue that Salomon was employing that limited company as agent, and that he was bound to indemnify that agent—the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is and there is not, a company. Lindley, L.J., on the other hand, affirms that there were seven members of the company, but, he says, it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability, and that the object of the whole arrangement was to do the very thing which the Legislature intended not to be done. It is obviously necessary to inquire where is that intention of the Legislature manifested in the statute? Even if we were at liberty to insert words to manifest that intention I should have great difficulty in ascertaining what the exact intention thus imputed to the Legislature is or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven members must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the Legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute. As one mode of testing the proposition it would be pertinent to ask whether two or three, or, indeed, all seven, may constitute the whole of the shareholders. Whether they must be all independent of each other in the sense of each having an independent beneficial interest—and this is a question that cannot be answered by the reply that it is a matter of degree. If the Legislature intended to prohibit something, it ought to specify what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. I am unable to get from the statute itself the limitation that that shareholder must be an independent and beneficially interested person. I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Salomon, and that the company is variously described as a myth and a fiction. Lopes, L.J., says: "The Act contemplated the incorporation of seven independent *bonâ fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader." The words "seven independent *bonâ fide* members with a mind and will of their own and not the puppets of an individual" are by construction to be read into the Act. Lopes, L.J., also said that the company was a mere *nominis umbra*. Kay, L.J., says: "The statutes were intended to allow seven or more persons *bonâ fide* associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint-stock company." The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence, that it is impossible to deny the validity of the transactions into which it has entered. Vaughan Williams, J., appears to me to have disposed of the argument that the company, which for this purpose he assumed to be a legal entity, was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one, as to which I am myself not satisfied, but, assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognizant of the conditions under which the company is formed and the conditions of the pur-

chase, it is impossible to contend that the company is being defrauded.

The proposition laid down in *Erlanger* v. *New Sombrero Phosphate Co.*—I quote the head-note in the "Law Reports" (3 App. Cas. 1218)—is that, "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it." But if every member of the company, every shareholder, knows exactly what is the true state of the facts, which for this purpose must be assumed to be the case here, Vaughan Williams, J.'s, conclusion seems to me to be inevitable—that no case of fraud upon the company could here be established. If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of. The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. I say, with the utmost deference to the learned judges, that we have nothing to do with the question, whether such a result be right or wrong, politic or impolitic, if this company has been duly constituted by law. Whatever may be the motives of those who constitute it, I must decline to insert into the Act of Parliament, limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below, but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shown to have done, or to have intended to do, anything dishonest or unworthy; but to have suffered a great misfortune without any fault of his own.

The result is that I move your lordships that the judgment appealed from be reversed, but as this is a pauper case I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that this appeal be dismissed with costs to the same extent.

Lord WATSON.—This appeal raises some questions of practical importance, depending upon the construction of the Companies Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favour with the courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us.

The appellant, Aron Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design of transferring his business to a joint-stock company, which was to consist exclusively of himself and members of his own family, he, on the 20th of July, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, settling the terms upon which the transfer was to be made by him, one of its conditions being that, in part payment, he was to receive £10,000 in debentures of the company. A memorandum of association was then executed by the appellant, his wife, a daughter, and four sons, each of them subscribing for one share, in which the leading object for which the company was formed was stated to be the adoption and carrying into effect, with such modifications (if any) as might be agreed on, of the provisional agreement of the 20th of July. The memorandum was registered on the 28th of July, 1892; and the effect of registration, if otherwise valid, was to incorporate the company, under the name of "Aron Salomon & Co. (Limited)," with liability limited by shares, and having a nominal capital of £40,000 divided into 40,000 shares of £1 each. The company adopted the agreement of the 20th of July, subject to certain modifications which are not material; and an agreement to that effect was executed between them and the appellant on the 2nd of August, 1892. Within a month or two after that date the whole stipulations of the agreement were fulfilled by both parties. In the terms thereof, 100 debentures, for £100 each, were issued to the appellant, who, upon the security of these documents, obtained an advance of £5,000 from Edmund Broderip. In February, 1893, the original debentures were returned to the company and cancelled; and in lieu thereof, with the consent of the appellant as beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip, in order to secure the repayment of his loan, with interest at 8 per cent. In September, 1892, the appellant applied for and obtained an allotment of 20,000 shares; and from that date until an order was made for its compulsory liquidation, the share register of the company remained unaltered, 20,001 shares being held by the appellant, and six shares by his wife and family. It was all along the intention of these persons to retain the business in their own hands, and not to permit any outsider to acquire an interest in it. Default having been made in the payment of interest upon his debentures, Mr. Broderip, in September, 1893, instituted an action in order to enforce his security against the assets of the company. Thereafter a liquidation order was made, and a liquidator appointed, at the instance of unsecured creditors of the company. It has now been ascertained that, if the amount realized from the assets of the company were, in the first place, applied in extinction of Mr. Broderip's debt and interest, there would remain a balance of about £1,055, which is claimed by the appellant as beneficial owner of the debentures. In the event of his claim being sustained there will be no funds left for payment of the unsecured creditors, whose debts amount to £7,733 8s. 6d.

The liquidator lodged a defence, in name of the company, to the debenture suit, in which he counterclaimed against the appellant (1) to have the agreements of the 20th of July and the 2nd of August, 1892, rescinded; (2) to have the debentures already mentioned delivered up and cancelled; (3) restitution of all sums paid by the company to the appellant under the agreements; and (4) a lien for these sums upon the business and assets. The averments made in support of these claims were to the effect that the price paid by the company exceeded the real value of the business and assets by upwards of £8,200; that the arrangements made by the appellant for the formation of the company were a fraud upon the creditors of the company; that no board of directors of the company were ever appointed; and that, in any case, such board consisted entirely of the appellant, and there never was an independent board.

The case was tried before Vaughan Williams, J., when the liquidator was examined as a witness on behalf of the company, whilst evidence was given for

the appellant by himself and by his son, Emanuel Salomon, one of the members of the company, who had been employed in the business for nearly twenty years. The evidence shows that before its transfer to the new company the business had been prosperous, and had yielded to the appellant annual profits sufficient to maintain himself and family and to add to his capital. It also shows that at the date of transfer the business was perfectly solvent. The liquidator, whose testimony was chiefly directed toward proving that the price paid by the company was excessive, admitted on cross-examination that the business when transferred to the company was in a sound condition, and that there was a substantial surplus. No evidence was led tending to support the allegation that no board of directors was ever appointed or that the board consisted entirely of the appellant. The non-success and ultimate insolvency of the business, after it came into the hands of the company, was attributed by the witness Emanuel Salomon to a succession of strikes in the boot trade, and there is not a tittle of evidence tending to modify or contradict his statement. I think it also appears from the evidence that all the members of the company were fully cognizant of the terms of the agreements of the 20th of July and the 2nd of August, 1892, and that they were willing to accept and did accept these terms. At the close of the argument Vaughan Williams, J., announced that he was not prepared to grant the relief craved by the company. He at the same time suggested that a different remedy might be open to the company, and, on the motion of their counsel, he allowed the counter-claim to be amended. In conformity with the suggestion thus made by the bench, a new and alternative claim was added for (1) a declaration that the appellant is liable to indemnify the company against the whole of their unsecured debts; (2) judgment against him for £7,733 8s. 3d., being the amount of these debts; and (3) a lien for that amount upon all sums which might be payable to the appellant by the company, in respect of his debentures or otherwise, until the judgment was satisfied. There was also added averments to the effect that the company was formed by the appellant and that the debentures for £10,000 were issued in order that he might carry on the business and take all the profits without risk to himself, and also that the company was the "mere nominee and agent" of the appellant. The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the averments made on amendment, were meant to convey a charge of fraud, and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose the specific facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members or upon persons who had dealings with the company is not indicated, although there may be very different considerations applicable to those two cases. The *res gestæ* which might imply that it was the appellant and not the company who actually carried on its business are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits, without any risk beyond loss of the money which he has paid for or is liable to pay upon his shares, and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish the risk of that loss. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant I cannot gather from the record, and I am not sure that I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider. No additional proof was led after the amendment of the counter-claim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said to have had in view, and the position of the company as his nominee or agent, must be a mere matter of inference derived from the agreements of the 20th of July and the 2nd of August, 1892, the memorandum and articles of association, and the minute-book of the company.

On re-hearing the case Vaughan Williams, J., without disposing of the original claim, gave the company a decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which the learned judge arrived at that conclusion, but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and consequently that the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an *alias* for Aron Salomon.

On appeal from his decision, the Court of Appeal made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that proceeded was embodied in the order. The opinions delivered by the lords justices are strictly in keeping with the reasons assigned in their order. Lindley, L.J., after observing "that the incorporation of the company cannot be disputed," refers to the scheme for the formation of the company, and says ([1895] 2 Ch. 337), "the object of the whole arrangement is to do the very thing which the Legislature intended not to be done"; and he adds that "Mr. Salomon's scheme is a device to defraud creditors." Assuming that the company was well incorporated in terms of the Act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient, before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross-appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With this exception, that the word "exorbitant" appears to me to be too strong an epithet, I entirely agree with Vaughan Williams, J., when he says, "I do not think that when you have a private company, and all the shareholders in the company are perfectly cognizant of the conditions under which the company is formed, and the conditions of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or upon the company." The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion; because it is not raised by the facts of the case, and, in any view, these considerations are of no relevancy in a question as to rescission between the company and the appellant. Counsel for the respondents argued that the agreement of the 2nd of August ought to be set aside, upon the principle followed by this House in *Erlanger* v. *New Sombrero Phosphate Co.* (*Limited*). In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false,

The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right, the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and the transaction was set aside at the instance of the liquidator, the Lord Chancellor (Earl Cairns) expressing a doubt whether, even in those circumstances, the remedy was not too late, after a liquidation order. But in the present case the agreement of the 20th of July was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were or were likely to be members of the company. In my opinion, therefore, *Erlanger* v. *New Sombrero Phosphate Co.* has no application, and the original claim of the liquidator is not maintainable.

The Court of Appeal, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of £10,000 worth of its debentures to the appellant, were "contrary to the true intent and meaning of the Companies Act, 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley, L.J.) does the very thing which the Legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the Legislature" is a common, but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Appeal Court, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counter-claim preferred by its liquidator must fail.

In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company. The provisions of the Act of 1862 which seem to me to have any bearing on this point lie within a very narrow compass. Section 6 provides that "any seven or more persons, associated for a lawful purpose"—such as the manufacture and sale of boots—"may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability"; and section 8, which prescribes the essentials of the memorandum in the case of a company limited by shares, *inter alia*, enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other, and the second plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. Nor does the statute, either expressly or by implication, impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of registration all the requirements of the Act had been complied with; and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator. The company was still free to modify or reject the agreement of the 20th of July; and the fraud of which the appellant has been held guilty by the Court of Appeal, though it may have existed *in animo*, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant in terms of it, and by his receiving an allotment of 20,000 shares in the company.

I have already intimated my opinion that the acceptance of the agreement is binding on the company; and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the Act, I do not think that any one of these things could subsequently render the registration of the company invalid. But I am willing to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company, but it is clear that if so, though he may have been its originator and the only person who took benefit from it, he could not have done any one of those things which, taken together, are said to constitute his fraud without the consent and privity of the other shareholders. It seems doubtful whether a liquidator, as representing and in the name of the company, can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders. However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact. The memorandum of association gave notice that the main object for which the company was formed was to adopt, and carry into effect, with or without modifications, the agreement of the 20th of July, 1892, in terms of which the debentures for £10,000 were subsequently given to the appellant in part payment of the price.

By the articles of association—article 62 (*e*)—the directors were empowered to issue mortgage or other debentures or bonds for any debts due, or to become due, to the company; and it is not alleged or proved that there was any failure to comply with section 43 or the other clauses of Part III. of the Act, which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of purchase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its shareholders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the Act of 1862 requires, and, in my opinion, a creditor who will not take the trouble to use the means which this statute provides for enabling him to protect him-

self must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both courts below. His costs in this House must, of course, be taxed in accordance with the rule applicable to pauper litigants.

Lord Herschell.—By an order of the High Court which was affirmed by the Court of Appeal, it was declared that the respondent company, or the liquidator of that company, was entitled to be indemnified by the appellant against the sum of £7,733 8s. 3d., and it was ordered that the respondent company should recover that sum against the appellant.

On the 28th of July, 1892, the respondent company was incorporated with a capital of £40,000, divided into 40,000 shares of £1 each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of the 20th of July, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed for the acquisition by the company of the business then carried on by the appellant. The company was, in fact, formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had 20,000 shares allotted to him. For these he paid £1 per share out of the purchase money which, by agreement, he was to receive for the transfer of his business to the company. The company afterwards became insolvent, and went into liquidation.

In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counter-claim that the company was formed by Aron Salomon, and the debentures were issued in order that he might carry on the said business and take all the profits without risk to himself, and that the company was the mere nominee and agent of Aron Salomon, and that the company or the liquidator thereof was entitled to be indemnified by Aron Salomon against all the debts owing by the company to creditors other than Aron Salomon. This counter-claim was not in the pleading as originally delivered; it was inserted by way of amendment at the suggestion of Vaughan Williams, J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for and made the order complained of. He was of opinion that the company was only an *alias* for Salomon; that the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them.

On appeal the judgment of Vaughan Williams, J., was affirmed by the Court of Appeal, that court "being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability and contrary to the true intent and meaning of the Companies Act, 1862, and further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The learned judges in the Court of Appeal dissented from the view taken by Vaughan Williams, J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and *cestui que trust*, but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established. It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly-constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances I am at a loss to understand what is meant by saying that A. Salomon & Co. (Limited) is but an *alias* for A. Salomon. It is not another name for the same person; the company is *ex hypothesi* a distinct legal *persona*. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits.

The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly-constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess. The Court of Appeal based their judgment on the proposition that the formation of the company, and all that followed it, was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premiss was, that the company was a trustee and Salomon their *cestui que trust*. I cannot think that the conclusion follows even if the premiss be sound. It seems to me that the logical result would be that the company had not been validly constituted, and therefore had no legal existence. But, apart from this, it is necessary to examine the proposition on which the court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years been, to use a common expression, converted into joint-stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons who business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company, and the transfer to it of

business, is that, whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference; the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable, without limit, to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering, but I can see no solid distinction between those cases and the present one. It is said that the respondent company is a "one-man" company, and that in this respect it differs from such companies as those to which I have alluded. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been only clerks or other persons who possess little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided, in each case, the requirements of the statute have been complied with, and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who practically takes the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. The creditors in the present case gave credit to and contracted with the limited company; but the effect of the decision is to give them the benefit, as regards one of the shareholders, of unlimited liability.

I have said that the liability of persons carrying on business can only be limited provided the requirements of the statute be complied with, and this leads naturally to the inquiry, What are those requirements? The Court of Appeal has declared that the formation of the respondent company, and the agreement to take over the business of the appellant, was a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share. The shares may, however, be of as small a nominal value as those who form the company please; the statute prescribes no *minimum*, and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination. The Legislature therefore clearly sanctions a scheme by which all the shares, except six, are owned by a single individual, and these six are of a value little more than nominal. It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion it makes no difference. The statute forbids the entry in the register of any trust, and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as, and in fact are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their *cestuis que trustent* if they have any. If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act? It may be that a company constituted like that under consideration was not in the contemplation of the Legislature at the time when the Act authorizing limited liability was passed; that, if what is possible under the enactments as they stand had been foreseen, a *minimum* sum would have been fixed as the least denomination of share permissible, and it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company, and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part payment of the purchase-money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this, the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstances that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked great mischief. It may well be that some check should be placed upon the practice, and that, at all events, ample notice to all who may have dealings with the company should be secured. But as the law at present stands, there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed.

It was contended on behalf of the company that the agreement between them and the appellant ought, at all events, to be set aside on the ground of fraud. In my opinion no such case has been made out, and I do not think the respondent company are entitled to any such relief.

Lord MACNAGHTEN.—I cannot help thinking the appellant, Aron Salomon, has been dealt with somewhat hardly in this case.

Mr. Salomon, who is now suing as a pauper, was a wealthy man in July, 1892. He was a boot and

shoe manufacturer trading on his own sole account under the firm of "A. Salomon & Co.," in High-street, Whitechapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighbourhood all along, and for many years past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital he had gradually built up a thriving business, and he was undoubtedly in good credit and repute. It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that if Mr. Salomon had been minded to dispose of his business in the market as a going concern, he might fairly have counted upon retiring with at least £10,000 in his pocket.

Mr. Salomon, however, did not want to part with the business. He had a wife and a family consisting of five sons and a daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners. They were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances. He turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action. All the usual formalities were gone through. All the requirements of the Companies Act, 1862, were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at £40,000 in 40,000 shares of £1 each. There were articles of association providing the usual machinery for conducting the business. The first directors were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorized to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting. And there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed £10,000 without the sanction of a general meeting.

The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public.

The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up. The subscribers met and appointed Mr. Salomon and his two elder sons directors. The directors then proceeded to carry out the proposed transfer. By an agreement dated the 2nd of August, 1892, the company adopted the preliminary contract, and in accordance with it the business was taken over by the company as from the 1st of June, 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over £39,000, a sum which represented the sanguine expectations of a fond owner rather than anything that can be called a businesslike or reasonable estimate of value. That, no doubt, is a circumstance which at first sight calls for observation, but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your lordships. The purchase-money was paid in this way: as money came in, sums amounting in all to £20,000 were paid to Mr. Salomon, and then immediately returned to the company in exchange for fully-paid shares. The sum of £10,000 was paid in debentures for the like amount. The balance, with the exception of about £1,000, which Mr. Salomon seems to have received and retained, went in the discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about £1,000 in cash, £10,000 in debentures, and half the nominal capital of the company in fully-paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had therefore no ground for complaint on the score of over-valuation.

The company had a brief career; it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too, and in view of that danger, contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could; both he and his wife lent the company money, and then he got his debentures cancelled and reissued to a Mr. Broderip, who advanced him £5,000, which he immediately handed over to the company on loan. The temporary relief only hastened ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realized enough to pay Mr. Broderip, but not enough to pay the debentures in full, and the unsecured creditors were consequently left out in the cold.

The order of Vaughan Williams, J., appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires (section 6) that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned lords justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter. When the memorandum is duly signed and registered, though there is only seven shares taken, the subscribers are a body corporate, "capable forthwith," to use the words of the enactment, "of exercising all the functions of an incorporated company." Those are strong words. The company attains maturity on birth. There is no period of minority; no intervening incapacity. I cannot understand how a body corporate, thus made "capable" by statute, can lose its individuality by issuing the bulk of its capital to

person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed. But his appeal was dismissed with costs, though the appellate court did not entirely accept the view of the court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in their order.

I must say I have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed himself to the full of the advantages offered by the Act of 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act, 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent: it has no sting in it. In an early case which, in some of its aspects, is not unlike the present, the owner of a colliery (to quote the language of Gifford, L.J., in the Court of Appeal) went on working the colliery, not very successfully, and then determined to form a limited company in order to avoid incurring further personal liability. "It was," adds the L.J., "the policy of the Companies Acts to enable this to be done." And so he reversed the decision of Malins, V.C., who—after expressing an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state"—had fixed the former owners with liability for the amount of the fully paid-up shares they took in exchange for their property (*Baglan Hall Colliery Co.*, 18 W. R. 499, L. R. 5 Ch. 346).

Among the principal reasons which induce persons to form private companies, as is stated very clearly by Mr. Palmer in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as Mr. Palmer observes, a trade can be carried on with limited liability, and without exposing the persons interested in it, in the event of failure, to the harsh provisions of the bankruptcy law. A company, too, can raise money on debentures, which an ordinary trader cannot do; any member of a company acting in good faith is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take.

If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised £5,000 debentures for the company that belonged to him seems to me strong evidence of his good faith and of his confidence in the company. The unsecured creditors of A. Salomon & Co. (Limited), may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon, and he had always paid his way; but they had full notice that they were no longer dealing with an individual, and they must be taken to have been cognizant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows such a thing as a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your lordships also think, that the ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up debenture holders generally step in and sweep off everything. And a great scandal it is.

It has become the fashion to call companies of this class "one-man companies." That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see, contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to guage the solvency of an individual as to estimate the financial ability of a crowd.

One argument was addressed to your lordships which ought, perhaps, to be noticed, although it was not the ground of decision in either of the courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an over value. There are, it seems to me, two answers to that argument. In the first place, the directors did just what they were authorized to do by the memorandum of association. There was no fraud or misrepresentation, and there was nobody deceived. In the second place, the company have put it out of their power to restore the property which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counter-claim. I cannot see what difference that makes. The reservation in the order seems to me to be simply nugatory.

I am of opinion that the appeal ought to be allowed, and the counter-claim of the company dismissed with costs, both here and below.

Lord MORRIS concurred.

Lord DAVEY.—It is possible and, I think, probable that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But after all, the intention of the Legislature must be collected from the language of its enactments, and I do not see my way to holding that if there are seven registered members, the association is not a company formed in compliance with the provisions of the Act, and capable of carrying on business with limited liability,—because the bulk of the shares are held by some only, or even by one of the members, and the others are what is

called "dummies," holding, it may be, only one share of £1 each; or because there are less than seven persons who are beneficially entitled to the shares. I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share, and from the provision in section 8, that no subscriber shall take less than one share, and from the provision in section 30, that no notice of any trust shall be entered on the register. With regard to the latter provision it would, in my opinion, be impossible to work the machinery of the Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. The learned counsel for the respondents (wisely, as I think) did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were dummies, and did not hold a substantial interest in the company—that is, what a jury would say is a substantial interest. In the language of some of the judges in the court below, any jury, if asked the question, would say the business was that of Aron Salomon, and of no one else.

It was not argued in this case that there was no association of seven persons to be registered, and the registration therefore effected nothing, or that the so-called company was a sham, and might be disregarded. And, indeed, it would have been difficult for the learned counsel for the respondents, appearing as they did, at your lordships' bar for the company who had been permitted to litigate in the courts below as actors (on their counter-claim), to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that section 18, making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it.

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound up, and and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities. Vaughan Williams, J., held that the company was an *alias* for the appellant, who carried on his business through the company as his agent; and that he was bound to indemnify his own agent, and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to *cestui que trust*. The ground on which the learned judges seemed to have chiefly relied was that it was an attempt by an individual to carry on his business with limited liability, which was forbidden by the Act and unlawful. I observe, in passing, that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share. I am at a loss to see how in either view taken in the courts below the conclusion follows from the premises, or in what way the company became an agent or trustee for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant, and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking counsel what the equity was, but got no answer. By an *alias* is usually understood a second name for one individual; but here, as one of your lordships has already observed, we have, *ex hypothesi*, a duly formed legal *persona*, with corporate attributes and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy, if any, would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally; but how either of those states of circumstances creates the relation of *cestui que trust* and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges. But counsel for the respondent company also relied on the alternative relief claimed by the pleadings, which was quite open to counsel here—namely, that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission, and as regards the cash portion of the price it must be observed than the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the extra money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible. Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires* by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded. Counsel relied on some *dicta* in *Erlanger v. New Sombrero Phosphate Co.*, a case which is often quoted and not infrequently misunderstood. Of course Lord Cairns' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and directors before the shares were offered for subscription, whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares and such contract will be binding though carried only by the votes of that shareholder was decided in *North-West Transportation Co. v. Beatty*. For these reasons I am of opinion that the appellant's appeal should be allowed, and the cross-appeal should be dismissed. I agree to the proposed order and costs.

Order of the Court of Appeal reversed.

Solicitors for the appellant, *Ralph Raphael & Co.*

Solicitors for the defendants, *S. M. & J. Benson.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 14.

SLOANE v. BRITAIN STEAMSHIP CO. (LIMITED). (a.)

Practice — Parties — Pauper—Leave to sue in formâ pauperis—*Affidavit—Case and opinion of counsel made an exhibit—Right of defendant to inspect exhibit—Ord.* 16, *rr.* 23, 24.

Where a plaintiff has been admitted to sue in formâ pauperis, *the defendant is not entitled to inspect the case laid before counsel and his opinion thereon, which have been produced to the judge upon the application for leave to sue in* formâ pauperis, *even though they have been made an exhibit to the affidavit filed upon that application.*

In re Hinchliffe, 43 *W. R.* 82, [1895] 1 *Ch.* 117, *distinguished.*

Appeal from an order made by Lawrance, J., in chambers.

The plaintiff applied for leave to sue in *formâ pauperis*, and filed an affidavit in support thereof as required by ord. 16, r. 24, the case laid before counsel and his opinion thereon being made an exhibit to the affidavit.

The application was granted, and the defendant, upon being served with the writ, took out a summons to inspect the exhibit to the affidavit. The master referred the summons to the judge, indorsing thereon that he had made inquires and found that the practice was to allow the affidavit to be inspected, and he drew attention to the case of *In re Hinchliffe*, 43 W. R. 82, [1895] 1 Ch. 117, where it was held that any person who has a right to inspect an affidavit has a right also to inspect any exhibit thereto. Lawrance, J., having made the order for inspection, the plaintiff appealed.

Gregson Ellis, for the plaintiff.—The decision in *In re Hinchliffe* cannot apply to a case of this kind. The case laid before counsel and his opinion thereon are really the plaintiff's brief in the action, and the defendant cannot be allowed inspection of that. The affidavit is not filed in the action, but it is filed before the action is commenced for the information of the judge, and the defendant has no right to inspect the affidavit. But even if the affidavit can be inspected, the case and opinion of counsel cannot, as they are solely for the information of the judge who has to decide whether the case is a fit one in which to allow the plaintiff to sue in *formâ pauperis*: *Bryant* v. *Wagner*, 7 Dowl. Prac. Cas. 676. The order, therefore, was wrong.

J. Eldon Bankes, for the defendant.—Every party is entitled, on paying the proper fee, to inspect an affidavit on the file of the court. Being entitled to see the affidavit, the defendant is entitled to see every exhibit to it. An exhibit forms part of the affidavit: *In re Hinchliffe*. The plaintiff need not have made the case and opinion of counsel an exhibit to the affidavit, but having done so the defendant is entitled to inspection. Inspection is necessary to enable the defendant to see whether he ought to move to discharge the order giving leave to sue in *formâ pauperis*. At any rate it is a matter of discretion, and the court will not interfere with the mode in which that discretion has been exercised.

Lord ESHER, M.R.—The true answer to the application for leave to inspect the exhibit is that the case is laid before counsel and his opinion taken thereon solely for the information of the judge in order that he may have the best means of deciding whether to allow the plaintiff to sue in *formâ pauperis*. The case and opinion of counsel are laid before the judge for his information alone, and no one else has any right to see them. It was never intended that that information should be seen by other persons for other purposes. The order must therefore be discharged.

LOPES, L.J.—In my opinion it is immaterial whether the case and opinion of counsel are made an exhibit to the affidavit or not. The case and opinion are for the information of the judge who has to decide whether to allow the plaintiff to sue in *formâ pauperis*, and the opposite party is not entitled to see them. In laying down that proposition I say no more than was said by Coleridge, J., in *Bryant* v. *Wagner*: "I apprehend that Mr. Channell is correct in stating that the certificate of counsel is a matter of importance. But then it is not for the benefit of the opposite party, but for the information of the court." That is the true ground upon which to put the case. As regards the case of *In re Hinchliffe*, the judges who decided that case had not the present case before their minds. If they had had their attention drawn to a case like the present I feel sure that they would have drawn the same distinction as we do between that case and this.

RIGBY, L.J.—In cases of this kind the rules require certain information to be laid before the judge which cannot be extracted from a litigant in other cases, and that information is for the judge alone so that he may see if a *primâ facie* case exists for allowing the plaintiff to sue in *formâ pauperis*. It is not intended for the other party, and the court will never allow it to be wrested to a wrong purpose. The mere fact that the case and opinion of counsel are made an exhibit to the affidavit makes no difference of any kind. I agree with Lopes, L.J., in what he has said as to *In re Hinchliffe*.

Appeal allowed.

Solicitors for the plaintiff, *Ewer & Neave*, for *Woodburn & Holme*, Liverpool.

Solicitors for the defendant, *Botterell & Roche*.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 2.

SMELTING COMPANY OF AUSTRALIA v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—Conveyance on sale—Contract for sale—Share in Colonial patent—Licence to use patent—"Property"—"Property locally situate out of the United Kingdom"—Doctrine of ejusdem generis—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.

An agreement made in England for the sale of a share in a patent granted in New South Wales and of a licence to use the patent in a particular district of New South Wales is an agreement for the sale of an interest in property within the meaning of section 59, *sub-section* 1, *of the Stamp Act*, 1891, *and is not within the exception of "property locally situate out of the United Kingdom." It is therefore chargeable with* ad valorem *duty.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Judgment of the Queen's Bench Division (Pollock, B., *and* Bruce, J.), ante, *p.* 61, *affirmed.*

Appeal from the judgment of a Divisional Court (Pollock, B., and Bruce, J.) on a special case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891, *ante*, p. 61.

The instrument upon which the commissioners were required to express their opinion was an agreement executed in England for the sale to the appellants of a share in a patent which had been granted in New South Wales, and of a licence to use the patent in a particular district of that colony.

The question was whether the instrument was chargeable with *ad valorem* duty under section 59, sub-section 1, of the Stamp Act, 1891, or was exempt under that section as being an agreement for the sale of "property locally situate out of the United Kingdom."

The nature of the instrument and the circumstances of the case are fully set out *ante*, p. 61.

Section 59, sub-section 1, of the Stamp Act, 1891, is as follows: "Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock or marketable securities, or any ship or vessel, or part interest, share or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

The commissioners held that the instrument was chargeable with *ad valorem* duty, and the Divisional Court affirmed their decision.

The appellants appealed to the Court of Appeal.

A. T. Lawrence (*Leslie* with him), for the appellants.—This case comes within the exception of "property locally situate out of the United Kingdom." The appellants are therefore not liable to pay *ad valorem* duty. All property of whatsoever description is deemed to have a local situation, at least for purposes of revenue: see *Attorney-General* v. *Bouwens*, 4 M. & W. 171, which was a case of probate duty. A patent gives certain rights within a definite area; this patent operates in New South Wales only. The share in this patent and the licence to use it, which are the subject-matter of this agreement, may correctly be described as property locally situate out of the United Kingdom. The word "property" in this exception ought not to be treated as a general word following particular words. The exception of "property locally situate out of the United Kingdom" is entirely distinct from the preceding exception of "lands, tenements, hereditaments, or heritages." It is therefore not to be confined to property *ejusdem generis* with real property, but it is applicable to property of any description.

Sir R. B. Finlay, S.G. (*Danckwerts* with him) for the respondents.—First, the word "property" in this exception ought to be construed as *ejusdem generis* with the property described in the preceding words, and to be limited to property in the nature of real property. Secondly, property such as that in question cannot be brought within the exception of "property locally situate out of the United Kingdom." Personal property has no locality: *Doe dem. Birtwhistle* v. *Vardill*, 5 B. & C. 438, at p. 451; *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, 40 W. R. Dig. 162. At any rate an incorporeal right, like a patent, cannot be said to have a local situation. The case, therefore, is not within the exception, and the appellants are liable. [He also cited *In re Wright and Commissioners of Inland Revenue*, 11 Ex. 458].

Lord ESHER, M.R.—I am of opinion that this appeal must be dismissed. I cannot disagree with Pollock, B., and say that the expression "locally situate," in section 59 of the Stamp Act, 1891, applies to a thing which in truth has no locality. I am inclined to think that the doctrine as to the usual construction to be placed on general words following particular words is applicable to this section, and that the words "or property locally situate out of the United Kingdom" mean property of the same kind as lands, tenements, hereditaments, or heritages. But inasmuch as Rigby, L.J., takes the contrary view, I do not decide this case on that doctrine.

In the first place, I think that what we are now dealing with is "property" within the meaning of that word in the earlier part of the section which says that any agreement "for the sale of any estate or interest in any property" shall be charged with *ad valorem* duty. The section then excepts "property locally situate out of the United Kingdom." It may be that there are chattels of which it can be affirmed that they are locally situate in some particular place. I will assume that that is so; if some physical, tangible thing is being dealt with, I can quite understand that that may be locally situate. But here we are dealing with a thing which cannot be touched, or seen, or placed anywhere; it does not exist in any given spot. I agree with Pollock, B., that this cannot be described by the words "locally situate"; it is therefore not within the exception. But it is within the words at the beginning of the section, and it therefore follows that the appellants are liable to the duty which the Crown claims. I think the judgment of the Divisional Court was right, and the appeal must be dismissed.

LOPES, L.J.—Two questions arise in this case under section 59 of the Stamp Act. The first question is, whether this thing, which is the subject matter of the agreement for sale, is "property" within the early part of the section. It is a share in a patent granted in New South Wales and a licence to use the invention protected by the patent. I am of opinion that the Divisional Court were right in saying that this was "property" within the meaning of the section. The second question is, Does it come within the exception? The exception is as follows: "Except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, &c." It is said on the part of the appellants that "property locally situate out of the United Kingdom" includes personal property. I think that it does not. In my opinion the doctrine of *ejusdem generis*, or, as it is sometimes expressed, *noscitur a sociis*, applies to this case. The preceding words are "lands, tenements, hereditaments, or heritages." The words "lands, tenements, or hereditaments" are the most comprehensive words for describing real property in England, and I believe that "heritages" has the same comprehensive meaning in Scotland. They follow the words "or property locally situate out of the United Kingdom." I think that means property *ejusdem generis* with that which has been mentioned before—that is to say, property in the nature of real property. But it is further said that the property which is the subject-matter of this agreement can be said to be locally situate out of the United Kingdom. In my opinion that is so; I do not

how such property as this can be said to be locally situate anywhere. I therefore think that the contention of the Crown is right on both grounds.

RIGBY, L.J.—I am of the same opinion so far as the result is concerned. But I cannot accept the view that the word "property" in this exception is necessarily confined to property of the same nature as lands, tenements, hereditaments, and heritages. The rule of *ejusdem generis* or *noscitur a sociis* ought in my opinion to be most carefully used. This section contains five exceptions. The first exception is "lands, tenements, hereditaments, or heritages," that is to say, real property. The second exception is "property locally situate out of the United Kingdom," which I understand to be an addition of something outside the United Kingdom, whether it be real or personal property. The third exception is "goods, wares, or merchandise"; the fourth is "stock or marketable securities"; the fifth is "any ship or vessel, or part interest, share, or property of or in any ship or vessel." Why should the word "property" in the second exception be associated with land rather than with wares and merchandise? I cannot think it is right to fix attention solely on what goes before the words in question, and to disregard what comes immediately after them. Then can this property be said to be property locally situate out of the United Kingdom? It may be that the expression "locally situate" is capable of being applied to chattels which have a tangible existence. But can a debt be said to be locally situate anywhere? It has been held that for the purposes of probate a debt is where the debtor is; but it does not follow that a debt has a local situation. Neither am I satisfied that any incorporeal right, such as the patent right with which we have to do in this case, can have a local situation.

I think that the judgment of the Divisional Court was right, and that the appellants are liable to *ad valorem* duty.

Appeal dismissed.

Solicitors for the appellants, *Ince, Colt, & Ince.*

Solicitor for the respondents, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. Stirling, J. } Oct. 27; Dec. 9.

PALMER *v.* RICH. (*a.*)

Joint tenancy—Freeholds—Leaseholds—Severance on marriage of female joint tenant—Leases by one joint tenant and husband of other joint tenant.

The marriage of one of two female joint tenants is not in itself a severance of the joint tenancy as regards either freeholds or leaseholds. In re Butler's Trusts, 36 *W. R.* 817, 38 *Ch. D.* 286, *followed as regards the leaseholds.*

The grant of a lease by one joint tenant and the husband of the other joint tenant is not such a disposition of the property by the husband as to sever the joint tenancy. The rule laid down in Robinson *v.* Preston, 4 *K. & J.* 505, 6 *W. R. Ch. Dig.* 87, *as to the purchase of property by two or more persons, followed.*

Special case.

The facts were as follows: In 1854 Thomas Palmer executed a voluntary conveyance of certain freeholds to his daughters Ellen Palmer and the plaintiff, as joint tenants. In 1856 some leaseholds were bought for £500 and also assigned to the plaintiff and Ellen Palmer as joint tenants. This £500 was provided by Thomas Palmer. Ellen Palmer, in 1859, married Augustus Greenhead. Soon after this marriage Thomas Palmer died.

In 1889 Ellen Greenhead and the plaintiff purchased certain leaseholds for £600, which was provided by them in equal shares. These leaseholds were assigned to them as joint tenants, though the purchase-money was raised out of the sale of lands of which they were tenants in common. The plaintiff, her sister, and brother-in-law all lived together in the leasehold house last purchased. Leases of the other property were granted by the plaintiff and her brother-in-law, and rents were received by the latter on behalf of the plaintiff and his own wife.

Ellen Greenhead died in August, 1895, and her husband in October of the same year. The defendants were the three co-heiresses and the sole next-of-kin of Augustus Greenhead, and one of them was also the legal personal representative of Ellen Greenhead and Augustus Greenhead.

T. A. Nash, for the plaintiff.—*In re Butler's Trusts*, 36 W. R. 817, 38 Ch. D. 286, is an authority that marriage does not effect a severance as regards the leaseholds, and this is much more the case as regards freeholds. The leases were only granted by the husband in right of his wife under 19 & 20 Vict. c. 120, s. 38, and 40 & 41 Vict. c. 18, s. 46. The mere fact that the husband enjoyed a benefit does not show any intention to sever: *Williams* v. *Hensman*, 1 J. & H. 546, 10 W. R. Ch. Dig. 27; *In re Wilks*, 40 W. R. 13, [1891] 3 Ch. 59. Here there was no agreement and no course of dealing with the property indicating an intention to sever.

Rowden, for the defendants.—The decision in *In re Butler* is on the ground that the husband takes no estate in chattels real. I submit that he does take an estate in the wife's freeholds on marriage, and therefore as regards the freeholds, marriage by itself is sufficient to effect a severance: *Baillie* v. *Treharne*, 29 W. R. 729, 17 Ch. D. 388. Further, the husband has here dealt with the property. [STIRLING, J.—If there were a term of 1,000 years, would a lease for one year granted by the husband effect a severance?] I submit it would. There is here just such a disposition by the husband as was required in *In re Butler's Trusts*. Coke states that a lease for years by one of two joint tenants puts an end to the joint tenancy. As regards the property acquired after Thomas Palmer's death, the purchase-money was derived from the sale of property of which they were tenants in common, and I submit this rebuts any presumption of joint tenancy: *Robinson* v. *Preston*, 4 K. & J. 505, 6 W. R. Ch. Dig. 87.

Nash, in reply.—As to the last point, the property was conveyed to the plaintiff and her sister as joint tenants. The lease was by both joint tenants, as the husband simply acted in right of his wife. The freeholds do not vest in the husband apart from his wife: Bright's Husband and Wife, vol. 1, p. 112.

Cur. adv. vult.

Dec. 9. STIRLING, J.—The first point raised was whether the marriage of Ellen Greenhead effected a severance of the joint tenancy. As regards the leaseholds, it is clearly laid down in Coke on Littleton, 185*b*, 351*a*, and in the case of *Bracebridge* v. *Cook*, Plowd. Comm. 416, that marriage does not sever the joint tenancy, and this statement of the law has recently been recognized as accurate by the Court of

(*a*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Appeal in *In re Butler's Trusts*. Consequently it was conceded in argument that there was no severance of the joint tenancy in the leaseholds by the marriage of Ellen Greenhead.

It was said, however, that there was no authoritative statement of the law and no decision that marriage did not effect a severance of a joint tenancy in fee. It certainly appears to be true that there is not to be found in Coke on Littelton any express statement of the law similar to that found at p. 351*a* as to leaseholds, but I cannot bring myself to doubt that the law was settled in the same sense in Lord Coke's time and has been so ever since. I arrive at that conclusion from a consideration of what is laid down in Coke on Littelton with reference to curtesy. In the first place it is distinctly laid down in Littelton, section 45, that a wife is not entitled to dower out of lands held by her husband jointly with another at the time of his death, but that she is, where the husband holds lands in common with another. Then, dealing with the case of curtesy, Lord Coke says at p. 30*a*: "Some have said," &c. Subsequently, commenting on section 283 of Littelton, he says at p. 183*a*: "Here Littelton hath well resolved a doubt," &c. It appears to me that Lord Coke was of opinion that a husband was not entitled to curtesy of lands held by his wife jointly with another; that there had been a doubt whether that applied to the case where lands were held under a grant to two women and the heirs of their bodies, but that this had been disposed of by Littelton. There is no suggestion of any doubt as to the case of lands held under a grant to two women and their heirs, and in all modern text-books which I have examined (it is enough to refer to three—viz., Roper on Husband and Wife, 2nd ed., pp. 11, 12; Burton's Compendium, p. 353; Williams on Real Property, 17th ed., p. 281), the law is stated to the effect that there is no right of curtesy in respect of an estate held in joint tenancy, but that the right does exist in respect of an estate held under a tenancy in common. It is obvious that such a state of the law is inconsistent with the view that marriage of itself converts a joint tenancy into a tenancy in common, and I may add that I have not found in the books any trace of such a doctrine.

The next point raised was whether the grant of the leases stated in paragraph 10 did not effect a severance of the joint tenancy. [His lordship read Coke on Littleton, section 292, and Coke's note, 188*b*, thereon.] Now the leases were granted not by Augustus Greenhead alone, but by him and the plaintiff; and the rent was reserved to them jointly. Whatever effect the grant of a lease by Augustus Greenhead *alone* might have had, I fail to see that the grant of such leases by him and the plaintiff created a several title or several rights in anyone. The tenants under those leases derived their title under *both* the lessors; their position is totally different from that of an alienee of one moiety of the lands held jointly.

It might be possible that a lease might be granted by the husband of a joint tenant and the other joint tenant in such form that a severance would be necessary to give effect to it; but this does not seem to be the result in the present case.

It was next contended that the facts stated in paragraph 9 of the special case constitute a course of dealing "sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common": *Williams* v. *Hensman*, J. & H. 557, 10 W. R. Ch. Dig. 27. I confess I cannot see this.

Finally it was urged that however the case might be as regards the two properties hitherto considered, the case was different as regards the property mentioned as purchased since the death of Thomas Palmer. The general rule is stated in *Robinson* v. *Preston*, a case cited for the defendants. [His lordship read at p. 510 in 4 K. & J., and continued:] No doubt under special circumstances such as existed there, that rule may be departed from. [His lordship read p. 515.] Here the circumstances seem to me insufficient to take the case out of the rule.

Judgment accordingly.

Solicitors, *Collins & Cook*, for all parties.

Chan. Div. } Romer, J. } Nov. 30.

In re BANKS.
DAWS v. BANKS. (*a*.)

Practice—Costs—Mortgage—Foreclosure action—Mortgagees' costs—Administration proceedings combined with foreclosure action—Executor's costs—Costs relating to the security.

So far as administration proceedings are necessary to enable mortgagees to realize their security, mortgagees will be entitled to add to their security their administration costs in the action so far as they relate to their security, and be paid the same in priority to the administration costs of the mortgagor's executor.

Motion.

This was a motion on the part of the executor of the defendant in a foreclosure and administration (so far as such administration might be necessary) action, to vary the minutes of the order made in the action, to the effect that the costs of the executor of such defendant might be paid before those of the plaintiffs.

The plaintiffs were mortgagees suing on behalf of themselves and all other creditors of the deceased defendant. The facts of the case were as follows: By an indenture of a settlement made on the marriage of John Sladen M. Banks and Mary Stace, certain trust funds were settled on Mary Stace for her life, the principal of which Banks had a right under the settlement to appoint by deed or will. Subsequent to the marriage the trustees of the settlement lent to Banks the sum of £7,200, on a mortgage of a certain real estate known as the Chilton estate. Banks, by his will dated the 7th of January, 1847, appointed the defendant Sladen (with others therein named) his executor, and appointed that the trust funds, subject to his wife's life interest, should go to Sladen's son, on the trust therein mentioned, and devised his real estate, subject to certain life interests, to the son or sons of the defendant Sladen in the manner therein mentioned.

After Banks' death interest on the mortgage fell into arrear, and the trustees of the settlement brought the action as above mentioned for foreclosure or sale of the Chilton estate, and for the administration of the real estate (other than that mortgaged by Banks) and of the personal estate of Banks. To this action the applicant was made a defendant.

At the hearing of the action judgment was given for the plaintiffs, and an order was made for the sale of the real estate. The minutes provided that the expenses of the plaintiffs should be first provided for.

Stewart Smith, for the applicant.—The applicant in this case represents the estate, and is under the circumstances entitled to his costs before the plaintiffs.

Eve, Q.C., and *Sebastian*, for the plaintiffs.

ROMER, J.—The only cases in which an executor

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

is entitled to his costs in priority are cases where proceedings have been commenced as administration suits. This was originally a foreclosure action, and so far as the plaintiffs' administration costs were necessary for the foreclosure action, they are entitled to add them to their security. The words "so far as they relate to this security" should be added to the words in the minutes that make provision for the plaintiffs' costs.

Solicitors, *Bower, Cotton, & Bower; Kingford, Dormer, & Co.*

Q. B. Div.
(Wills and Wright, JJ.) Dec. 17.

THE CONSERVATORS OF HAYES COMMON *v.* THE BROMLEY DISTRICT COUNCIL. (*a.*)

Common—Right of highway authority to take gravel—Order of justices—Discretion to make or refuse order—Commons Act, 1876 (39 *&* 40 *Vict. c.* 56), *s.* 20.

Under the Commons Act, 1876, *s.* 20, *the justices to whom application is made for an order under the section have a discretion to make or refuse such order.*

Case stated by justices.

Prior to 1876 the surveyor of highways for the district of Bromley had exercised the right of digging for gravel upon Hayes Common under the powers granted them by the Highways Act, 1835, s. 51.

The Commons Act, 1876, s. 20, enacts that no surveyor of highways or highway board shall dig for gravel, &c., upon any of the commons therein referred to without the consent of the conservators of such common, or in default of such consent without the order of two justices sitting in petty sessions within the districts in which such common is situated, "who may in their order prescribe such conditions as to mode of working and restitution of the surface as to them shall seem expedient."

Hayes Common was one of those contemplated by the Act.

After the Act was passed, the surveyor, and, later, the respondents, to whom were transferred the rights and liabilities of the surveyor, continued to dig for gravel with the consent of the conservators.

In 1896 the conservators withheld their consent, and the respondents then applied to the justices for an order under section 20.

The justices, considering that the rights conferred by the Highways Act, 1835, had not been taken away by the section, held that they had no discretion to refuse the order, and made the order prayed for accordingly.

Rawlinson, for the appellants.—The justices had a discretion to make or refuse the order, and as they exercised no discretion the order is bad.

Macmorran, Q.C. (*Clarke Williams* with him), for the respondents.—The right of the highway authority to take materials off a common, for road making, have been expressly reserved by other Acts dealing with the subject, and the Commons Act, 1876, did not take away that right.

WILLS, J. [after stating the facts and reading section 20.].—The conservators could give or withhold consent. If they withheld it there was power to apply to the justices for an order. The justices have jurisdiction to make or refuse the order. If it had been intended to make it imperative for the justices to grant the order the Act would have said so. But it does not. It says that they may prescribe conditions as to the mode of working, &c. That only means that if they do make an order it may be made subject to those limitations. The case must go back to the justices for them to exercise their discretion, taking into consideration the question whether under the circumstances it is reasonable to allow the district council to use the common in the way they desire.

WRIGHT, J.—I agree.

Solicitors for the appellants, *Birkett & Horner.*

Solicitors for the respondents, *May, Sykes, & Batten.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Wills and Wright, JJ.) Dec. 16.

HINDLE AND ANOTHER (*Appellants*) *v.* BIRTWISTLE (*Respondent*). (*a.*)

Factory Acts — Dangerous machinery — Factory and Workshop Acts, 1878 (41 *&* 42 *Vict. c.* 16), *s.* 5; 1891 (54 *&* 55 *Vict. c.* 75), *s.* 6.

Under section 5 *of the Factory and Workshop Act,* 1878, *as amended by section* 6 *of the Factory and Workshop Act,* 1891, "*all dangerous parts of the machinery*" *in a factory must either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed in the factory as they would be if they were securely fenced.*

Held, that, although a part of a machine might not be dangerous in the ordinary course of its working, yet it might be a "dangerous" part of a machine within the meaning of the Acts if, owing to external causes or to the negligence of a workman, it was liable to cause accidents.

Special case stated by the Recorder of Blackburn.

At a court of summary jurisdiction at Blackburn the appellants were convicted under the Factory and Workshop Acts, 1878 and 1891, for that they, on the 7th of August, 1895, being the occupiers of a cotton factory, did unlawfully neglect to fence a dangerous part of the machinery in the factory—namely, the shuttles, such shuttles not being in such a position or of such construction as to be equally safe to every person employed in the factory as if they were securely fenced.

The appellants appealed against such conviction to quarter sessions.

Upon the hearing of the appeal the following facts were proved:—

The appellants, on the 7th of August, 1895, were, and for several years previously had been, the occupiers of a certain receiving shed in Blackburn in which there were the ordinary looms and shuttles used in weaving cotton cloth, and they carried on there the business of cotton manufacturers. It was admitted that the said shed was a factory within the meaning of the Factory and Workshop Acts, 1878 and 1891. On the 7th of August a shuttle flew out of the shuttle-race of one of the looms in work in the factory and in its flight struck and seriously injured a weaver in the employment of the appellants. The accident was caused by the negligence of the said weaver in fastening the picking band of the loom too taut, whereby the shuttle was deflected from its proper course in the shuttle-race and so flew out. In addition to the accident on the 7th of August there were, during the years 1891 to 1895, three other serious accidents caused

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

by shuttles flying from looms in the appellants' factory, but to what cause or causes the said accidents were to be attributed there was no evidence to show. During the said period, and down to the 7th of August, 1895, there were 1,400 looms, or thereabouts, in work during most working days in the appellants' factory, and it was agreed, so far as the looms and shuttles were concerned, that the appellants' machinery was substantially in the same condition all through the said period.

It was proved to the recorder's satisfaction that while the shuttle was running backwards and forwards in the shuttle-race—that is to say, while it was performing in due course the part it was intended to perform in weaving cotton—it was not dangerous, and it was not at that time a dangerous part of any machinery within the meaning of the Factory Acts of 1878 and 1891.

It was, however, proved that shuttles did occasionally fly out from the shuttle-race during the process of weaving under circumstances which rendered such flying shuttles dangerous to any persons who might chance to be in the line of their flight. So far as the evidence before the recorder went the flying out of shuttles from the shuttle-race was due to one or other of the following causes:—(*a*) In consequence of the shuttle not being true; (*b*) in consequence of the negligence of the weaver in fastening the picking-band too taut, or some other act of negligent user of the machinery by the person in charge of it; (*c*) in consequence of some foreign substance accidentally getting into the shuttle-race; and (*d*) in consequence of some defect in the yarn or thread used in the loom.

There was no evidence before the recorder to show, nor did the respondent suggest, that the appellants' loom, or any of them, were at any time during the period before mentioned or on the 7th of August fitted with shuttles that were not true.

There was no evidence before the recorder to show that the appellants omitted any reasonable precaution to prevent foreign substances getting into the shuttle-race or to detect any defect in the yarn or thread.

There was no evidence that at any time during the said period or on the 7th of August there was in fact any foreign substance in the shuttle-race of any of the appellants' looms, or any defect in any of the yarn or thread used in their looms; but it was to be taken that, in common with all looms and shuttles used in weaving cotton, the appellants' looms and shuttles were liable to be thrown out of gear by the causes mentioned (*b*), (*c*), and (*d*).

It was contended on behalf of the respondent (1) that a machine or part of a machine liable to become temporarily dangerous, whether by its negligent user or by a cause external to the machinery itself, was a dangerous machine or dangerous part of a machine within the meaning of the Acts; (2) that the recorder was bound as a matter of law to infer from the fact of the occasional occurrence of accidents at the appellants' factory from flying shuttles that the shuttles were dangerous parts of the machinery.

It was contended on behalf of the appellants (1) that it was in each case a question of fact for the court whether a machine or part of a machine was a dangerous machine or dangerous part of a machine: (2) that the obligation to fence machinery imposed upon the occupier of a factory by the said Act applies only to a machine or part of a machine which was dangerous in the ordinary course of careful working; (3) that a machine or part of a machine was not dangerous within the meaning of the said Acts from the mere fact that it might occasionally become dangerous by being thrown out of gear in the process of manufacturing the article which it was designed to manufacture by any of the above-mentioned causes.

The recorder found as a fact that the shuttles in the appellants' factory were not dangerous parts of the machinery, and quashed the conviction, but stated this case for the opinion of the court.

If the court was of opinion that the fact that the appellants' looms and shuttles were on the 7th of August liable to become temporarily dangerous by reason of any of the above-mentioned causes (*b*), (*c*), and (*d*), the decision of the recorder was to be reversed and the conviction was to stand, with costs.

The Factory and Workshop Act, 1878, s. 5:

"With respect to the fencing of machinery in a factory the following provisions shall have effect:

"(3) Every part of the mill gearing shall either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced. . . ."

The Factory and Workshop Act, 1891, s. 6, sub-section 2, enacts that in section 5, sub-section 3, of the Act of 1878, before the words "every part" shall be inserted the words "all dangerous parts of the machinery and."

Sir R. E. Webster, A.G. (*H. Sutton* and *L. Sanderson* with him), for the respondent, in support of the appeal.—The recorder has found as a fact that the shuttles were not dangerous parts of the machinery; but in coming to that conclusion he has not proceeded on the right principle. He thought that as the shuttle was not in its normal state dangerous, it could under no circumstances become dangerous. The true view of the enactment is that if by careless working or by some external cause a machine, otherwise secure, is liable to become dangerous, then it is a dangerous machine within the Act, and must be fenced.

Sir E. Clarke, Q.C. (*G. Sutton* with him), for the appellants.—The decision of the recorder was right. He has found as a fact that the shuttle was not a dangerous part of the machine. If the proposition of the Attorney-General is right it will lead to an enormous extension of the Act, for it is impossible to imagine any machine that may not by some unforeseen cause or other be liable to become temporarily dangerous. Therefore, according to that argument, every machine is "dangerous" within the meaning of the Act; but that cannot have been the intention of the Legislature.

Sir R. E. Webster, A.G., replied.

WILLS, J.—This is a case of considerable importance, but the enactment is plain and intelligible, and I see no difficulty in construing it. The Acts say that all dangerous parts of the machinery shall be securely fenced. The recorder seems to think that no part of the machinery can be dangerous, unless it is dangerous in the ordinary course of working, however carefully it may be worked. I disagree with that view, which, in my opinion, would be a disastrous limitation of the Act. I think that machinery is dangerous if, in the ordinary course of events, danger may be expected if it is worked without protection. Of course it would be absurd to say that merely because an accident had occurred a machine was dangerous. But it is equally absurd, to my mind, to say that a machine is not "dangerous" within the Act unless it is always dangerous. Many accidents occur where the machine is of the best possible kind, and is most carefully worked, but is the machine any the less dangerous on that account? All the circumstances of the case must be taken into consideration and if there is a substantial element of danger in the use of the machine with precaution, then, in my

opinion, it is "dangerous" within the meaning of these enactments. The recorder has not applied his mind to that view of the case. He appears to have thought that if the machine was of such a kind that accidents would not occur if it was carefully worked, then it was not dangerous. It is impossible to lay down any more definite rule than I have done. The tribunal must in each case decide according to the material facts. Under these circumstances the case must be remitted to the recorder for him to reconsider his decision.

WRIGHT, J.—I am of the same opinion. Two justices of the borough came to the conclusion that the shuttle was dangerous. The recorder reversed their decision on an erroneous view of the law. The case as stated refers to various causes which might occasion the shuttle to fly out. All these causes must be taken into consideration, but none of them are conclusive. I do not agree with the argument that the shuttle is dangerous because if it flies out it is dangerous. In deciding the question, the chance of the shuttle flying out must be taken into account.

Case remitted.

Solicitor for the respondent, *Solicitor to the Treasury.*

Solicitor for the appellants, *J. W. Carter*, Blackburn

Court of Appeal.

From Chan. Div. (Lord Russell of Killowen, C.J., and Lindley and A. L. Smith, L.JJ.) — Nov. 23, 24; Dec. 18.

MARSH v. JOSEPH. (a.)

Solicitor—Unauthorized use of solicitor's name—Fraud—Liability of innocent solicitor—Negligence—Partnership.

The name of a firm consisting of two solicitors had been used, improperly and without authority, in a fraudulent petition by means of which payment out of court of a sum of £4,000 was obtained by a person not entitled thereto. One partner in the firm knew nothing of the matter; the other had been told that proceedings were about to be taken, and knew, after an order for payment had been made, that the firm name had been used in proceedings of some sort. The Treasury having made good the £4,000,

Held, that the last-mentioned partner had not, by omitting to inform the court that the firm name had been used without authority in the petition, made himself or his firm liable to refund the sum misappropriated; and that the two solicitors were respectively liable to replace only such parts of the fund as they had respectively received in payment of the firm's costs.

There is not as a matter of law any usage that it is within the scope of a solicitor partnership for one of the partners to authorize the use of the firm name by a third person and to thereby bind his co-partners. Such usage, if any, must be established by evidence in each case.

Judgment of Kekewich, J., 44 *W. R.* 462, *varied.*

Cross-appeals from the decision of Kekewich, J. (reported 44 W. R. 462).

The question raised was whether John Clear and J. R. Green, who were in partnership as solicitors under the firm name of "Clear & Green," were liable to make good, or whether either of them was liable to make good, all, or any, and what part of, a sum of £6,387 0s. 2d. which stood to the credit of the suit of *Marsh* v. *Joseph*, and which was paid out by the Paymaster-General pursuant to an order of Kekewich, J., dated the 13th of July, 1895, and which order was procured by the fraud of one J. A. Hales, a solicitor. Hales was an undischarged bankrupt and an uncertificated solicitor. That he was the former was known to Clear; the latter fact was not.

The facts of the case were these: In 1877 the action of *Marsh* v. *Joseph* was instituted for the administration of the trusts of a settlement of the 9th of September, 1858. In that suit J. A. Hales acted as solicitor for the plaintiffs therein. Under the settlement Jacob Moses (who subsequently changed his name to John Moses Marsh) was entitled to certain property for life, and he had power to appoint the same to one or more of his children, and failing appointment it devolved upon all equally. Later, the settled property was sold, and the fund in court represented the proceeds. In July, 1895, Hales called upon Clear and said he had some business, and that he should require another solicitor to represent one of the formal parties, and asked Clear, "Will you act for me?" To this Clear replied, "We shall be very happy on receiving instructions." The name of the case was not mentioned, nor the character of the business, nor the name of the supposed formal party for whom Clear & Green were to act, and those gentlemen heard nothing further about the matter until after the consummation of Hale's fraud, and after payment out by the Paymaster-General of the fund in question.

On the 13th of July, 1895, a petition was presented in the name of Joseph Moses Marsh, which, after reciting the settlement of 1858, that Joseph Moses Marsh had been certified by the Chief Clerk in the suit of *Marsh* v. *Joseph* to be the eldest son of John Moses Marsh (formerly Jacob Moses) and that certain appointments of new trustees under the settlement of 1858 had been made, proceeded to state that by deed-poll of the 31st of December, 1894, John Moses Marsh, under his power of appointment, and subject to his own life interest, had irrevocably appointed the sum then in court standing to the credit of the action of *Marsh* v. *Joseph* to his son Joseph Moses Marsh absolutely for his own benefit. Such petition further stated that John Moses Marsh died on the 8th of March, 1895. The petition then prayed that the court should, subject to certain provisions as to costs and for payment of succession duty (properly estate duty), order that the fund be paid to the petitioner, Joseph Moses Marsh. Upon the back of that petition the names "John Clear & Co." appear as solicitors for the petitioner. The petition was verified by what purported to be an affidavit of the petitioner, to which were exhibited (amongst other documents) the settlement of 1858 and the alleged deed-poll of the 31st of December, 1894. The affidavit is endorsed "John Clear & Co., Serjeant's-inn." For the purposes of the hearing of the petition Hales, again using the name of "John Clear & Co.," instructed counsel to appear in support of the petition, and in the name of "J. Hales" instructed other counsel to appear for all the other parties interested and to consent to the prayer of the petition. Accordingly the matter came before Mr. Justice Kekewich on the 13th of July, 1895, when he made the order prayed. The "payment schedule" to the order provided for payment to "John Clear, of Serjeant's-inn," as petitioner's solicitor, of "agreed costs" of petitioner, £15, to "John Hales, of 15, Clifford's-inn," of £10 as "agreed costs" of the respondents, and in respect of the estate duty £224 11s. 5d. Accordingly, on the 10th of August, 1895, the cheques were drawn in the Paymaster-General's office upon the Bank of England

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

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—one, payable to Joseph Moses Marsh, for £6,137 8s. 9d.; one, payable to John Clear, for £15; and one, payable to John Hales, for £10. These cheques, with provision for estate duty, exhausted the fund in court.

On the same day (the 10th of August) by, or upon the introduction of, J. A. Hales, an account was opened at Child's Bank in the name of Joseph Moses Marsh, and the cheque of £6,137 8s. 9d. was paid in to the credit of that account and was credited as cash. On the same day, also, two cheques were drawn upon the account, one for £100 to self, and the other for £1 8s. 1d. to "J. A. Hales," and were cashed.

Shortly put, the means by which the money was obtained out of court were the fraudulent contrivances of Hales, either acting alone or in complicity with some other person or persons. There was no deed of appointment by John Moses Marsh—the document produced was a forgery; and no affidavit in verification of the petition had been made by Joseph Moses Marsh. The proceedings were in fraud of that person and the other persons beneficially interested. Ultimately, in October, 1895, Hales was, upon his own confession, convicted at the Old Bailey for forging the name of Joseph Moses Marsh on the back of the cheque for £6,137 8s. 9d.

Between July, 1895, and the 12th of August, 1895, the date at which Hales's fraud was complete, when he had got the fund in question out of court and under his control, and when the two cheques against it had been paid—there had been no communication of any kind between Hales and Clear & Green. On that 12th of August, about one o'clock, Hales called at the office of Clear & Green, and saw the former. Hales reminded Clear of his having spoken to him about some business that he was going to bring to Clear & Green. He said: "It is all done. I did it for you. I did not want to bother you. The cheque is waiting for your costs at the Paymaster-General's." Clear thereupon reprimanded him and asked him what business he had to use his name or the name of the firm. To which Hales replied: "I thought it was such a simple matter that it was not worth while. I thought I could carry it out and instructed counsel, and I have done everything necessary." To this Clear replied that he liked to know what was going on; that he did not like people to use their names, and that he had never allowed it on any occasion. Ultimately Clear took and cashed the cheque for £15, repaid to Hales £10 14s. 6d. out of its proceeds, which the latter said represented payments by him to counsel, and handed the balance, £4 5s. 6d. in cash to his partner, J. E. Green, who on the same day entered it thus in the cash-book of the firm: "Received cash of J. Hales, *re* Joseph, £4 5s. 6d." This was the sole connection of Green with the matter. Between one and two o'clock on the 12th of August, a cheque, payable to "self" drawn on account at Child's for £4,000, was cashed; on the 13th of August a like further cheque for £50 was cashed, and on the 14th of September a like further cheque for £20 was cashed. There then remained (after payment of these cheques) £1,966 0s. 5d. to the credit of the account, and that sum so remained up to October, 1895, when the fraud was discovered, and it has been recovered for the benefit of the persons entitled.

Upon this state of facts the persons defrauded petitioned the court for relief against the Paymaster-General or the Commissioners of the Treasury, under the Chancery (Funds) Act, 1872. The claim to this relief was not denied, but on the hearing of the petition it was alleged on the part of the Treasury that Clear and Green were, as officers of the court, liable to make good the moneys lost, and the court was asked so to order.

Clear, in his evidence at the trial, stated that he did not inquire, nor did Hales tell him, what was the nature of the business in which his name or that of his firm had been used, and that he did not ascertain till a much later period that his name or that of his firm had been used for a petitioner who was seeking payment of money out of court.

Kekewich, J., in his judgment, accepted as true the foregoing account given by Clear of the facts so far as he was concerned. The learned judge explicitly found that Clear had no reason to believe that Hales had intended to use or had used his name until the 12th of August, 1895. As to Green, he also explicitly acquitted him of all personal blame. His lordship, however, held (1) that it was the duty of Clear when on the 12th of August he first knew that his firm's name had been used by Hales without authority in proceedings in court, to have at once informed the judge of that fact; (2) that Clear by accepting the cheque of £15 for costs and placing it to the account of his firm had thereby condoned on behalf of his firm the unauthorized use by Hales of the firm's name; and (3) that Green as Clear's partner was together with Clear jointly and severally liable to make good to the Treasury so much of the money as was drawn out of the bank by Hales after the 12th of August, 1895—viz., the sums of £50 and £20, making, together with the sum of £15 for costs, a sum of £85.

The Commissioners of the Treasury, and also Green, and Clear, severally appealed from this decision.

Sir R. Finlay, S.G., and *Ingle Joyce*, for the Crown.—Clear is liable for £4,000, both because he authorized the use of his firm's name, and because he ratified what had been done: *In re Dangar's Trusts*, 37 W. R. 651, 41 Ch. D. 178; *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 35 W. R. 718, 18 Q. B. D. 714; *Barwick* v. *English Joint-Stock Bank*, 15 W. R. 877, L. R. 2 Ex. 259; *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43, 20 W. R. C. L. Dig. 16; *In re R. A. Ward*, 31 Beav. 1, 11 W. R. Ch. Dig. 100. He is liable even if he was not negligent. But here he ought to have applied at once to the court as soon as he found out that an improper use had been made of his name. Had he done, so the loss might have been prevented. Green is liable for his partner's act.

They also referred to Storey on Agency, section 244; *Freeman* v. *Rosher*, 13 Q. B. 780; *Lewis* v. *Read*, 13 M. & W. 834; *Bolton and Partners* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295; *Brook* v. *Hook*, 19 W. R. 508, L. R. 6 Ex. 89; Chalmers on Bills of Exchange (illustration 7 to section 24 of the Act of 1882); *In re Spencer*, 18 W. R. 240; *Brydges* v. *Branfill*, 12 Sim. 369; and *Norton* v. *Cooper*, 3 Sm. & G. 375.

Ashton Cross, for Clear.—Clear was guilty of no negligence—or, at any rate, of none that contributed to the loss. In none of the cases cited was the solicitor himself defrauded.

Witt, Q.C., and *E. de Witt*, for Green.—The jurisdiction against solicitors given by 35 & 36 Vict. c. 44 is merely punitive, and cannot be invoked against Green, who has done nothing wrong. It was not within Clear's powers under the partnership articles to employ Hales, who, as an uncertificated solicitor and undischarged bankrupt, had no right to act at all.

They referred to *Scholfield* v. *Lord Londesborough*, *ante*, p. 124, [1896] A. C. 514.

Stewart Smith, for the petitioners in the court below.

Sir R. Finlay, S.G., in reply, referred to section 16 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), and to Lindley on Partnership, 6th ed., pp. 137 *et seq.*

Cur. adv. vult.

Dec. 18.—Lord RUSSELL OF KILLOWEN, C.J., read the judgment of the court, which, after stating the facts, proceeded: The question then was, before Kekewich, J., and now is before us, whether on the facts stated the firm of Clear & Green or any, and, if so, which, member of the firm is liable for any, and, if so, for what, part of the moneys lost. The learned judge, as I understand, acquitted Clear of responsibility in respect of all moneys drawn from the account at Child's Bank up to and including the 12th of August. He says expressly that, in his judgment, no action, however energetic, on Clear's part, would have availed to stop the payment of the £4,000 cheque on the 12th of August, but he finds that Clear on that day condoned what he (Clear) thought was an irregularity in the use of his name, and the learned judge makes him liable to repay the amount of the £15 cheque, and for any loss by any withdrawal from Child's Bank after the date of the 12th of August. This would represent a liability of Clear for £15 and £50 and £20, in all £85. As to Green, the learned judge, while, as I have said, acquitting him of all personal blame, arrives at the conclusion that Clear was acting within the scope of the partnership authority in what he did, and that, therefore, Green is subject to the same liability as his partner. From these judgments there are cross-appeals. Green gave notice of appeal on the 21st of May, 1896, the Crown on the 22nd of May, 1896, and Clear on the 10th of June, 1896. On the argument before us the discussion proceeded on the appeal of the Crown, for whom it was contended that the learned judge had rightly found that Clear had on the 12th of August, 1895, condoned or ratified the use of his name, but that the learned judge had failed to carry that conclusion to its legitimate consequences by fixing Clear with the results, which, it was contended, followed upon the use of his name, and that he was legally liable for the entire loss—namely, £4,171 8s. 1d., and for the cheques of £15 and £10 for costs. It was further contended that Green was likewise liable for the acts of his partner. On the other hand, it was contended for Clear that his liability was limited to the repayment of the amount of the £15 cheque, and for Green that his liability was limited to the £4 5s. 6d. received by him for the partnership. We have now to consider these various contentions.

No question of jurisdiction was raised before us, but I think it important to state the principle upon which the count acts. It is that where negligence or other breach of duty is committed by a solicitor, an officer of the court, in a matter in which the court has seisin, the court may, and if it can do full justice will, summarily order its officer to make good the loss occasioned by his neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the act of negligence or misconduct.

In the present case the learned judge has divided the loss into (1) the loss which he considers occurred up to and including the 12th of August, and (2) that after the 12th of August; and he has fixed Clear and Green with the latter loss only. Before considering whether this is correct, it will be convenient to deal with the broader contention of the Crown—viz., that the firm are liable for all the loss whenever it occurred. Apart from the doctrine of ratification, it cannot be pretended that there was any ground for fixing Clear or Green with liability. Neither had done any blameworthy thing. Neither had authorized the use of the firm name. Neither knew up to the 12th of August that the firm name had in fact been used for any purpose, and when, on that day, Clear learned that it had been used, the mischief had been done, the money had gone out of the control of the court and into that of the perpetrator of the fraud. The money was lost, and the question was not whether the loss could be prevented, but whether any of it could be recovered. How had it been obtained? It had been obtained by reason of the order of the court of the 13th of July, 1895, which in its turn had been obtained by the fraudulent fabrication of the deed-poll and of the affidavit purporting to verify it, followed by the petition containing untrue statements, and the employment by Hales in Clear's name of counsel for the petitioner to support the petition, and of counsel by Hales in Hale's name to consent to the prayer of the petition. Of all this Clear and Green were ignorant. Indeed it is obvious that if Hales had not chosen to mention the cheque for £15 to Clear, in order to get out of it the fees paid to counsel, the fraud would have been equally successful and complete; or, again, if he had used the firm's name without any such conversation as occurred in July. When, then, is the true effect of what takes place on the 12th of August? To appreciate this one must recur to the conversation in July, when Clear was asked by Hales whether he would act for a formal party and said he would if instructed. On the 12th of August, Hales in effect says to Clear, "I did not think it worth troubling you about the formal business I mentioned in July. It was simple; I did it myself. There's a cheque for £15 for you, but you'll have to return me all for counsel's fees, which I have paid, except £4 5s. 6d., which you keep for yourself." Clear complained of the use of his name, reprimanded Hales, but kept and paid to his partner this £4 5s. 6d. I doubt whether this is any ratification in any real sense; but assuming that it amounts to ratification, of what is it ratification? At most it was ratification of the use of his name in a formal matter for a formal party. Is that enough to fix him with liability for what had been fraudulently done by Hales for his own purposes? I think not. Clear did not know that his name had been used for the petitioner, nor that the object of the petition was to obtain payment out of a fund in court. The amount of the cheque was not such as to suggest that the work had been other than the employment of counsel for a formal purpose, as for a change of investments or appointment of new trustees, or the like. In a word, there was nothing to suggest in the remotest way that Hales had for his own fraudulent purposes used Clear's name, and been a party to forgery and perjury in effecting those purposes. We are not called upon to act in business as if every man with whom we come into relations is a thief, and therefore men's actions are not to be judged by a standard of unbelief in professional honesty. To constitute a binding adoption of acts *a priori* unauthorized these conditions must exist: (1) The acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were. In the present case, although the name of Clear (J. Clear & Co.) was used, it is apparent that that user and the other fraudulent acts of Hales were done for his own purposes. It is admitted that Clear had no knowledge

of the fraud which had been committed, and in my judgment it is impossible properly to draw the conclusion that Clear by taking the cheque for £15 and keeping the £4 5s. 6d. intended unqualifiedly to take upon himself the responsibility for what had been done, however wickedly and fraudulently it had been done. To use the language of Kekewich, J., he condoned what he believed was a mere irregularity. Where the supposed ratification relates to acts as to which there is no pretence of any *a priori* authority, as in this case, where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were, or however culpable they were. I find an absence of such knowledge and an absence of any ratification except this—putting it at the highest—a ratification of the use of the name of the firm for a formal party. Such ratification is not enough to fix Clear or Green with the fraudulent acts of forgery and perjury or with the fraudulent statements in the petition to which Hales, to further his own ends, was a party. It follows from what I have said that, even if Clear had *a priori* authorized the use of his name for a formal party, he would not be responsible for the acts of fraud and forgery committed in this case by his supposed agent for that agent's own fraudulent purposes. In my judgment, therefore, the contention of the Crown fails as against both Clear and Green.

It remains to consider whether Kekewich, J., was right in fixing Clear and Green with the loss (as it is called) after the 12th of August as well as with the amount of of the £15 cheque. First as to Clear. Obviously the judgment must stand against Clear for the £15. He received the cheque for £15, part of the fund in court fraudulently obtained, and he has not validly discharged himself of it. As to the rest, I have already pointed out that in my judgment the loss was complete when the cheque of the Paymaster-General was credited as cash by Child's Bank on the 10th of August, two days before Clear knew that the firm name had been used, and that the only question then was whether any of that loss could be recovered back. I understand the learned judge to have proceeded on on the ground that Clear had failed in his duty in not promptly informing the court that his name had been used without his authority. But, assuming for the moment this failure of duty, did it prevent the recovery of any part of the money? It is said it did, for that if he had informed the court, a stop would have been put upon the account at Child's Bank, and the cheques for £50 on the 13th of August and for £20 on the 14th of September would not have been honoured. Is this so? I agree that Clear ought to have resented as grossly improper, the unauthorized use of his name. Suppose he had said so in stronger terms than he did to Hales, and added, as many men acting on a high standard of professional conduct would have done, "I will straightway inform the court," is it not probable that Hales would at once have withdrawn the bank balance? Is it not further probable that the balance of £1,965 0s. 5d. which was recovered, was allowed to remain because Hales was, in the absence of any threat of this kind, lulled into a false sense of security? Indeed, if Clear had gone to the court, all that he could have said was that he thought it proper to state that his name had been used without authority, but whether used for any improper purpose he could not say, and some time must have been occupied by inquiring before any action could be taken, and meanwhile it is not probable that Hales would have been idle. I cannot see my way, therefore, to the conclusion that Clear's silence in any sense led to any part of the loss. But further, to hold Clear liable to make good the £50 and £20 drawn out from Child's Bank after the 12th of August can only, in my judgment, be right upon the assumption that Clear knew or ought to have suspected that a dishonest use had been made of his name and that prompt action would, or might, prevent or lessen any loss following upon that dishonest use. But Clear had no knowledge or even suspicion of anything of the sort. To hold him liable for these sums is to hold him responsible for a breach of duty which is not imposed by any known legal principle, and which the court is not warranted in imposing on its own officers. To do so would be too oppressive on honest men desirous of doing right.

This conclusion is quite consistent with the cases relied upon by counsel for the Crown, for in all of them the solicitor who was held liable for money improperly obtained out of court, had done far more than Clear did in this case. In *Slater* v. *Slater*, 58 L. T. N. S. 149, the solicitor had allowed his name to be used for the petitioner upon whose application the money was obtained, and that solicitor actually received the money. So in *In re Dangar's Trusts* the solicitor held liable was the solicitor for the petitioner who obtained the money; he took an active part in obtaining the money, and his negligence, or that of his clerk, caused the loss. In *In re Ward* and in *Todd* v. *Studholme*, 5 W. R. 277, 3 K. & J. 324, the solicitor had the conduct of the suit and was held liable for his negligence in it. In *In re Spencer* the solicitors had acted for the petitioners, and their negligence caused the loss for which they were held liable. In *Brydges* v. *Branfill* the solicitors were the solicitors for the petitioners, and they received the money. Clear's conduct does not bring him within the principles applicable to any of these decisions.

As to Green, it follows from what I have said that as to him the question is narrowed to this —is he liable jointly and severally with Clear for the £15, or only for the £4 5s. 6d. which he received from Clear and paid into the bank account of the firm as part of the partnership assets? That he is liable for the £4 5s. 6d. is obvious, and upon the grounds which apply to the £15 cheque in the case of Clear. Is he liable for anything more? I think he is not. The learned judge, as I gather, proceeded on the ground that it was within the scope of the agency authority created by the partnership for one partner to allow the use of the name of the firm by another solicitor, and thereby to bind his co-partner. Is that sound? As a proposition of law I know of no authority for it, and I confess I should be surprised to find that it was usual to do so. But any such usage must be established by evidence; the court cannot, as a matter of law, say that there is any such usage, and I do not find that in this case any evidence to that effect was given or offered. Indeed, in this case, the question is not merely whether the permission to use the firm's name was within the scope of the partnership authority, but whether it was within such authority to ratify *ex post facto* the unauthorized use of such name. In the absence of any evidence of usage or course of business on these points, I come to the conclusion that the £15 cheque received by Clear was not received by him in respect of any transaction in which he had a right to engage on behalf of the firm. The receipt of the cheque was not the receipt of the firm, nor was Clear's knowledge of the receipt and of the circumstances under which he received it the knowledge of the firm. Green's liability began and ended with the receipt by him from Clear of the £4 5s. 6d. cash, and is confined

to that sum. The result, therefore, in my judgment, is that Clear's liability must be reduced to the sum of £15, and Green's to the sum of £4 5s. 6d., part of the £15, and the order appealed from must be varied accordingly.

Solicitors, *Hare & Co.*, for *The Solicitor for the Treasury; John Clear; J. E. Green; Mear & Fowler.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Dec. 17.

KIRKHAM *v.* ATTENBOROUGH.
KIRKHAM *v.* GILL. (*a*.)

Sale of goods—Goods delivered "on sale or return"—Passing of property—"Adopting the transaction"—Pledge of goods—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 18, *r.* 4 (a).

Where a person to whom goods are delivered on sale or return pledges them he thereby does an act "adopting the transaction" within the meaning of section 18, *rule* 4 (a), *of the Sale of Goods Act,* 1893, *and he becomes the purchaser, and the seller cannot recover the goods from the pledgee, but can only sue the purchaser for the price.*

These were two appeals from the judgment of Grantham, J., in favour of the plaintiff, at the trial of the actions without a jury.

In *Kirkham* v. *Attenborough* the action was brought to recover possession of a diamond necklace and a brooch which had been pledged by Winter with the defendant, a pawnbroker. The plaintiff, who was a manufacturing jeweller, from time to time delivered various articles of jewellery to Winter "on sale or return," and among others the two articles in question in this action. Winter, without having paid the plaintiff the price, pledged the two articles with the defendant, who in good faith advanced money upon them. Winter having died, the plaintiff discovered that they had been pledged, and brought this action to recover possession of them. The facts in *Kirkham* v. *Gill* were of a similar nature. The learned judge gave judgment in both cases for the plaintiff.

The defendants in each case appealed. Both appeals were argued together.

H. D. Bonsey (*C. L. Attenborough* with him), for the defendant in *Kirkham* v. *Attenborough*; and

Bucknill, Q.C. (*C. L. Attenborough* with him), for the defendant in *Kirkham* v. *Gill*.—The property in these articles passed to Winter when he pledged them. By exercising that right of ownership in them he "adopted the transaction": section 18, rule 4 (*a*), of the Sale of Goods Act, 1893. He dealt with them as his own, and thereby signified his acceptance of them as purchaser, and the seller could only sue him for the price: *Brown* v. *Marr*, 7 Court Sess. Cas., 4th series, p. 427. The property passes if the person to whom the goods are delivered does some act inconsistent with their return. Goods delivered on sale or return gives the buyer alone an option to return them within a reasonable time: *Moss* v. *Sweet*, 16 Q. B. 493. [They also referred to *In re Florence, Ex parte Wingfield*, 27 W. R. 346, 10 Ch. D. 591, and section 35 of the Sale of Goods Act, 1893.] Secondly, if the property did not pass to Winter, the plaintiff entrusted Winter with the symbol of property, and enabled him to hold himself out as the owner, and was therefore estopped from denying Winter's title to deal with the goods: *Brown* v. *Marr*; *Henderson* v. *Williams*, 43 W. R. 274, [1895] 1 Q. B. 521.

McCall, Q.C., and *W. E. Hume Williams*, for the plaintiff in each case.—Section 18 of the Sale of Goods Act, 1893, deals with the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Therefore, the only question here is, When did both parties intend that the property should pass? The words "adopting the transaction" in section 18, rule 4 (*a*), mean doing some act as between buyer and seller contemplated by the contract, and within the intention of both parties, so as to carry out the contract. They do not include any act inconsistent with a return of the goods which is detrimental to the interests of the seller. The rule should not be interpreted so as to defeat the intention of the parties. Winter here could have redeemed the goods, and returned them to the plaintiff. *Brown* v. *Marr* was decided before the Sale of Goods Act, 1893, came into operation, and is no authority upon the construction of that statute.

Lord ESHER, M.R.—The contract between the plaintiff and Winter was for the delivery of certain goods to the latter on sale or return. That was the whole contract. That is a contract well known in business, and the courts have been called upon to construe that contract, and have placed an interpretation upon it. When a contract has become common in business, and the courts have placed an interpretation upon it, then all courts ought to adopt that interpretation. The contract being simply what I have stated, the property in the goods does not pass at the time when the contract is made, but it passes upon something subsequently being done. The person who has received the goods may return them within a reasonable time, but the option of returning them is solely his, and the person who has delivered the goods to him cannot demand their return at any time, his only right being to sue the other for the price or value of the goods. The courts having placed that construction on the contract, we must now see what act of the proposed buyer will have the effect of passing the property. Upon this point we must look at the principles adopted by the courts, and now inserted in a code. We must see what it is which the person who has received the goods on sale or return must do to show that he has accepted the goods as sold to and bought by him.

By section 18, rule 4, "when goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer: (*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction." The words are most unhappily chosen. When the person to whom the goods are delivered signifies his approval or acceptance of them as the purchaser that gives the other party a right to bring an action for the price of the goods. The seller cannot demand the return of the goods; he can only sue for the price. Then we come to the words "or does any other act adopting the transaction." We must give those words some meaning. What transaction is he to adopt? Clearly not the delivery of the goods on sale or return, because that has been already effected. The words must mean adopting the transaction in such a way as to make him the purchaser of the goods. It must be some act which signifies that he has adopted the transaction in the sense that he is to be considered as the purchaser of the goods. If he does any act which is inconsistent with his being other than the purchaser, that is sufficient. In the present case the person to whom the goods were delivered on sale or return pawned them. He cannot

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

get them back from the pawnbroker without repaying the sum advanced upon them. That act is inconsistent with his free power to return them. He ought not to have done that unless he treated himself as the purchaser. Therefore he has done an act which is only consistent with his being the purchaser, and he thereby made himself the purchaser.

The judgment must therefore be reversed and entered for the defendant in both cases.

LOPES, L.J.—I am of the same opinion. It is important to consider the meaning of the contract for the delivery of goods on sale or return. The position of a person who receives goods on sale or return is this: He has the option of becoming the purchaser in three ways. First, he may buy them at the price named by the seller. Secondly, he may retain them so long as to make it unreasonable that he should return them. Or, thirdly, he may do something inconsistent with his being other than the purchaser. The words of the section are difficult to construe. If a person to whom goods are delivered on sale or return retains them for an unreasonable time, he does something which is inconsistent with their return, and he thereby adopts the transaction. Again, if he does any other act inconsistent with their return, such as selling or pledging them, he will no longer have free control over the goods, and he brings himself within the words of the section as "adopting the transaction." If that is the true construction of the Act, it is clear that the defendant is entitled to retain these goods, inasmuch as the pledge was an act inconsistent with the return of the goods, inconsistent, that is to say, with Winter being other than the purchaser of them.

RIGBY, L.J., concurred.

Appeals allowed.

Solicitors for the plaintiff, *Colyer & Colyer.*

Solicitors for the defendants, *Stanley Attenborough & Tyer; Attenborough & Son.*

From Q. B. Div.
Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 30.

ROBERTS *v.* SECURITY CO. (LIMITED). (*a.*)

Insurance—Burglary—Policy signed and sealed—Payment of premium—Condition precedent—Recital that premium had been paid—Estoppel—Waiver.

On the 14th of December, 1895, the plaintiff signed a proposal form addressed to the defendant company for an insurance against loss by burglary, the form stating that no insurance would be considered in force until the premium was paid. The first premium was stated to be 9s. 11d., to the 1st of January, 1897, and 9s. 9d. annually afterwards. On the 18th of December a protection note was given to the plaintiff, reciting the proposal and declaring the plaintiff to be provisionally protected, subject to the conditions contained in the form of policy used by the company, for seven days from that date. The seven days expired on the 25th of December, and on the night of the next day the plaintiff suffered a loss by burglary. On the 27th of December, at a meeting of the directors of the company, who were ignorant of the loss, a policy was duly signed and sealed insuring the plaintiff from the 14th of December, 1895, to the 1st of January, 1897, the policy reciting that the first premium, 9s. 11d., had been paid, and one of the provisoes therein stated that no assurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. No premium was ever paid, and the policy never left the company's office.

Held, that the company must be taken to have waived the prepayment of the premium, and that they were therefore liable on the policy.

Appeal by the defendants from the decision of the Divisional Court (Grantham and Wright, JJ.), affirming the judgment of the Leeds County Court judge in an action upon a policy of insurance against loss by burglary and housebreaking.

On the 14th of December, 1895, the plaintiff signed a proposal form for an insurance for £167 on furniture and other chattels against loss by burglary and housebreaking, whereby he agreed to accept a policy subject to the usual conditions prescribed by the company and indorsed on that policy, and on the back of the form it was stated that no insurance would be considered in force until the premium was paid. The first premium was 9s. 11d. to the 1st of January, 1897, and 9s. 9d. for each year afterwards, the premium being renewable on the 1st of January in each year. The extra 2d. in the first premium was for the "odd time," which was defined to mean that policies were renewable on the 1st of the month, and the premium for the odd time over twelve months must be added to the year's premium.

No premium was ever paid.

On the 18th of December, 1895, the following protection note, signed by the company's agent, was given to the plaintiff: "Mr. Roberts, having made a proposal to this company for insurance against loss arising from burglary and housebreaking for the sum of £167 on property described in his proposal, and having paid to me the sum of £ (left blank), is hereby declared to be provisionally protected against that risk (subject to the conditions contained in and indorsed on the form of policy used by the company) for seven days from this date, or until the proposal be in the meantime declined." The seven days expired on the 25th of December, and on the night of the 26th of December a burglary was committed and a loss occurred under the policy.

On the 27th of December at a meeting of the directors of the company, who were in ignorance that a burglary had been committed, a policy was signed by two directors and the secretary, and the seal of the company was affixed thereto, insuring the plaintiff as described in the proposal form from noon of the 14th of December, 1895, to noon of the 1st of January, 1897. The policy recited that the first premium (9s. 11d.) had been paid by the assured to the company, and one of the provisoes therein stated that no assurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid.

The policy never left the company's office.

The defendants denied liability under the policy on the ground that there was no concluded contract of insurance. The plaintiff in his evidence stated that the only reason why he had not paid the premium was that he was never asked for it, and that he was always ready to pay it.

The county court judge held that the prepayment of the premium had been waived, and gave judgment for the plaintiff, and the Divisional Court affirmed this decision.

Channell, Q.C. (*G. M. Cohen* and *A. Neilson*), for the defendants.—All the documents expressly stated that no insurance should be in force until the premium was paid. The payment of the premium was a condition of the policy coming into operation. The

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

burglary took place after the seven days during which the protection note was in operation, and before the policy was signed. The policy expressly stated that no insurance should be held to be effected until the premium was paid. The policy never left the company's possession, and was not a contract by the company until delivered to the assured in exchange for the premium. The recital in the policy that the premium had been paid was incorrect.

He referred to *Xenos* v. *Wickham*, 16 W. R. 38, L. R. 2 H. L. 296; *Canning* v. *Farquhar*, 34 W. R. 423, 16 Q. B. D. 727.

Longstaffe, for the plaintiff, was not called upon.

Lord ESHER, M.R.—In this case there has been a proposal for insurance, and that proposal has been accepted. If the matter had stopped there we should have had to consider the effect of the proposal and the acceptance. But the matter has gone beyond that. There is a policy signed and sealed on the 27th of December. What, therefore, would have been the effect of the proposal and the acceptance becomes immaterial. Here there is a policy. Was this policy executed upon condition that it was not to be an effectual policy until certain things were fulfilled? The policy was duly signed and sealed by the company. The policy, it was said, was kept in the company's office, and was never delivered to the plaintiff. There is no suggestion that the policy was delivered to the secretary to be held as an escrow—that is, until some condition was fulfilled. The policy was executed, and it remained, I suppose, in the hands of the company's secretary. The company might have delivered it to their secretary as an escrow, but this was not done. The policy therefore having been executed, and no condition being attached to its delivery, it became the company's concluded contract. That being so, we must construe the policy and see how it applies. From what time did it take effect? It insured the assured from noon of the 14th of December, 1895, to noon of the 1st of January, 1897. The argument against that is that the recital that the premium had been paid was untrue, and it was proposed to show that the premium had never been paid, and that therefore the policy never came into operation. In the first place the company are not at liberty to show that as against their own act and deed. But, in my opinion, the best mode of dealing with that argument is this. The company have treated the premium as paid, and have therefore waived its prepayment. The company cannot in this case get rid of their liability, after the deed has been executed and the loss has happened, merely by showing that the premium has not been paid. The result, therefore, is that the company are liable to pay the plaintiff, but can deduct the premium from the sum payable.

LOPES, L.J.—I am of the same opinion. I think that the proposal and the protection note came to an end when the policy was executed. The question we have to determine is whether there is a concluded agreement between the parties. In my opinion, when the policy was duly executed it became a concluded contract. It is said that we can go back to the statement in the proposal that no insurance would be considered in force until the premium had been paid. But we find in the recitals in the policy a statement that the premium has been paid. The company seek to go against their own solemn statement. In my opinion they are estopped from saying that the premium has not been paid; and even if there is no estoppel the company must be taken to have waived the prepayment of the premium. The execution of the policy, under the circumstances, is conclusive proof of a concluded agreement. It seems to me that if the assured had gone to the company's office the day after the execution of the policy and tendered the premium and demanded the deed, the company would have had no answer to the demand.

RIGBY, L.J.—I am of the same opinion. The signing and sealing of the policy created an insurance as from noon of the 14th of December, 1895. The annual premium is to be 9s. 9d. I find, however, that the first premium covers the period from the 14th of December, 1895, to the 1st of January, 1897, and amounts to 9s. 11d. That shows an extra 2d. for the few days remaining of the current year from the 14th of December, 1895, to the 1st of January, 1896—that is to say, for the period partly before and partly after the policy had been executed. The company, at the very least, waived the prepayment of the 2d., which was the sum applicable to the period during which the loss occurred. I think that the company also waived the prepayment of the whole 9s. 11d., but that becomes immaterial because the loss occurred before the end of the year 1895. The policy most certainly is a deed. It is in the form of a deed, and I do not see how it is possible to say that there is no bargain. Even if it were shown to have been delivered as an escrow upon condition that it was not to be handed over to the assured until payment of the premium, still it would be as good and complete a deed, when the condition was fulfilled, as if it had been delivered unconditionally at the first. If, therefore, the assured had gone to the office of the company with the premium, the deed must have been handed over to him. I do not think that he ought to lose his right because he has not actually tendered the premium. He was perfectly ready to pay it. His right under the concluded agreement is to have the amount of the loss made good to him upon his paying the premium of 9s. 11d.

Appeal dismissed.

Solicitors for the plaintiff, *Harman, Ward, & Collier.*

Solicitors for the defendants, *Burchell & Co.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 20.

COUNTY COUNCIL OF MIDDLESEX *v.* ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION. (*a.*)

Poor law—Rating—Exemptions—County council offices—User for administrative purposes—Joint occupation with quarter sessions.

Premises were occupied as to one part by a county council exclusively for the purpose of the administrative business of the county; another part of the premises was occupied by the county council jointly with the quarter sessions.

Held, that occupation for the administrative business of the county was not occupation for a "Crown" purpose so as to exempt the county council from being rated for the relief of the poor; that as to the part of the premises occupied jointly with the quarter sessions the county council must be rated in proportion to the extent of their occupation.

Decision of the Divisional Court (Cave *and* Wills, JJ.), 44 *W. R.* 666, *affirmed.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Appeal by the Middlesex County Council from a decision of the Divisional Court (Cave and Wills, JJ.) on a case stated under section 40 of the Valuation (Metropolis) Act, 1869, reported 44 W. R. 666.

The name of the Middlesex County Council was inserted in a supplemental valuation list of the united parishes of St. Margaret and St. John the Evangelist, Westminster, in the St. George's Union, as that of the occupiers of "that part of the Guildhall, Westminster, being the county hall, committee rooms, offices, office of the county surveyor, vaults, and rooms used by the caretaker, and such parts of the building as are used by the Middlesex County Council for administrative purposes as distinguished from Crown purposes."

The county council were assessed in respect of their occupation of the premises at £225 gross and £188 rateable value.

Parts of the Guildhall were used exclusively by the quarter sessions, except that the courts were occasionally used by the county council for the purpose of hearing applications for music and dancing licences. Other parts were used exclusively by the county council. Other parts, including the offices of the clerk of the peace, who was also *ex officio* clerk of the county council, were used jointly by the county council and the quarter sessions.

The questions for the opinion of the court were:

1. Is the Guildhall, or any and what part thereof rateable and within the description of rateable property the subject of the Valuation (Metropolis) Act, 1869.

2. Upon what principle is the Guildhall, or any rateable part thereof, to be valued and assessed for the purpose of the poor or other rates.

3. Is the question whether the parts of the building used by the county council exclusively are capable of being let separately from the rest of the building material.

The Divisional Court held that the parts of the building used exclusively for the administrative purposes of the county council were not exempt from rating, and that as to such parts of the premises as were used jointly, the occupations must be apportioned, and that, so far as they were occupied by the county council they were rateable: see 44 W. R. 666.

The county council appealed.

Danckwerts, for the appellants.—First, the whole building is exempt from rating, being used for "public purposes." The administrative duties performed by the county council are the same as were before 1888 performed by the justices in quarter sessions, and the premises occupied by quarter sessions for administrative county business were exempt from liability to poor rate: *Hodgson* v. *Carlisle Local Board*, 8 E. & B. 116; *Commissioners of River Tone* v. *Ash*, 10 B. & C. 349; *Mersey Docks* v. *Cameron*, 13 W. R. 1069, 11 H. L. Cas. 443; *Reg.* v. *Justices of Worcestershire*, 11 A. & E. 57; *Nicholson* v. *Assessment Committee of Holborn Union*, 35 W. R. 230, 18 Q. B. D. 161; *Coomber* v. *Justices of Berks*, 32 W. R. 525, 9 App. Cas. 61. Secondly, assuming that the purposes, for which the county council use that part of the building occupied by them exclusively, are not "public" purposes, nevertheless the county council is not rateable, for where a building is mainly used for "public" purposes as is the case here, you cannot pick out certain parts, not so used, and rate them: *Martin* v. *Assessment Committee of West Derby*, 31 W. R. 489, 11 Q. B. D. 145; *Pearson* v. *Assessment Committee of Holborn Union*, [1893] 1 Q. B. 389, 41 W. R. Dig. 165.

Bosanquet, *Q.C.* (*W. C. Ryde* with him), for the respondents.—The use of parts of the building for the administrative purposes of the county council is not such a user as will entitle the county council to exemption. A building is only exempt if used for "Crown" purposes, that is to say, it must be used for the purpose of that part of the government of the county which is theoretically administered by the Crown: *Greig* v. *University of Edinburgh*, L. R. 1 H. L. Sc. 348. (He was stopped by the court.)

Danckwerts, in reply, cited: *R.* v. *Justices of Glamorganshire*, 5 T. R. 279.

Lord ESHER, M.R.—The county council are described in the valuation list as occupiers of the premises in question. No point is raised by the case as to whether the county council were rightly put in the list as occupiers, and the question raised by the case is whether the county council is liable to be rated in respect, not of the whole, but of certain parts of the building. The whole building is in the occupation of the county council, but a part of the building is used exclusively by the justices for the purposes of the judicial side of their jurisdiction as justices in quarter sessions. Other parts are used jointly by the justices when performing their administrative functions and by the county council. Other parts are not used by the justices at all, but are used exclusively by the county council in carrying out the duties entrusted to them by Parliament. The parts of the building in respect of which the county council's name has been inserted in the valuation list are the parts used jointly by the county council with the justices and the parts used exclusively by the county council.

It has been contended that no part of the building is rateable because it is said that the whole building is used for public purposes. In my opinion that argument is contrary to several decided cases in the House of Lords and the Court of Appeal. The purposes for which the county council use their part of the building are no doubt in one sense "public purposes," but they are not "Crown" purposes within the definition given in the House of Lords in *The Mersey Docks* v. *Cameron* by Lord Westbury and Blackburn, J., both of whom draw a distinction between public purposes properly so-called, and Crown purposes which are no doubt public but are also something more. I think that that case is an authority for saying that those parts of the building which are needed exclusively by the county council must be rated.

As to the part of the building which is used jointly with the justices, I think that if the justices had used that part for judicial purposes, there might have been some question whether the county council was not exempt from rateability in respect of their occupation of that part. The justices, however, use that part solely for administrative purposes which would not come within the definition of Crown purposes, and that being the case the county council are liable to be rated in respect of their occupation of that part. I am, therefore, of opinion that the judgment of the Divisional Court was perfectly right.

It is said that the court should have specifically determined which rooms in the building were rateable. The court has, however, laid down the principle on which certain portions of the building are rateable, and then the court said that a skilled person acting on this principle would be perfectly competent to deal with the matter. In so dealing with the case the Divisional Court was in my opinion quite right, and this appeal must therefore be dismissed.

LOPES, L.J.—The county council have been treated as rateable in respect of so much of the Guildhall as is in their occupation. They claim exemption on the

ground that they use the building for public purposes. There is nothing in the Statute of Elizabeth exempting any occupier from liability to the poor rate, beyond what is involved in the position that the Crown is not bound by the Act, because it is not expressly mentioned in it. Up to the time of the case of *The Mersey Docks* v. *Cameron* there was no doubt considerable laxity in dealing with these questions, but in that case it was clearly laid down by the House of Lords that public buildings are liable to be rated, provided that they are not used for Crown purposes. Down to the year 1888 I think that probably the Guildhall at Westminster was exempt, on the ground that it was used by the justices for judicial purposes and for nothing else, because at that time the administrative business of the county was done by the justices in quarter sessions assembled. In 1888 the Local Government Act was passed, which brought about a great change. The judical work of justices remained at quarter sessions, and continued to be work done by virtue of their office as justices—that is, servants of the Crown. But the administrative work of the county was transferred to the county council, a body so constituted that it might or might not consist of justices. The county council did not derive its authority from the Crown, but was elected. The result is that the exemption from rateability only applies to that portion of the building which is used for Crown purposes. So much of the building as is used for the administrative purposes of the county council is rateable.

Mr. Danckwerts argued ingeniously that the services of the justices, which had been transferred to the council, were still imperial services, and that therefore the exemption still applied to them, although they were discharged by different persons. In other words his argument comes to this, that the exemption is in respect of the services rendered, and not of the person who renders them. It is an ingenious argument, but it cannot prevail. For these reasons I am opinion that the appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. The question is whether premises occupied by a county council for the purpose of performing their administrative duties are within the statute of 43 Elizabeth c. 2. It seems to be a remarkable thing to suggest that they are not. There is no doubt that for a long period prior to the decision of the House of Lords in *Mersey Docks* v. *Cameron*, erroneous opinions prevailed as to the existence of exceptions from rateability. It is also true that those earlier decisions were not expressly overruled by the House of Lords, but I am clear that not one of the cases decided prior to the House of Lords case is an authority in this case. I do not deny that there are cases in which it has been held that justices in quarter sessions assembled are representatives of the Crown, and that the premises occupied by them are exempt from rateability. But there is no case decided in which a body like the county council, using a building solely for administrative purposes connected with local government, has been held exempt. There being no previous decisions applicable, we must go back to the statute, 43 Eliz. c. 2. When the matter is so looked at, I do not see how there can be any doubt about it. In my opinion this building is clearly within the statute. There are parts of the building which are not in the exclusive occupation of either the justices or the county council. I should have thought that there would be some difficulty in saying that there was any exemption at all in respect of that part of the building, but that question is not raised in this case, and therefore I do not express any opinion as to that. But I have no doubt whatever that the county council are rateable in proportion to the extent to which they use those parts of the building. Having considered the judgments delivered in the court below, I think that they have laid down the true principle applicable to this case.

Appeal dismissed.

Solicitor for appellants, *R. Nicholson.*

Solicitor for respondents, *W. J. Fraser.*

High Court of Justice.

Chan. Div. } Stirling, J. } Oct. 30, 31; Nov. 17, 18, 28

In re THE ROUNDWOOD COLLIERY CO.
LEE *v.* THE ROUNDWOOD COLLIERY CO. (*a.*)

Company—Voluntary winding up of company—Landlord and tenant—Distress put in before commencement of winding up—Staying proceedings—Companies Act, 1862, *ss.* 87, 134—*Mining lease—Power of distress extending to chattels on premises other than those demised by the lease—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 6—*Bills of Sale Act* (1878) *Amendment Act,* 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 8.

The rules laid down in the case of the compulsory winding up of a company in In re The Great Ship Co., 12 *W. R.* 139, 4 *De G. J. & S.* 63, *and* In re Lancashire Cotton Co., 36 *W. R.* 305, 35 *Ch D.* 656—*that if an execution is issued or a distress levied before the commencement of the winding up, permission will be given to proceed to sale unless there are special reasons rendering such a course inequitable, while, in the absence of special reasons, such permission will be refused where the execution is issued or the distress levied after the commencement of the winding up—apply to the case of a voluntary winding up.*

The commencement of a voluntary winding up is the time of the passing of the second or confirmatory resolution.

A power of distress in a mining lease which enables the lessor to seize chattels on premises other than those demised by the lease is a licence to take possession of personal chattels as security for a debt within section 4 *of the Bills of Sale Act,* 1878 *and, accordingly the lease must be registered as a bill of sale.*

These were two motions—one on behalf of the liquidator of the company, the other on behalf of the plaintiff in a debenture-holder's action—seeking to restrain the further proceeding with two distresses levied by two landlords of land held by the company under leases from them.

Two questions were raised, the first of which applied to both distresses. The second to one only.

The first was whether the distresses ought to be restrained under the jurisdiction conferred by the Companies Act, 1862.

The second question was whether one of the distresses was invalid on the ground that it was made under a power in the lease which rendered it necessary that the lease should be registered as a bill of sale, there having in fact been no registration of the lease.

The facts were as follows:

The company was formed in 1889, and in 1890 became the assignees of a lease by Mr. Foljambe,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

dated the 7th of November, 1890, of a colliery and seams of coal for thirty years, at a rent of £1,600 per annum and royalties.

By a lease dated the 20th of November, 1891, Lord Effingham demised to the company certain seams of coal adjoining those demised by the former lease at certain rents and royalties.

Under both leases rent was in arrear in September, 1896.

On the 24th of September, 1896, a general meeting of the company was held, at which a special resolution was passed that the company should be wound up voluntarily.

On the 1st of October, 1896, the writ in a debenture-holders' action was issued.

On the 12th of October two distresses were put in, one by Mr. Foljambe, the other by Lord Effingham.

On the 13th of October a general meeting of the company was held, at which the resolution passed on the 24th of September was duly confirmed, and a liquidator was appointed.

On the 15th of October the usual judgment was given in the debenture-holders' action, and the liquidator was appointed receiver and manager on behalf of the debenture-holders.

The power of distress in the lease granted by Lord Effingham, which was affected by the second question in the case, will be found fully set out in the judgment.

Buckley, Q.C., and *Eustace Smith*, for the liquidator.—This is not a common law power of distress, but a license to take possession: Bills of Sale Act, 1878, s. 6. An attornment clause in a mortgage is a bill of sale: *In re Willis*, 36 W. R. 793, 21 Q. B. D. 384. Under section 4 of the Bills of Sale Act this clause is a bill of sale. Section 6 was introduced to meet the power of distress given by attornment, and was not to affect a contractual power of distress. This power, however, is to distrain on goods which are not on the land demised, and is not a common law power of distress due to an attornment. The distress ought to be restrained on the ground that the landlords knew that the company was in liquidation. We also say that this is a proceeding which ought to be restrained by the court under the jurisdiction conferred by the Companies Act, 1862.

They also referred to *Thomas* v. *Patent Sionite Co.*, 29 W. R. 349, 596, 17 Ch. D. 250; *Tennent* v. *City of Glasgow Bank*, 27 W. R. 649, 4 App. Cas. 615; *Pulbrook* v. *Ashby*, 35 W. R. 179, 56 L. J. Q. B.

Younger, for the plaintiff in the debenture-holders' motion, adopted the same arguments.

Graham Hastings, Q.C., and *Upjohn*, for the landlords.—We submit that there is no jurisdiction under the Companies Act, 1862, to restrain these distresses. An injunction will not be granted under section 85 of that Act on the application of the liquidator under section 138 unless the case fall within section 163. If there has been a distress before the commencement of the winding up the court cannot interfere: *In re Great Ship Co.*, 12 W. R. 139, 4 De G. J. & S. 63; *Ex parte Maclaren, In re McColla* 29 W. R. 389, 16 Ch. D. 535. [STIRLING, J.—Has it ever been held that in a voluntary winding up the court may not exercise its jurisdiction under section 85?] We do not know of any case to that effect. [*Buckley, Q. C.*, referred to *Westbury* v. *Twigg & Co.*, 40 W. R. 208, [1892] 1 Q. B. 77.] Our point is that the court has no jurisdiction to stop a distress once levied. The court can put an end to an action, but where an action is finished it cannot stop a man from levying execution: *In re Thurso New Gas Co.*, 38 W. R. 156, 42 Ch. D. 486. This is a question of a distress, and the distress is complete when the sheriff has seized the goods. Section 85 does not relate to a case where a man has got a security, but where he is not secured and is going to get a distress you may stop him. [STIRLING, J.—Is not a distress a proceeding?] We submit not. [*Buckley, Q.C.*, referred to *In re South Kensington Co-operative Stores*, 29 W. R. 662, 17 Ch. D. 181.] There is no case in which a distress has been levied before the winding up has commenced and not been proceeded with. "Proceeding" in section 85 is *ejusdem generis* as action or suit. Our proposition is that when a man has arrived at his journey's end the court will not interfere. Sections 85 and 87 are quite different to section 163. It must be a proceeding against the company which can be enforced against its property. [STIRLING, J., referred to *Re Exhall Mining Co.*, 4 De G. J. & S. 377, 12 W. R. Dig. 136.] Section 85 cannot alter anything which has been done before the winding-up.

As to the second point, section 6 of the Bills of Sale Act, 1878, aims at securities for money lent: *Pulbrook* v. *Ashby*, and the applicants must make out that this power of distress is within this section. This is not a mere power to seize chattels, but a rent-charge: *Daniel* v. *Stepney*, 22 W. R. 662, L. R. 9, Ex. 185. The power in that case was very similar to the present one, which is at any rate good as against the lessee. We submit that this power does not come within the Bills of Sale Act at all, but at any rate it is sufficiently provided for by section 6, which is supplemental to the interpretation clause and contains an express exception of a mining lease. In any case the Bills of Sale Act does not apply to the securities of a company incorporated under the Act of 1862: *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627. A licence to seize goods followed by seizure constitutes a security created by the man whose goods they are, and the case is the same as if the goods had been handed over by the debtor himself if he was not a party to the seizure at the time. They also referred to *Wheatley* v. *Silkstone Colliery Co.*, 33 W. R. 797, 29 Ch. D. 715; *Robson* v. *Smith*, 43 W. R. 632, [1895] 2 Ch. 118; *Government Stock Investment Co.* v. *Manila Railway Co.*, 44 W. R. 166, [1895] 2 Ch. 551; *Biggerstaffe* v. *Rowlatts Wharf*, 44 W. R. 536, [1896] 2 Ch. 93; *In re New City Constitutional Club*, 35 W. R. 421, 34 Ch. D. 646; *In re London and Devon Biscuit Co.*, 19 W. R. 943, L. R. 12 Eq. 190; *In re Hawkins*, 16 W. R. 451, 1136, L. R. 3 Ch. App. 787; *In re Withernsea Brickworks Co.*, 29 W. R. 178, 16 Ch. D. 337; *In re London Cotton Co.*, 14 W. R. 575, L. R. 2 Eq. 53; *In re Marriage, Neave, & Co., ante*, p. 42, [1896] 2 Ch. 663: *Krehl* v. *Central Gas Co.*, 18 W. R. 1035, L. R. 5 Ex. 289.

Buckley, Q.C., in reply.—A distress is a proceeding within the meaning of section 85 or section 87 of the Companies Act. The point as to time is immaterial: *In re Lancashire Cotton Co.*, 36 W. R. 305, 35 Ch. D. 656; *In re Brown, Bailey, & Dixon*, 30 W. R. 5, 18 Ch. D. 649. The fact that it is a voluntary winding up makes no difference. The court can always interfere in a proceeding. If a distress is a proceeding a sale under a distress is a proceeding in that distress. This has been decided in the case of an execution: *In re Perkins Beach Lead Mine Co.*, 26 W. R. 164, 7 Ch. D. 371.

He also referred to *In re General Rolling Stock Co.*, 20 W. R. 762, L. R. 7 Ch. App. 646; *Walker* v. *Banagher Distillery Co.*, 1 Q. B. D. 129, 24 W. R. Dig. 215; *Rose* v. *Garden Lodge Coal Co.*, 26 W. R. 353, 3 Q. B. D. 235; Buckley on the Companies Acts, p. 234.

Cur. adv. vult.

Nov. 28.—STIRLING, J., after stating the facts,

continued: The first point, which applies to both distresses, is that the court ought to restrain both under the jurisdiction which it is said is conferred by the Companies Act, 1862. That Act contains no provisions as to distress expressly applicable where the winding up is purely voluntary, but section 138 enables the liquidator in a voluntary winding up to apply to the court to exercise in respect of any matter all or any of the powers which the court might exercise if the company were being wound up compulsorily; and it is asserted on the one hand and denied on the other that in the case of a compulsory winding up the court has power to restrain further proceedings under a distress levied or execution issued at the commencement of a winding up, but not completed by sale. Undoubtedly in one of the earliest cases on the subject, *In re Great Ship Co.*, 12 W. R. 139, 4 De G. J. & S. 63, great doubt was expressed as to the existence of the jurisdiction by both or one of the learned judges who there constituted the Court of Appeal. It is said on behalf of the landlords that it has never yet been decided that the jurisdiction exists; while on behalf of the applicants the contention is that, although there may be no express authority on the point the course of subsequent decisions as shown by such cases as *In re Exhall Mining Co.; In re Perkins Beach Co.; In re Artistic Colour Printing Co.*, 28 W. R. 943, 14 Ch. D. 502; *In re South Kensington Stores;* and *In re Lancashire Cotton Co.*, and others, proves that the doubts expressed as to the existence of the jurisdiction in *In re Great Ship Co.* had been removed. These last-mentioned cases do appear to me, as at present advised, to bear out the contention of the applicants. I do not, however, express a final opinion on the matter, for I have come to the same conclusion as the learned judges who decided *In re Great Ship Co.*, that the jurisdiction, if it exists, ought not to be exercised in the present case. [His lordship read the judgment of TURNER, L.J., in that case, and continued:] The result I understand to be that a creditor who has issued execution or a landlord who has levied distress before the commencement of the winding up will be allowed to proceed to sale unless there is established the existence of special reasons making it inequitable that he should be permitted so to do. On the other hand, the case of *In re Lancashire Cotton Co.*, shows that a creditor who does not issue execution or a landlord who does not levy a distress until after the commencement of the winding up will not be allowed to proceed unless there are special reasons which render such a course inequitable. In applying these rules to applications made in a voluntary winding up, the first enquiry is, What is the commencement of a voluntary winding up? That was long ago settled to be the time of the passing of the second or confirmatory resolution where the winding up is resolved upon by special resolution: *Weston's case*, 17 W. R. 510; L. R. 4 Ch. App. 42. It follows that in the present case these distresses had been put in force at the commencement of the winding up, and consequently the discretion of the court is to be exercised according to the rules laid down in *In re Great Ship Co.* The distresses, therefore, ought to be allowed to proceed unless there are special reasons which render it inequitable that they should be permitted so to do.

On what special grounds then is the present application based? It is remarkable that there is not in the affidavits filed in the case any statement or even suggestion of any fact (except the passing of the first resolution on the 24th of September) which would render it inequitable to permit the landlords to proceed. At the bar, attention was called to the date of the notice of distress—viz., the 13th of October; it is said that the usual practice is to give notice of the distress immediately it is levied, and I am asked to draw the inference that the landlords were proceeding with such haste as to indicate a consciousness on their part that speed was necessary in order to prevent the distresses from being defeated. In my opinion, if such a case was to be made, it ought to have been raised on the affidavits in such a way as to give those who were actually engaged in levying the distress an opportunity of explaining the departure from the ordinary practice. Further, it seems to me that the inference sought to be drawn from the fact is scarcely warranted. Notice is given because the statute (2 Will. & M., sess. 1, c. 5, s. 2) makes it essential to the exercise of the right of sale, but it is well settled (see *Trent* v. *Hunt*, 1 W. R. 481, 9 Ex. 14) that the absence of notice does not affect the validity of the distress, but merely prevents the landlord from selling until the expiration of a specified time—viz., five days after such notice is given. If notice had been given on the 12th of October the landlords would have been able to sell after the 17th of October; as it was not given until the 13th of October they were unable to sell until after the 18th of October. I confess that I do not see that it is right under these circumstances to draw any inference seriously unfavourable to the landlords.

It was further contended that the rights of the general creditors had intervened at the date when the distresses were levied, and consequently that they ought not to be allowed to proceed, and reliance was placed on the analogy offered by the case of *Tennent* v. *City of Glasgow Bank*, where it was held that after a bank had stopped payment and its insolvency had been well known, it was too late for a shareholder to repudiate shares which he had been induced to take by misrepresentation; and Lord Cairns went so far as to say that he would "be disposed in any case to hesitate before admitting that, after a company has become insolvent and stopped payment, whether a winding-up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors." I may point out that in the present case, although it may be taken that the company was insolvent on the 12th of October, yet the affidavit of the liquidator shows that it was still carrying on business. He says: "Up to Monday, the 12th inst., the collieries of the defendant company were in full working order." And subsequently he says that the agent of the landlord who levied the distress had stopped all work at the collieries. Admitting, however, the existence of the rule laid down in *Tennent* v. *City of Glasgow Bank*, still, the case there considered was one in which a shareholder was seeking to escape liability to any creditor, and it appears to me that different considerations apply to the case of a contract between two classes of creditors, as, for example, between a landlord levying a distress and the general body of creditors. I think that it would be inconsistent with the reasoning of Turner, L.J., in *In re Great Ship Co.*, to apply the rule laid down by Lord Cairns to such a case. To defeat the distress, it should be made out that it is for some reason inequitable to allow it to proceed; here it is not even shown that the distraining landlords knew of the passing of the resolution of the 24th of September, even if such knowledge would be sufficient to raise an equity against them. There is no authority for such a proposition, and it hardly seems consistent with the *ratio decidendi* in *Ex parte McLaren*, where it was held that a non-assenting creditor of a compounding debtor under section 126 of the Bankruptcy Act, 1869, against whom no equity could be raised by reason of his

personal conduct, could acquire a valid security for his debt by levying execution on the debtor's goods at any time before the registration of an extraordinary resolution accepting the composition, even although such creditor had been present (but silent) at the meeting when the resolution was passed.

It may, perhaps, be thought that, if in such a case as the present the court refuses to interfere, the passing of the first resolution to wind up will operate as an invitation to unpaid judgment creditors and landlords to use their legal remedies, and that the distribution of the assets of the company *pari passu* among the creditors in accordance with section 133 will thus be interfered with. It may be that one of the objects of section 84 of the Act of 1862, by which the time of the presentation of a petition is fixed as the commencement of a winding up by the court, was to prevent such a result. Still the fact remains that the Legislature did not see fit to make a voluntary winding up commence at the passing of the first resolution; and in reality, as it seems to me, I am asked to fix the commencement, so far as actions, suits, and other legal proceedings are concerned, at another date than that determined by the Act of Parliament. In my judgment I ought not to do that; and consequently I think that the motion fails so far as it is based on section 138 of the Companies Act, 1862.

The second point relates to the validity of the distress put in by Lord Effingham only. It is said that this distress was made under a power which renders it necessary that the lease granted by Lord Effingham should be registered as a bill of sale under the Bills of Sale Acts, 1878 and 1882. The lease has not been so registered, and it was not disputed before me that if it ought to be so registered the distress was invalid.

The lease in question is a demise of a bed or seam of coal under certain specified closes for thirty years from the 1st of July, 1891, at the half-yearly rent of £30 for every acre in extent being one foot in thickness, and so in proportion for any greater or less extent than an acre, and for every greater or less thickness than one foot gotten during the previous half-year, so that a minimum rent of £45 half-yearly shall be paid during the first year, and increasing minimum rents during the second and succeeding years of the term. The lease contains a covenant on the part of the lessees to pay the rents reserved; and also a power in the following terms: "Provided always, and it is hereby agreed and declared that if and whenever any of the rents hereinbefore reserved, or any part thereof shall be in arrear for twenty-one days, whether the same shall have been legally demanded or not, the lessor, his heirs or assigns, may enter and seize, distrain, sell, and dispose of in the same manner as landlords may for rent in arrear, any engines, machinery, implements, tools, chattels, or effects then belonging to the lessees or their assigns in or about any of the premises hereby demised, or any adjoining or neighbouring colleries, and out of the moneys arising from the sale of any distress or distresses so levied, may satisfy and pay or retain all arrears of rent, and the expenses incident to any such proceedings rendering the overplus (if any) unto the lessees or assigns." The chattels taken under the distress levied by Lord Effingham were not found on the premises demised by this lease, but on adjoining lands demised by Mr. Foljambe.

The question turns on the meaning of sections 4 and 6 of the Bills of Sale Act, 1878. [His lordship read the sections, and continued:] These sections have to a certain extent been the subject of judicial decision. The words "power of attorney, authorities, or licenses to take possession of personal chattels as security for any debt" occur in the Bills of Sale Act, 1854; no such clause as section 6 is found in that Act, and it was decided by the Court of Appeal in *In re Stockton Iron Furnace Co.*, 27 W. R. 433, 10 Ch. D. 335, that an ordinary clause in a mortgage whereby the mortgagors attorned and became tenants to the mortgagees of the mortgaged property at a yearly rent was not an authority or license to take possession of personal chattels within the meaning of the Act of 1854; the ground of decision being as I understand that that Act was not intended to interfere with the creation of tenancies, or the rights of landlords, even where the tenancy was created for the purpose of securing a debt, so long as the tenancy was a real one not a mere fiction. As was pointed out in *Ex parte Jackson*, 29 W. R. 253, 14 Ch. D. 725, section 6 of the Act of 1878 was introduced in order to alter the law as regards tenancies created by way of security for debts; and accordingly it has been held by the Court of Appeal in *Ex parte Kennedy*, 36 W. R. 793, 21 Q. B. D. 384, and *Green* v. *Marsh*, 40 W. R. 449, [1892] 2 Q. B. 330, that attornments, instruments, and agreements whereby a power of distress is given or agreed to be given (whether expressly or by operation of law) by way of security for a present or future debt or advance, now fall (in general) within the scope of the Bills of Sale Acts. It is to be observed, however, that mining leases are excepted from the operation of section 6 of the Act of 1878, while (as is pointed out by Lindley, L.J.: *Ex parte Kennedy*, 21 Q. B. D. at page 394) there is nothing either in that section or any other section of the Bills of Sale Acts which applies to ordinary leases (that is, leases not created as securities for debts or advances) or affects the landlord's power of distraining under such leases. It has, however, been held in *Pulbrook* v. *Ashby* that a power of distress introduced into a lease for the purpose of securing to the lessor a debt other than rent is a license to take possession of personal chattels as security for a debt within the meaning of section 4 of the Act of 1878. [His lordship read the section, and continued:] The question is whether the power of distress in the present case is not such a license.

Now, in the first place, though mining leases are excepted from the operation of section 6 of the Act of 1878, there is nothing to except them from the operation of section 4. Again, the power in question is entirely different from the power of distress which is ordinarily incident to the relationship of landlord and tenant. On the one hand it is limited to goods of the lessee; on the other it extends to those goods though not found on the demised property but on adjoining or neighbouring collieries. The object of extending the power to such last-mentioned goods is obviously to provide additional security to the lessor for the rents reserved by the lease; and as those rents do not issue out of the adjoining or neighbouring collieries, I think that they constitute as regards the goods there found, a debt and nothing more.

The case seems to me to be on all fours with that of a lessor granting an ordinary lease of a house, but reserving to himself a power to distrain on goods of the lessee found in another house not comprised in the lease. I think such a power would be a license to take possession of personal chattels as security for a debt.

In my judgment, therefore, the lease is as regards the goods seized, a bill of sale; and the distress ought to be restrained.

Solicitors, *J. & R. Gole; Bell, Brodrick, & Gray*, for *Parker, Rhodes, & Co.; Radford & Frankland*, for *Pashley & Hodgkinson*.

Chan. Div. } Romer, J. } Dec. 18.

SIMPSON v. HUGHES. (a.)

Contract—Vendor and purchaser—Specific performance—Letters—Inquiry as to time for completion—Open term.

A party (the purchaser) to a contract for the sale of real estate, in a letter accepting the vendor's offer added the words, "I should like to know from what time Mr. Hughes (the vendor) wishes the purchase to date."

Held, on the letter as a whole, that these words were merely a courteous way of asking the vendor the time at which he wished to complete, and in no way added a fresh term, or prevented the agreement from forming a binding contract.

Trial of action.

This was an action for specific performance in which Mr. William F. Simpson was the plaintiff and Mr. Hugh R. Hughes and Professor George F. Armstrong were the defendants.

Another action, brought by Armstrong against Hughes, was heard at the same time; but the case only calls for a report on one point.

The facts were as follows:—

The defendant Hughes was the owner of certain freehold hereditaments known as the Wray estate, situate at Grasmere, in the county of Westmoreland, consisting of a house and garden in the occupation of the plaintiff, about sixteen acres of pasture land and three or four acres of wood.

In August, 1895, the plaintiff made an offer to Charlton, the agent of the defendant Hughes, for the purchase of the Wray estate for the sum of £1,500, which offer was refused on the 23rd of August, 1895.

On the 7th of November Charlton, the agent of Hughes, wrote to the plaintiff a letter containing the following sentence: "Mr. Hughes has received an offer for the Wray estate of £1,700, which he has refused. He will take £2,000. Are you disposed to purchase at that price?"

The plaintiff replied on the 8th of November, 1895: "I had not wished to give so much, but have decided to accept Mr. Hughes's offer, and will give the £2,000 he asks for the freehold of the Wray property. I should like to know from what time Mr. Hughes wishes the purchase to date."

The plaintiff submitted that this letter constituted a binding contract.

Armstrong had also been negotiating for a sale of the same property, and claimed that a contract which he alleged that he had made with Hughes was entitled to priority over the plaintiff's contract.

Armstrong's action was dismissed.

Eve, Q.C., and *Fellows*, for the plaintiff.—The letter of the 8th of November was a formal acceptance of the offer. After the letter the parties were at one, and there was a binding contract.

Neville, Q.C., and *Leigh Clare*, for the defendant Armstrong.—The alleged contract leaves the time for completion unsettled. When nothing is said about completion, the court may fix a term; but in this case the parties left the time for completion to be fixed afterwards.

They referred to *May* v. *Thomson*, 20 Ch. D. 705, 31 W. R. Dig. 187.

Oswald, Q.C., and *G. P. Lawrence*, for the defendant Hughes.

ROMER, J.—I conclude that the contract is binding on the defendant Hughes. The letter of the 8th of November was a complete acceptance, and after it there was a binding contract. The only question that it is necessary to discuss is whether the words in the letter of the 8th of November, "I should like to know from what time Mr. Hughes wishes the purchase to date," were intended to create a fresh term. Looking at the letter as a whole, it is not, in my opinion, intended to make the time of completion a fresh term or to leave the matter open to subsequent negotiations. The letter is only a courteous way of asking the vendor when he desired to complete. The plaintiff Simpson is entitled to specific performance. As to Professor Armstrong he might or might not have had a binding contract with Hughes; but in any case his rights are subject to those of Simpson.

Solicitors, *Hyde, Tandy, & Mahon; Quayle & Ouvry; Meredith, Roberts, & Mills.*

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Q. B. Div. (Wright and Bruce, JJ.) } Jan. 15.

MORRISS v. HOWDEN. (a.)

Ship—Merchant shipping—Passage broker—Contract ticket—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 320, 341, 342.

Section 341 (1) *of the Merchant Shipping Act*, 1894, *which defines a passage broker to be a "person who sells or lets, or agrees to sell or let, or is in anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea," refers to a sale or letting of a passage commencing at a definite time for a specified voyage in a named ship.*

Section 320, *which enacts that "if any person . . . receives money from any person for or in respect of a passage as a steerage passenger in any ship . . . proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket . . . ," refers to a receipt of money paid for a specified passage commencing at a fixed time in a named ship.*

A person not a duly qualified passage broker within section 342 *contracted for the sum of* £22 *to send a lad from Liverpool to Canada and to place him as pupil upon a farm in Ontario. He procured from a properly qualified passage broker a steerage passage in a steamship from Liverpool to Quebec together with a contract ticket. He received no commission upon the sale of the ticket, nor did he make any direct profit out of it.*

Held, that neither the original contract nor the contract ticket was a sale or letting of a passage within the meaning of section 341 *so as to make the person liable to a penalty under section* 342.

Held, also, that in procuring the contract ticket the person was not "concerned in the sale or letting of a passage" within section 341.

Held, also, that the person was not guilty of an offence under section 320.

Case stated by a police magistrate.

Two informations were laid against the respondent, the one, under section 342 of the Merchant Shipping Act, 1894, for unlawfully acting as a passage broker without being duly licensed, and the other, under section 320 of the same Act for receiving money for or in respect of a passage without giving a contract ticket.

Section 342 enacts that a person shall not act,

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

directly or indirectly, as a passage broker unless he complies with certain conditions, as to giving security and holding a licence, therein mentioned, and provides a penalty.

The respondent was the Secretary of the Anglo-Canadian Farm Pupil Association, which was an association for placing farm pupils in Canada. He was not qualified to act as a passage broker. He got into communication with a lad named E. W. Craven, and on the 6th of May, 1896, forwarded to him a list of rates, which was as follows:

"1st, including saloon passage and 1st class rail fare £27
2nd, including saloon passage and 2nd class rail fare £25
3rd, including intermediate passage and 2nd class rail fare £22
4th, including steerage passage and 2nd class rail fare £18
These rates include steamship fares from Liverpool and also rail fares to your destination in Ontario, with our charges for placing and supervision of the pupil for one year."

E. W. Craven selected the 3rd on the list, and his father, James Craven, paid the £22, for which a receipt was given. In the receipt the sum was stated as being "a premium for which we undertake to place his son, E. W. Craven, who is now seventeen years of age, as a farm pupil in Western Ontario, Canada." In the same document were the words: "It is distinctly understood that the above-named sum includes 2nd class steamship passage from Liverpool to Quebec and 2nd class rail to Thamesville."

A passenger's contract ticket for a passage on board the steamship *Mongolia*, sailing on the 21st of May, was forwarded to E. W. Craven. It was obtained by the respondent from Messrs. Thomas Cook & Sons through their agent, Mr. H. C. Robinson.

The contract ticket was for an intermediate passage, and the sum named upon it, £8 18s. 11d., was paid by the respondent to Messrs. Cook & Sons.

Messrs. Cook & Sons were duly authorized to act as passage brokers.

The association represented by the respondent made a profit out of the £22, but no profit was made directly over the steamship fare, nor did the association receive any commission from the shipowners.

The magistrate found that the passage secured for E. W. Craven was a steerage passage within the meaning of sections 268 and 341 of the Act. But he dismissed both informations on the grounds, respectively, that the respondent had not acted as a passage broker within the meaning of section 342, and that he had given to E. W. Craven a contract ticket sufficient to satisfy section 320.

Bonsey, for the appellant.

The respondent was not represented.

Cur. adv. vult.

BRUCE, J.—The principal question in this case is whether the respondent Howden acted, directly or indirectly, as a passage broker within the meaning of section 342 of the Merchant Shipping Act, 1894. The meaning of "passage broker" is to be ascertained by reference to section 342. [His lordship read the section.] Looking at the other sections of the statute bearing upon this matter, and to the forms contained in the schedule to the Act relating to passage brokers and to steerage passengers, I think that the act referred to means a selling or letting in a named ship of a passage to commence at a definite time for a specified voyage. I am, therefore, of opinion that the agreement entered into on the 12th of May, of which the written receipt of that date signed by the respondent is evidence, was not an agreement for selling or letting a passage within the meaning of section 341. The agreement entered into by the respondent was, I think, an agreement to procure Craven a passage at some convenient time in some fitting ship from Liverpool to Quebec, but it was not a selling or letting, or an agreement to sell or let a passage at a definite time in a named ship.

And although the passage ultimately obtained was a steerage passage, I am not at all sure that there is anything in the letter of the 6th of May, or in the receipt of the 12th of May, to show that the "intermediate" passage, or the second-class steamship passage in those documents referred to, was a steerage passage within the meaning of section 341. The contract ticket forwarded to E. W. Craven was made out in due form and signed by Mr. Robinson, the authorized agent of Messrs. Cook & Son, who were duly qualified as passage brokers. That circumstance conferred upon Craven all the advantages which the Merchant Shipping Act has provided for the security of steerage passengers. But it is said that this contract ticket was a letting or selling of a steerage passage in a ship within section 341, and that the respondent was concerned in the selling or letting. No doubt he procured the ticket and paid £8 18s. 11d. for it out of the £22 mentioned on the receipt of the 12th of May, but the respondent made no profit out of the ticket, and received no commission from the shipowners or from the passage brokers. I think it must be conceded that a person who as a mere act of friendship paid for and procured a passenger ticket for another, could not be said to be concerned in the contract of sale or letting contained in the passenger ticket. So far as the act of the respondent towards Craven was concerned, it seems to me that what he did was to purchase as agent for Craven a ticket for a passage for E. W. Craven. To be concerned in a sale or letting means, I think, to have a part or share in the sale or letting, to have something to do with the sale or letting, to have some interest in the transaction, or in some way to derive some profit or advantage from it. In *Todd* v. *Robinson*, 14 Q. B. D. 739, 33 W. R. Dig. 127, the Court of Appeal seems to have thought that a person might be interested in a contract and yet not concerned in it. In the present case the respondent seems to have been a passive agent paying on behalf of Craven for the ticket, and forwarding it to him. If the father, James Craven, had purchased of Messrs. Cook & Son through their authorized agent, a ticket for his son, E. W. Craven, he would not, I think, have been guilty of any breach of the provisions of section 341, and as regards the act of the purchaser of the ticket, I cannot see upon what principle it is possible to distinguish between a purchase of a ticket by a father for a son, and the purchase made by the respondent.

It is said that the respondent, or those on whose behalf he acted, made a profit out of the £22. But we are dealing only with the £8 18s. 11d. paid for the passage-money, and out of that there was no profit.

It seems to me it would be straining the language of section 341 to hold that the respondent was concerned in the sale or letting of the passage. I therefore think that the learned magistrate was right in refusing to convict him of an offence under section 342.

I also think that the magistrate was right in refusing to convict under section 320. The respondent did give to Craven a contract ticket duly signed on behalf of the owners of the ship. But, further, I am not satisfied that he received money from Craven for or in respect of a passage in any sense

within the meaning of section 320. It seems to me to be clear that this section must mean a receipt of money paid for a specified passage commencing at a fixed time in a named ship. The £22 received by the respondent was not paid to him in respect of a passage in any named ship, and it would have been impossible for the respondent at the time he received the £22 to have procured a contract ticket such as is mentioned in section 320.

Appeal dismissed.

Solicitor for the appellant, *Solicitor for the Board of Trade.*

Q. B. Div.
(Wills and Wright, JJ.) Dec. 17.

THE OVERSEERS OF THE PARISH OF LLANRHAIADR-YN-MOCHNANT AND THE ASSESSMENT COMMITTEE OF THE LLANFYLLIN UNION (*Appellants*) *v.* THE DEAN AND CHAPTER OF ST. ASAPH (*Respondents*). (*a.*)

Tithe — Rating — Deduction — Rectory — Liability to repair chancel.

In ascertaining the rateable value of a tithe rent-charge issuing from a rectory the tithe owner is not entitled to a deduction for money expended in repairs to the chancel of the parish church.

Case stated by magistrates sitting at quarter sessions upon an appeal from the decision of the assessment committee of the Llanfyllin union.

The respondents, under an Act of 29 & 30 Car. 2, acquired the rectory of Llanrhaiadr-yn-Mochnant.

By the terms of the Act the rents and profits of the rectory were appropriated to the special purpose of repairing the Cathedral Church of St. Asaph, and to the better maintenance of the choir.

Out of the proceeds of the rectory the respondents had from time to time expended sums on the repair of the chancel of the parish church of Llanrhaiadr.

In fixing the rateable value of the tithe rent-charge issuing from the rectory the magistrates allowed a deduction, 1 per cent. of the gross value, in respect of these repairs.

Marshall, Q.C. (*Ellis J. Griffiths* with him), for the appellants.—The sum allowed for the expenses of repairing the chancel is not a proper deduction. At common law the obligation to repair the chancel imposed on the rector is a personal liability, and is not a charge upon the tithe rent-charge. But here the tithe rent-charge was appropriated by Act of Parliament to a special purpose. The respondent, therefore, had no power to apply any part of it to the purpose of repairing the chancel.

Stephenson Moore, for the respondents. — The liability to repair the chancel stands on the same footing as ecclesiastical dues, which have been held to be a proper deduction: *R.* v. *Joddrell*, 1 B. & Ad. 403; *R.* v. *Capel*, 12 A. & E. 382.

WILLS, J.—This deduction cannot be allowed. In the cases cited by the respondents it was not stated what was the nature of the ecclesiastical dues; but in *R.* v. *Joddrell* the *ratio decidendi* was that the profits of the rectory was the only fund out of which the dues could be paid. The dues were a charge upon the rectory; but the liability in the present case to repair the chancel is a personal liability imposed upon the rector by virtue of his holding the office, and the liability would still subsist were there no funds issuing from the rectory at all.

WRIGHT, J., concurred.

Solicitors for the appellants, *Robbins & Co.*, for *Pughe & Jones*, Llanfyllin.

Solicitor for the respondents, *Peterson.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Wills and Wright, JJ.) Dec. 7.

THORPE *v.* PRIESTNALL. (*a.*)

Sunday trading—Prosecution—Consent of chief constable —Institution of proceedings—Lord's Day Observance Act, 1676 (29 *Car.* 2, *c.* 7), *s.* 1—*Amendment Act*, 1871 (34 & 35 *Vict. c.* 87), *s.* 1.

The Lord's Day Observance Amendment Act, 1871, *s.* 1, *provides that no prosecution shall be instituted under the Lord's Day Observance Act*, 1676, *except by or with the consent in writing of the chief officer of police of the district or of certain other persons.*

Held, that the consent in writing must be given before the laying of the information.

Case stated by the stipendiary magistrate of Sheffield.

An information was laid against the appellant, charging him with doing work of his ordinary calling upon a Sunday contrary to the Lord's Day Observance Act, 1676, s. 1.

The section enacts that "no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary calling upon the Lord's Day or any part thereof (works of necessity and charity only excepted)."

Section 4 provides that no person shall be proceeded against for any offence under the Act, except within ten days after the offence was committed.

It was proved that the appellant was a barber, and that on Sunday, the 5th of July, he shaved customers between the hours of 10.30 a.m. and 12.30 p.m., and that at some time between the same hours he sold a newspaper.

The stipendiary magistrate found that the appellant was exercising his ordinary calling, and convicted him of the offence.

The Lord's Day Observance Amendment Act, 1871, s. 1, enacted that no prosecution or other proceeding shall be "instituted" against any person under the principal Act, "except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed," or with the consent in writing of certain other persons. Before the information was laid the consent of the chief constable of the district was asked, and he gave his consent verbally. The information was laid on the 6th of July, and on the same day a summons was granted.

The written consent of the chief constable was not secured till the following day, but it was dated back to the 6th of July. The service of the summons upon the appellant was subsequent to the written consent.

Brook Little, for the appellant.—The prosecution was not instituted with the written consent of the chief constable as required by the Act of 1871. The consent ought to have been obtained before the information was laid. [Counsel contended also that

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the appellant was not "a tradesman, artificer, labourer, workman, or other person" within the meaning of the Act of 1676.]

Danckwerts, for the respondent.—The consent was obtained in time because it was obtained before the summons was served. The Act used the word "instituted" and not "commenced." The word "instituted" referred to a stage later than that indicated by the word "commenced," and implied that the prosecution or proceeding had been established in the sense that process had been served on the person proceeded against. Proceedings were not even "commenced" until service of process: *Ditcher* v. *Denison*, 6 W. R. 342, 11 Moore P. C. 324, and *Yates* v. *Reg.*, 33 W. R. 482, 14 Q. B. D. at p. 661.

WILLS, J.—The appeal must succeed. Looking at the Act of 1871 it is clear that the institution of proceedings is an act which can be done by the chief constable himself. All he can do is to lay the information. He cannot issue the summons or serve it. Therefore the subject-matter to which the Act refers when it directs that the institution of a prosecution shall be made with the written consent of the chief constable is the laying of the information.

WRIGHT, J., concurred.

Solicitors for the appellant, *Campion & Simmons*, for *A M. Wilson*, Sheffield.

Solicitors for the respondent, *Aldous & Walford*.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — Nov. 16.

WILD v. SOUTHWOOD. (a.)

Bankruptcy—Assets—Relation back of trustee's title—Protected transaction—Charging order—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 45, 46, 49—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 23.

A charging order under section 23 *of the Partnership Act*, 1890, *being a proceeding* in invitum, *is not a "contract, dealing, or transaction" protected under section* 49 *of the Bankruptcy Act*, 1883 (*compare* Courage *v.* O'Shea, 43 *W. R.* 232, [1895] 1 *Ch.* 325).

Where the proceeds of an execution have been ordered into court, the creditor cannot be held to have completed his execution by seizure and sale within the meaning of section 45 *of the Bankruptcy Act*, 1883.

Summons in Queen's Bench Chambers referred by Day, J., to Vaughan Williams, J.

The facts were as follow: Upon the 20th of April, 1895, the plaintiff Wild obtained a judgment against Southwood for £125 and costs. Upon the same day day he took out a summons under section 23 of the Partnership Act, 1890, for a charging order on the interest of the defendant in the firm of Southwood Brothers Lloyd & Jones, and obtained such order and the appointment of a receiver of such interest upon the 27th of April. Upon the 23rd of May the plaintiff took out a summons to enforce the charging order by sale. Southwood's partners appeared upon the hearing of the summons and tendered the amount due to avoid a sale, but the judge being informed that a bankruptcy petition had been presented against Southwood upon the 22nd of May, ordered his partners to pay the money into court instead of to Wild. A receiving order was made against Southwood on the 15th of June, the date of the act of bankruptcy relied upon being the 17th of April. Wild then took out the present summons for payment of the money out of court, which, being opposed by the trustee in the bankruptcy, was referred by Day, J., to Vaughan Williams, J.

H. Terrell, for Wild.—The creditor in this case is entitled to retain the benefit of his execution because he has completed it either by "seizure and sale" or "by the appointment of a receiver" within the meaning of section 45 of the Bankruptcy Act, 1883. The payment of the money into court was equivalent to completion of the execution by seizure and sale, and that money never was the debtor's and cannot be claimed by his trustee.

Hansell, for the trustee in Southwood's bankruptcy.—The money in court is part of the bankrupt's property divisible among his creditors; it has been obtained subsequently to the act of bankruptcy by means of a charging order which has been held not to be "a contract, dealing, or transaction" protected under section 49 of the Bankruptcy Act, 1883: *Courage* v. *O'Shea*, 43 W. R. 232, [1895] 1 Ch. 325. Secondly, the charging order was not a security because it was obtained after the act of bankruptcy and does not come within the definition in section 168 "mortgage charge or lien on the property of the bankrupt," since by relation back all the property of the bankrupt vested in the trustee before the charging order was obtained. Further, payment into court is not equivalent to completion by seizure and sale: *Butler* v. *Wearing*, 17 Q. B. D. 182, 34 W. R. Dig. 17.

VAUGHAN WILLIAMS, J.—I am of opinion that I ought not to order the payment of this money out of court to the plaintiff. The dates in the case are agreed; there was an act of bankruptcy upon the 17th of April, 1895, and all these orders are subsequent to that act of bankruptcy. The question remains what are the rights of the execution creditor.

I will first deal with the rights of the execution creditor irrespective of the protective sections, but under section 45, which I consider restrictive. His right is to seize the goods or property of the debtor but he has no rights against what is not the property of the debtor. At the date of the first step in obtaining this execution, was the interest in the partnership the property of the debtor or not? To my mind it is plain that on the 20th of April, when the summons for this charging order was taken out the property in the interest in the partnership had ceased to be the property of the debtor, and had, by the event which has occurred, become the property of the trustee.

This law, which makes the trustee's title relate back to a time antecedent to events which have taken place before the making of the receiving order operates no doubt very hardly in many cases, and therefore the Acts of Parliament have contained protective sections in relief of persons affected by the stringency of this law. Apart from such sections it is clear that this execution cannot hold good against the trustee.

In the present Act of Parliament the protective section is section 49, and upon that the plaintiff cannot rely. The case of *Courage* v. *O'Shea* is a distinct decision that the obtaining of a charging order under section 14 of the Judgments Act, 1838, is "a transaction" within section 49 of the Bankruptcy Act, 1883. I do not consider that the fact that the order is under section 23 of the Partnership Act, 1890, makes any difference, for it is a proceeding "*invitum*," and cannot be called "a transaction."

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

There remains the argument that this money is not, and never was, part of the property of the bankrupt. I don't agree to that at all; it seems to me that this money is just as much the proceeds of the sale of part of the debtor's property as if it were the proceeds of the actual sale of tangible goods forming part of the property of the debtor.

Solicitors for the plaintiff, *Wild & Wild.*

Solicitors for the trustee in the bankruptcy, *Field, Roscoe, & Co.*

Privy Council.

(*On Appeal from the Supreme Court of Trinidad and Tobago.*)

July 28, 1896.

TRINIDAD ASPHALTE CO. *v.* CORYAT. (*a.*)

Vendor and purchaser—Purchaser with notice—Recitals—Estoppel.

The plaintiff obtained a conveyance to himself of the legal estate in certain land, with express notice that the defendants were transferees of D.'s interest therein. The grant of D.'s interest to the defendants' predecessor in title contained an erroneous recital of D.'s earlier title.

Held, that the defendants were not precluded from showing what interest really passed under D.'s grant, even if it was contrary to the recitals.

This was an appeal by the defendants in the action, the Trinidad Asphalte Co., against a decision of the Supreme Court of Trinidad and Tobago.

The facts are given in their lordships' judgment.

Haldane, Q.C., G. Lawrence, and *H. F. Previté,* for the appellants.

Crackanthorpe, Q.C., and *Abraham,* for the respondent.

The judgment of their lordships (Lord WATSON, Lord HOBHOUSE, Sir RICHARD COUCH) was delivered by

Lord HOBHOUSE. — The facts material for the decision of this case may be stated in a short compass. Nicola Dernier was grantee under the Crown of the land in dispute. One Alexis built a house on it, having acquired from Nicola a sufficient interest for that purpose. In the year 1881 Dulcinore Victor contracted with Alexis and Nicola for the purchase of the land, and she paid for it, and entered into possession, but without any conveyance. Nicola died in 1885. In 1888 Dulcinore agreed to sell the land to McCarthy for thirty dollars, and for that purpose executed a conveyance which was registered. Marie Dernier, a sister of Nicola, who had lived with him, joined in the conveyance, presumably with the object of passing the legal estate. She, however, was not Nicola's heir. McCarthy took possession, and his title has passed to the defendants, the Asphalte Co. During these transactions the land was of very small value: but the development of the Pitch Lake which it adjoins has increased its value an hundredfold or so.

In the year 1892 the plaintiff Coryat obtained a conveyance from the heir of Nicola. The plaintiff now sues for possession. The defendants claim to be equitable owners in fee, and demand that the plaintiff shall convey the legal estate to them, on the ground that he had notice of their title when he bought the legal estate. Nathan, J., at the trial, and afterwards the Court of Appeal, have decided in favour of the plaintiff. The defendants are now appealing against the decree of the Supreme Court.

The plaintiff's counsel at this bar have disputed the acquisition of an equitable estate in the property by Dulcinore. It seems to have been hardly, if at all, discussed in the court below. At the trial Nathan, J., spoke of it as apparently true, and did not hint that the reality differed from the appearance. On appeal, the learned judges, without intimating any doubt, simply state the fact, and conduct elaborate legal discussions on that basis. Mr. Crackanthorpe has argued that there was no evidence on which the court could found such a conclusion, but it appears to their lordships that the evidence is quite sufficient for the purpose.

The case really made by the plaintiff below was that he is a purchaser for value without notice, and that his legal title overrides the equitable interest acquired by the defendants. The argument of his counsel at the trial, so far as reported in the judge's notes, and the judgments in his favour, all turn on the absence of notice to him.

The registered deed of conveyance to McCarthy is in the following terms:—

"Conveyance.

"This deed made this 25th day of January in the year of our Lord one thousand eight hundred and eighty-eight between Marie Accent Damien (*sic.*) of the ward of La Brea in the Island of Trinidad spinster of the first part, Dulcimore Victor also of the ward of La Brea aforesaid laundress of the second part, and John William McCarthy manager of the Pitch Works at La Brea aforesaid of the third part. Whereas the said Dulcimore (*sic.*) Victor some time in the year one thousand eight hundred and eighty-one purchased from the said Marie Accent Damien the hereditaments hereinafter granted and was thereupon let into possession of the same but no deed of convey ance was ever executed by the said Marie Accent Damien. And whereas the said John William McCarthy has lately contracted and agreed with the said Dulcimore Victor for the purchase of the said hereditament at the price of thirty dollars. And whereas the said Marie Accent Damien has consented to be made a party to these presents for the purposes hereinafter expressed. Now this deed witnesseth that in pursuance of the said agreement and in consideration of the sum of thirty dollars as purchase-money to the said Dulcimore Victor paid by the said John William McCarthy on or before the execution of these presents the receipt whereof the said Dulcimore Victor hereby acknowledges the said Marie Accent Damien as beneficial owner at the request and by the direction of the said Dulcimore Victor hereby conveys and the said Dulcimore Victor hereby conveys and confirms unto the said John William McCarthy all and singular that certain piece or parcel of land situate in the ward of La Brea aforesaid measuring seventy-five feet on the northern side thereof seventy-five feet on the southern side thereof and forty feet in width and bounded on the north by lands now or formerly of one Henry Angeas on the south and west by lands of the said Marie Accent Damien and on the east by the Pitch Lake-road. To hold the same unto and to the use of the said John William McCarthy in fee simple.

"In witness whereof the said parties hereto have hereunto set their hands the day and year first herein above written.

"MARIE A. DEMIER (*sic.*).
"DULCIMORE × VICTOR
"Her mark."

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

This is on the face of it a very careless composition. The names are misstated. Marie is made to convey as "beneficial owner," though it is stated that she had sold to Dulcinore in the year 1881, and though it is Dulcinore and not Marie who is the contracting vendor and the recipient of the purchase-money. Another mistake is made which is not apparent from the deed itself—viz., that Dulcinore is represented as having purchased, not from Nicola as the fact was, but from Marie, who never had any interest.

On the ground of this mistake the learned judges below came to the very startling conclusion that the deed was a nullity; that because Dulcinore did not derive title from Marie, therefore she conveyed nothing at all; and that McCarthy, though he contracted for the purchase, not of any particular interest in the land but of the very land, and not with Marie but with Dulcinore, received nothing at all. At best, they say, the deed took effect as between Dulcinore and McCarthy by way of estoppel. Then they proceed to discuss whether the plaintiff, finding the defendants in possession, was bound to inquire into the nature of their interest, and come to the conclusion that because a system of registration exists in Trinidad he was not so bound.

The plaintiff's counsel here have declined to attempt the hopeless task of supporting this construction of the deed. It is beyond dispute that it transferred to McCarthy whatever interest Dulcinore had. But then they argue, if their lordships rightly understand them, that this transfer, though absolute in its terms, only operated between grantor and grantee, and that as between the grantee and all other persons, only so much interest passed as Dulcinore derived from Marie, which was nothing at all. This is extremely like a reversion to the repudiated theory of estoppel. Why the deed should be construed differently according to the person who comes to construe it, has not been explained, nor can their lordships comprehend.

The Registration Ordinance has been referred to; but its only bearing on the case is, first, that it gives legal priority to deeds according to the date of their registration instead of the date of their execution; and secondly, that it provides a public office in which they may be seen. Here the defendants' deed was prior in every respect. Nothing turns on the system of registration. There is no question in the case beyond the familiar one, whether the plaintiff had notice, express or other, of the defendants' equity before he bought the legal estate.

Their lordships have not been able to understand how there can be room for doubt in answering that question. There was the deed, plain for everybody to see. Whatever was in that deed the plaintiff saw and knew. And the deed told him that in the year 1881 Dulcinore purchased the land, and took possession, and that she contracted to sell it to McCarthy, and actually conveyed it to him, and received the purchase-money. Knowing all this, the plaintiff yet asserts that he had no notice of the grantee's equity because the deed contains an erroneous recital of the mode in which that equity became vested in the grantor.

The plaintiff seems to have imagined that he, a stranger to the deed, was entitled to treat the recitals as indisputable, and to insist that the grantee should not show the truth of the case if it was contrary to the recitals. He has treated the matter as though some representation had been made to him on the faith of which he had acted. He did not abstain from inquiry. He inquired carefully enough to ascertain that Nicola and not Marie was the owner of the land, and that Marie was not Nicola's heir, and to trace out the heir. And then having got the legal estate, he thought he might safely proceed to eject the possessors. But he never inquired in the right and obvious quarter. He must have disregarded the fact disclosed by the deed that Dulcinore purchased and took possession in 1881, when Nicola was living, as the plaintiff, who had searched out the heir, must have known. If he had made inquiry with reference to that fact and to the inference which it suggests, he would probably have avoided the error which led him to bring this suit.

Their lordships make this remark with reference to the tone of complaint which is taken on the ground that the plaintiff has been deceived by the recitals in the deed; not as intimating that the case turns on the question whether the plaintiff ought or ought not to have made further inquiry. On that question they only think it right to say that they are not prepared to agree that the existence of a register relieves one who is dealing with a vendor out of possession, from ascertaining the interest of one in possession, when that possession is in accordance with a registered deed. But they do not rest their judgment on that ground. They rest it on the plain and obvious ground that the plaintiff had express notice that the defendants were transferees of Dulcinore's interest whatever it might be, and that an erroneous recital of her earlier title does not preclude her grantee from showing what interest really passed by her grant.

The consequence is that the plaintiff's suit entirely fails; and as he has got the legal estate with notice of the defendants' title, he is bound to convey it to them. The proper course will be to discharge the decrees below; to dismiss the plaintiff's claim; to give the defendants judgment on their counter-claim, and to order the plaintiff to pay the whole costs of the suit in both courts.

Their lordships will humbly advise her Majesty in accordance with this opinion.

The plaintiff must also pay the costs of this appeal.

Solicitors for the appellants, *Sutton, Ommanney, & Rendall.*

Solicitor for the respondent, *J. N. Mason & Co.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 9.

DIXON v. GREAT WESTERN RAILWAY CO. (a.)

Railway—Negligence—Duty to fence line—Duty to maintain fence erected more than five years after opening of line—Railways Clauses Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 68, 73.

In an action against a railway company for negligence in failing to fence their line it appeared that no fence had ever been erected till more than five years after the opening of the line. The jury found that a fence which had been subsequently erected by the company had been allowed to become rotten.

Held, that notwithstanding section 73 *of the Railways Clauses Act,* 1845, *the defendants were liable for not satisfying the obligation imposed on them by section* 68.

Appeal from the judgment of Lord Russell of Killowen, C.J., on further consideration after trial of the action with a jury.

The plaintiff was occupier, as tenant of the lord of the manor, of certain meadow land, through which

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the defendants' branch line from Twyford to Henley passed, and he brought this action to recover the value of a colt, which, as he alleged, he had lost through the negligence of the defendants in failing to fence their railway.

The piece of railway which passed through the plaintiff's land was constructed on a viaduct about five feet high carried on wooden piers.

From the year 1857, when the line was first opened for public use, to 1884 this piece of railway was never fenced at all.

In 1884 Colonel Baskerville, who was then lord of the manor, erected a fence, but in doing so he encroached upon the defendants' land. The defendants thereupon removed this fence, and erected a new fence along the boundary of their land.

In September, 1895, two colts belonging to the plaintiff, which had been let out to graze on the plaintiff's land, broke through the fence, and one of them strayed under the viaduct, and was found to have sustained such injuries by striking its head against the piers, probably in consequence of being frightened by a passing train, that it had to be destroyed.

The jury found that the fence was rotten, that the colt was injured in consequence of the fence being rotten, and that the viaduct was dangerous without a proper fence so as to be a nuisance and source of danger to cattle using the adjoining meadows.

On further consideration, the Lord Chief Justice gave judgment for the plaintiff for £50, the agreed amount of damages.

The defendants appealed.

Bucknill, Q.C., and *A. Lyttelton*, for the defendants.—At common law a landowner is not bound to fence his land against his neighbour's cattle: *Hilton* v. *Ankesson*, 27 L. T. N. S. 519, 21 W. R. Dig. 104; *Hounsell* v. *Smith*, 8 W. R. 277; *Ponting* v. *Noakes*, 42 W. R. 506, [1894] 2 Q. B. 281. The obligation of the defendants to fence their line depends on sections 68 and 73 of the Railways Clauses Act, 1845. By section 68: "The company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway—that is to say, . . . sufficient posts, rails, . . . or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, . . . and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require." By section 73: "The company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway . . . after five years from the completion of the works and the opening of the railway for public use." The effect of these sections is that whatever fences are put up within five years must be maintained, but, if no fence is put up within five years, the company cannot after that time be called upon to put one up: *Colley* v. *London and North-Western Railway Co.*, 29 W. R. 16, 5 Ex. D. 277; *Ryan* v. *Great Southern and Western Railway Co.*, 32 L. R. (Ir.) 15, 41 W. R. Dig. 203. Here no fence was ever put up till nearly thirty years after the opening of the railway.

Montague Lush and *W. Seton*, for the plaintiff.—Section 68 imposes an imperative obligation on the company to put up fences and to keep them in repair for all time. Section 73 does not affect this obligation: *Corry* v. *Great Western Railway Co.*, 29 W. R. 623, 7 Q. B. D. 322.

LORD ESHER, M.R.—Section 68 of the Railways Clauses Act, 1845, says that the company shall make and at all times thereafter maintain certain works for the accommodation of the owners of adjoining land, including fences for separating the land taken for the use of the railway from the lands not so taken. That is a statutory obligation without any limit of time or any limitation whatever. In this case the company, though not till nearly thirty years after the opening of the railway, did put up a fence. The plaintiff complains that the company having put up this fence did not maintain it but let it get rotten. To this the company answer: You did not require us within five years to put up a fence or to go before the magistrates under section 69, and therefore we are not now bound either to make or keep up a fence. Their argument is that section 73 puts a limitation on section 68. But section 73 says that the company shall not be compelled to make any further or additional accommodation works after five years from the opening of the railway. Unless we strike out the words "further or additional" this case does not come within that section, for here the company never made any accommodation works at this part of their line within the five years. In my opinion we cannot strike out those words, and therefore section 73 does not apply. But if it does apply, I think that that section only relates to the tribunal which, by the statute, has the power of compelling the company to make accommodation works. It puts a limit on the time within which the company can be summoned before magistrates under section 69, but it does not do away with the statutory duty imposed by section 68. Lush, L.J., in *Corry* v. *Great Western Railway Co.* seems to me to have held that the obligation imposed by section 68 was unlimited. I think that the judgment of the Lord Chief Justice was right and that this appeal must be dismissed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Graham Gordon.*

Solicitor for the defendants, *Nelson.*

High Court of Justice.

Chan. Div. North, J. — Nov. 17, 18, 20, 21; Dec. 21.

In re CONSORT DEEP LEVEL GOLD MINES (LIMITED).
Ex parte STARK.
Ex parte ELLISTON. (*a.*)

Company—Shares—Contract—Acceptance—Notice of acceptance—Underwriting—Irrevocable authority—Misrepresentation.

A. signed a letter addressed to the secretary of the M. Co. undertaking to underwrite shares in the C. Co., and authorizing the secretary to apply for such shares in his behalf. The secretary applied for some shares, but notice was not given to A.

Held, that A. could not set up non-acceptance of his offer as against the C. Co.

In re Henry Bentley & Co. *v.* The Yorkshire Breweries, Limited, Ex parte Harrison, 69 *L. T. N. S.* 204, *followed.*

Motion.

(*a.* Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

The applicant Stark had signed the following underwriting contract.

"11th September, 1895. To Mr. J. Akerman, secretary of the Mines Acquisition Company.

"Consort Deep Level Company.—

"With reference to the prospectus . . . offering 80 000 shares for public subscription, and in consideration of your agreeing to pay me a commission of 15 per cent., I hereby undertake to subscribe or find responsible subscribers to your satisfaction for 10,000 shares of £1 each or such less number as may be accepted by you. . . . It is further agreed that this letter shall be irrevocable if 40,000 shares are underwritten or applied for prior to the public issue of the prospectus and allotment is made on or before the 30th of September, 1895. . . . My liability under this agreement shall continue notwithstanding any variation between the prospectus shown to me and the prospectus issued to the general public, so long as the nominal capital of the company and the amount fixed for the purchase consideration shall remain the same.

"The above contract is accepted by me to the extent of 10,000 shares.—J. AKERMAN, 12th September, 1895."

The Mines Acquisition Co. was registered on the 15th of May, 1895. The business was to acquire and deal in mining options, and it promoted the Consort Deep Level Gold Co., and it was desired to get the shares of the latter company underwritten. Mr. Mellor, one of the firm of solicitors who acted for the Consort Deep Level Gold Co., communicated with Ernest Oswald Lambert, who was desirous of underwriting part of the capital. Mr. Mellor was told that 20,000 or 25,000 shares would be taken up in Germany and Holland and he communicated this fact to Lambert. Lambert himself underwrote certain shares, but he was not otherwise the agent of the company.

The prospectus seen by Stark contained this passage: "Three reefs appear to traverse the property,—viz., the Consort Main Reef, which in some places is as much as 10 feet wide and has already produced £35,000 of gold."

A second prospectus was issued in which the words, "on adjoining properties" were added.

The evidence given by Stark was as follows: "On the 9th or 10th of September, 1895, Ernest Oswald Lambert told me that he had 20,000 shares to underwrite. He said 25,000 shares had been underwritten in Germany and Holland, and that he had himself underwritten 10,000 shares. I did not read all the underwriting letter. Lambert asked me to ask Elliston to underwrite 3,000 shares. He said all the shares would be taken up, and that there was no chance of our being called upon. I told Elliston what Lambert told me, and he underwrote 3,000 shares."

The resolution to allot was passed by the Consort Deep Level Gold Mines Co. on the 27th of September, 1895.

On Lambert telling Stark that he must pay a deposit of 2s. 6d. per share, he refused to pay.

On the 15th of September Stark called at the company's office and inquired how shares were being applied for. He repudiated the shares by letter of the 12th of October, 1895. Stark's name, and that of Elliston were not, however, removed from the register, so on the 7th of January, 1896, notice of motion for their removal from the register was given.

Swinfen Eady, Q.C., and *W. F. Hamilton*.—The offer to underwrite was never accepted by the Mines Acquisition Co., and it could be withdrawn until its acceptance was communicated to the applicants (*In Re National Savings Bank Association, Hebb's case*, 15 W. R. 754, L. R. 4 Eq. 9). Then, as to the statements made by Lambert; if an agent, who has authority to contract makes a misstatement, the principal cannot take the benefit of the contract, and say that he is not responsible for the misstatement: *Mullens* v. *Miller*, 31 W. R. 559, 22 Ch. D. 194; *In re Metropolitan Coal Consumers' Association, Karbery's case*, [1892] 3 Ch. 1, 40 W. R. Dig. 41. There the prospectus was issued before the company was registered; and Kekewich, J., said that the misrepresentation must be brought home to the company; and Lindley, L.J., distinguished *Wainwright's case*, 63 L. T. N. S. 429, 39 W. R. Dig. 44, and said: "Speaking generally there is no doubt that a misrepresentation in order to vitiate a contract must be made by a party to it or by his agent. But this rule is not without exception."

Bigham, Q.C., and *Upjohn*, for the respondents.—No acceptance of the offer was necessary; the applicant authorized Akerman to act on his behalf. But as a matter of fact the acceptance was communicated, for the demand of 2s. 6d. a share could only be made if the applicants were in fact underwriters: *In re Hannan's Empress Gold Mining and Development Co., Carmichael's case*, [1896] 2 Ch. 643, shows that the authority given to Akerman was irrevocable. At all events the applicants are estopped from setting up non-acceptance of their offer as against the Consort Co.: *In re Henry Bentley & Co.* v. *The Yorkshire Breweries (Limited)*, 69 L. T. N. S. 204. As to the representations in the prospectus, it cannot fairly be interpreted to mean that £35,000 of gold had been already produced upon this property. There is no evidence that Stark or Elliston were induced to underwrite by any misrepresentation. It is necessary for a man to show (1) That a misrepresentation came to his knowledge; and (2) that he relied upon it.

They cited *Newlands* v. *National Employers' Association*, 54 L. J. Q. B. 428, 33 W. R. Dig. 168; *Gibson's case*, 6 W. R. 384, 2 De G. & J. 275; and *Ogilvie* v. *Currie*, 16 W. R. 769, 37 L. J. Ch. 541.

Eady, in reply.—The true construction of the letter is that it was a contract between Stark and the Mines Acquisition Co. The Consort Deep Level Gold Mines Co. is not entitled to sue upon it: *Fairlie* v. *Fenton*, 18 W. R. 700, L. R. 5 Ex. 169, per Kelly, C.B., p. 171; *Green* v. *Kophe*, 4 W. R. 592, 18 C. B. 549; *Hahn* v. *North German Pikwood Co.*, 8 Times L. R. 557. *Karbery's case* shows that the company cannot dissociate itself from its agent. The prospectus represents that £35,000 worth of gold had been extracted from the company's property. Lambert represented that 25,000 shares had been taken up in Germany. The company is bound by this.

Cur. adv. vult.

Dec. 21.—NORTH J., after stating the facts, said: I come to the conclusion that the underwriting letter was an offer to the Mines Acquisition Co., and not to Akerman as an individual. It is perfectly impossible that Akerman could pay the 5 per cent. in cash and 10 per cent. in shares, while the Mines Aquisition Co. was in a position to do so. It is incredible that it was intended that Akerman should enter into a gambling transaction as to shares which he did not hold. It is said Akerman as an individual was the person contracted with, but the correspondence makes it clear that he was only the agent for the Mines Acquisition Co. I conclude, then, that the underwriting letter

was an offer made by Stark to the Mines Acquisition Co., and accepted by Akerman on its behalf. It was said that the provision as to 40,000 shares being applied for or underwritten was not complied with, but it is proved that 40,000 shares were underwritten and 3,960 applied for by the public. It is said that the shares must be *bonâ fide* underwritten for the contract to be binding, and I agree, for a sham application would not be an application at all, but I see no reason to doubt that the contracts were *bonâ fide*.

On the 27th of September the company proceeded to allotment, and notice of allotment was sent to the public subscribers. It is said that notice was not then sent to the underwriters, and that until such notice was given, the allotment to them was not complete. I do not, however, construe the letter in this way; the provision as to allotment before the 30th of September, in my view, enables the company to proceed to allotment, even on the 30th, although notice could only be given on the following day. In my opinion notice of allotment was not given upon the 30th, because notice of application for shares is not notice of allotment, but it seems to me that the allotment was complete when the resolution to allot was passed on the 27th of September. The fact that some persons did not receive notice of allotment does not prevent the allotment from taking place before the 30th of September.

The next question is, Was the offer made by the underwriting letter accepted? Acceptance was signed by Akerman on the 11th of September. It is said that no notice of such acceptance was given to Stark and Elliston. Was notice of acceptance necessary? I think that it was as between the Mines Acquisition Co. and the underwriters, who wanted to know the limit of their liability. It was specially necessary in this case, as a cheque for 2s. 6d. per share deposit was to accompany the letter. Here no cheque accompanied, so the applicants had not made an offer in the terms of the letter. If 40,000 shares had been subscribed for by the public, the underwriters were entitled to be paid their commission, but the company might have said no cheque was sent, so the offer was not taken into account. Was notice of acceptance given? I think it is clear that it was not, though an attempt was made to show notice was given because Stark called at the company's office. It is enough to say the evidence of notice being given is altogether insufficient. The question then arises whether non-communication of the acceptance makes the offer invalid. In my opinion it does not. The Consort Co. did not know that there was no communication of acceptance. Looking at the form of acceptance written at the bottom of the letter, and to the fact that the applicants authorized Akerman to apply for shares in their name, whatever the respective rights of the Mines Acquisition Co. and the applicants may be, the applicants are estopped from setting up non-acceptance of this offer as against the Consort Co. *Ex parte Harrison* is conclusive on this point. It is said that the application to the Consort Co. was not accompanied by a cheque, but the Consort Co. could waive this. It is said again that the Mines Acquisition Co. should have made the application, but it was made by Akerman, their agent. It is said that there is no resolution of the Mines Acquisition Co. authorizing Akerman to act, but I think that there is ample evidence that he was authorized to act as agent for the Mines Acquisition Co., which is treated as the principal throughout the whole transaction. There was no delegation, he only acted as secretary of the Mines Acquisition Co. It is said again that Stark's application was revoked on the 12th of October, before it was accepted. There was a lapse of fourteen days, and in the absence of authority I should have been inclined to think that the application might have been withdrawn as against the Consort Co., whatever his contract not to withdraw with the Mines Acquisition Co. might have been, although Stark might be liable in damages to the Mines Acquisition Co. if he did withdraw. *Carmichael's case*, however, is exactly in point. But on the facts I hold that the authority was not revoked. The letter of the 30th of September by the applicant's solicitor is said to be a revocation. The letter points out that notice of acceptance was not given, but that is not a revocation of the authority.

Having disposed of these legal grounds, I come to the question of misrepresentation. First, as to the capital being subscribed in Germany. This was a verbal statement by Lambert of what he said Mr. Mellor told him. The applicants knew that the company had not yet been brought out, and that shares could not have been actually taken. All that the statement could have meant was that it was expected that the shares would be taken, and I cannot believe that the statement was understood as meaning that the shares had been actually taken up. If the statement was that persons in Germany had promised to take shares, there is no evidence that this was not the case. Mr. Clements, the person referred to as concerned in this transaction, was called and not cross-examined upon this point. The statement was material, as the more shares were taken, the less would be the liability of the underwriters. Was the statement untrue? If it was, it is said that the company cannot take advantage of a contract induced by the misrepresentation of its agent. *Mullins* v. *Miller* and *Karbery's case* are relied upon. Of the four heads laid down by Romer, J., in *Lynde* v. *Anglo-Italian Hemp Spinning Co.*, 44 W. R. 359, [1896] 1 Ch. 178, the second and third heads are said to apply to the present case. It is said that Mr. Mellor and Lambert were agents for the Consort Co. They were certainly not agents at the time of the alleged misrepresentation. Mr. Mellor was to be solicitor to the company when formed, and Lambert had no interest in the company. The second head does not apply. The fourth is what comes nearest to the present case. But how could the Consort Co. know of the misrepresentation? The only possible means would be Mr. Payne's letter of the 30th of September. I do not think it necessary to go into the question of misrepresentation, as non-acceptance of the offer of the underwriters is the ground put forward in that letter, and it is said not to be necessary to go into the question of misrepresentation.

It is said that the Consort Co. were put upon inquiry, but I do not think that the company was bound to inquire about something which it was told was not relied upon. How could it possibly have found out about the alleged misrepresentations? At the time of allotment the directors had no notice that the applications were induced by misrepresentation.

The next point is the alleged misrepresentation in the prospectus. In the first prospectus there are said to be three misrepresentations. Stark gives different dates at which he discovered these misrepresentations. The first alleged misrepresentation as to the water rights was not even opened to me. The second, as to Mr. Clements, the acting gold commissioner, does not seem to me to be a misrepresentation. The third, as to the £35,000 worth of gold. Some time after the 10th of December Stark got hold of the second prospectus, in which the words "on adjoining property" are added. Stark says that he believed that £35,000 worth of gold had been extracted from

this property. It is said that the alteration shows that this is the meaning, but I do not think this is so. A person, on reading the prospectus, might fairly make the alteration to avoid any possible misunderstanding. Then, is this a misrepresentation? My first impression was that this does amount to a misrepresentation. And a first impression is more valuable as to a point like this than a conclusion arrived at after consideration. But I am not satisfied that Stark relied on the misrepresentation, if misrepresentation there was. It is not suggested that Stark complained to Lambert upon the point, and there is no trace of complaint upon this ground in the correspondence. The same criticism applies to Elliston.

The motion fails, and must be dismissed with costs.

Solicitors, *W. J. Payne; Mellor, Smith, & May.*

Chan. Div. } Feb. 28; March 6, 1896.
Stirling, J. }

In re KONIG & EBHARDT'S TRADE-MARK. (*a.*)

Trade-mark—Royal crown—Practice of the Trade-marks Office — Instructions to applicants — Trade-marks Rules, 1890, *r.* 30—*Validity.*

By No. 30 *of the instructions issued in* 1890 *to persons applying for the registration of trade-marks it is provided that the royal arms, and arms so nearly resembling them as to be calculated to deceive, and representations of the royal crown will not be registered.*

The comptroller having refused to register a trade-mark on the ground that the device was similar to the royal crown,

Held, that the device did not in fact so closely resemble the Royal crown as to be calculated to deceive.

The practice of the Trade-marks Office considered.

This was a motion brought by way of appeal against the refusal of the comptroller to register a trade-mark in respect of goods in class 39.

The applicants were Germans who have for some time past used in Germany the mark in question. The mark proposed to be registered consisted of a shield and floral device, and the words *urbi et orbi* surmounted by a coronet. The comptroller refused to proceed with the registration of the mark, and by a letter to the applicants, dated the 6th of May, 1895, stated that the reasons why he refused to proceed with their application, so long as the device above the shield remained part of the proposed mark, were (1) because of the similarity of the device in question to the royal crown, and (2) under section 72 of the Patents, Designs, and Trade-marks Act, 1883, in view of certain trade-marks on the register, and of which he there gave a list.

The applicants appealed to the Board of Trade against that refusal, and the Board of Trade referred the matter to the court and directed that the persons interested in the trade-marks mentioned in the comptroller's letter should be served.

The applicants now moved that the comptroller might be directed to proceed with the registration. The applicants had not formally served the persons interested in the registered marks, but had applied to them all by letters, and of such persons some consented unreservedly to the applicants' mark being registered, others desired certain limitations as to the mode of user of the applicants' mark if registered, and two of such persons left the matter to the court.

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

The first reason stated by the comptroller was based upon the practice of the trade-marks office under the instructions to persons wishing to register trade-marks issued in the year 1890.

By No. 30 of such instructions it is provided that "the following will not be registered as trade-marks or as prominent parts of trade-marks unless the marks have been registered before the 13th of August, 1875: The royal arms and arms so nearly resembling them as to be calculated to deceive . . . representations of the royal crown."

Upon the hearing of the motion counsel on behalf of the applicants stated that they were willing to confine the registration of the mark in question to account-books, ruled paper, and other paper for use in books, and to disclaim any right to the exclusive use of the crown device.

Moulton, Q.C., and *Whinney*, for the applicants.—The fact that none of the persons already on the register object to our mark is strong evidence that it will not deceive. Further, we say that the device does not in fact resemble the royal crown.

Sir R. E. Webster, A.G., and *Ingle Joyce*, for the comptroller.—The refusal to register is based upon the practice which has long prevailed in the office under which similar applications have been refused. This is a public question affecting the practice of the office and we ask your lordship not to be influenced by the fact that private individuals such as the owners of registered trade-marks do not oppose.

Moulton, Q.C., replied.

STIRLING, J., stated the facts and said: With the above modifications, it appears to me that the application for registration will be right, and free from objection in respect of the trade-marks already on the register, and the application if so limited will not fall within section 72 of the Act of 1883. With reference to the first of the reasons given by the comptroller—namely, the similarity of the device in question to the royal crown—this objection relates to the crown or coronet which appears surmounting the device of a shield proposed to be registered. It has been correctly pointed out on behalf of the applicants that there is no binding rule in reference to this matter. Nevertheless, in all the series of instructions from time to time since 1877 issued by the comptroller to persons intending to apply for the registration of trade-marks, there have been contained provisions similar to the provisions contained in No. 30 of the instructions issued in 1890. These instructions have been perfectly well known to all applicants for trade-marks ever since the year 1877. They have been largely acted on and further, it appears from the evidence in the present case that applications for registration have been refused on this ground, and whether or no these instructions are binding on me, I should be very slow to depart from the practice which has been followed for twenty years. I do not, however, propose to decide this case on the ground that there ought to be no departure from these instructions; indeed I have not been asked to depart from them, for it has been urged in argument that the coronet in question was not in fact a royal crown. What is a royal crown? It is that which appears on the royal arms and is sufficiently well known. It is a circlet surrounded by two arches. But the crown in question has no arches and resembles the coronet of a marquis. If the rule in question had applied to all coronets I should have been disposed to hold that it ought not to be departed from; but it does not apply to all coronets and in my opinion the coronet in question does not so closely resemble the royal crown as to be calculated to deceive. Subject to the dis-

claimers above mentioned the trade-mark ought to be registered.

Solicitors, *Gresham, Davies, & Dallas; The Solicitor to the Board of Trade.*

Chan. Div. } Jan. 13, 14.
Kekewich, J. }

HORNSEY DISTRICT COUNCIL *v.* SMITH. (*a.*)

Local government—Paving expenses—National school—"Charge upon the premises"—"Owners"—Enforcement of charge by sale or mortgage—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*School Sites Act,* 1841 (4 & 5 *Vict. c.* 38), *s.* 6.

Where expenses arising under section 150 *of the Public Health Act,* 1875, *have been declared to be a charge upon the premises in respect of which they were incurred, under section* 257 *of the Act, the court will enforce such charge by sale or mortgage even though the land so charged has been dedicated exclusively to the purposes of a National school under the School Sites Act,* 1841.

This was a summons by the Hornsey District Council for the enforcement by sale or mortgage of a charge upon a National school within the plaintiffs' district in respect of certain paving and other expenses which had been incurred and apportioned against the trustees of the school under section 150 of the Public Health Act, 1875, and which had recently been declared by the court to be a charge upon the school premises under section 257 of the same Act (reported 44 W. R. 559, and [1896] 2 Ch. 254).

The site of the school had originally formed part of the glebe of the parish, and had been conveyed to trustees under section 6 of the School Sites Act, 1841 (4 & 5 Vict. c. 38), for the purposes of a school and for no other purposes whatever.

The plaintiffs had not taken summary proceedings against the trustees for the recovery of the expenses within the time specified by the Public Health Act, 1875.

Macmorran, Q.C., and *Beaumont,* for the applicants.—A statutory charge is enforceable by sale or mortgage (*Scottish Widows Fund* v. *Craig,* 30 W. R. 463, 20 Ch. D. 208), and it makes no difference whether the trust is a private or public trust. Section 257 of the Public Health Act, 1875, charges "the premises," and all successive ownerships on the premises (*Corporation of Birmingham* v. *Baker,* 17 Ch. D. 782, 30 W. R. Dig. 121), and there is no outside person interested in this land so as to prevent the sale, as was the case in *The Guardians of Tendring Union* v. *Dowton,* 40 W. R. 145, [1891] 3 Ch. 265. We could have sued the trustees under the Act, and they would have been personally liable for these expenses (*Bowditch* v. *Wakefield Local Board of Health,* L. R. 6 Q. B. 567, 19 W. R. C. L. Dig. 66).

Dibdin, for the respondents.—The School Sites Act intended that school property such as this should be incapable of being sold. There is no reverter clause to section 6 of that Act, and as this school is a charity, if the purposes of the trust fail, a scheme *cy près* would have to be settled. The land is properly left saddled with this trust and cannot be sold. It is stamped with a charity. The poor of the parish of Hornsey can enforce this trust, and it cannot be argued that they come within the definition of "owners," they are therefore outside persons who have an interest in this land, and the case of *The Guardians of Tendring Union* v. *Dowton* applies. The statutory nature of this trust renders the land exempt from such expenses as these: *Wright* v. *Ingle,* 34 W. R. 220, 16 Q. B. D. 379.

KEKEWICH, J.—The present case is one of considerable difficulty and importance, but in my opinion the applicants are entitled to have the sum due to them and charged upon the land, raised by sale or mortgage. That the ordinary rights of persons entitled to a charge extend to cases where charges are given by statute is established by the decision in *The Scottish Widows Fund* v. *Craig,* which decision does not seem to me to have otherwise any bearing upon the present case. The statute under which this land is held is the School Sites Act, 1841 (4 & 5 Vict. c. 38), and the conveyance was made under section 6 of that Act in the form prescribed by section 10. The property was to be held by the trustees for the purpose of a site for a school and "for no other purpose whatever"; if the land ceases to be used for that purpose then one of two things must happen, either the trustees must lose the land by its devolution on other persons, or they must hold the land subject to an action for breach of duty; in the latter event they continue to hold the land as owners, but in the former event, if the land can be recovered from them by other persons, then it belongs to those other persons as owners. It is peculiar that section 6 of the School Sites Act does not provide for the case of reverter, but I do not think it necessary to discuss how the land could be dealt with if it ceased to be held by the trustees for the purpose of a school. Mr. Dibdin suggests that as this is a charitable trust there would have to be an application of the property *cy près* at the instance of the Attorney-General, who would not represent the Crown otherwise than as *parens patriae,* and that the property would then pass to those persons who were held to be entitled to it under the scheme settled *cy près.* Consequently, if the contingency occurred, either the trustees would continue to hold the land as owners, or else the land would belong to the persons entitled to it under the scheme. So long as the school is a school, the trustees hold the land as owners, when it ceases to be a school the trustees still continue to be the owners until the land is recovered from them by some unascertained persons who then become the owners. The 257th section of the Public Health Act, 1875, contains provisions for the recovery of expenses incurred by the local authority and for making them a charge upon the premises. The effect of that section was considered by Sir George Jessel in *The Corporation of Birmingham* v. *Baker,* and he held that the charge on the premises was a charge on all successive ownerships. According to that decision this money must be raised by sale or mortgage like any other charge. But then it is said that the Court of Appeal differed from that view in *The Guardians of Tendring Union* v. *Dowton.* In that case the difficulty arose like this. There there was an adjoining owner who was entitled to the benefit of a restrictive covenant against the use for certain purposes of the land, subject to the charge, and the question was whether the charge on the premises, and therefore on all the owners in succession, could be enforced by sale as against an outside person, a stranger, who was entitled to the benefit of a restrictive covenant. The Court of Appeal held that the charge could not be enforced against him. The Lord Chancellor admits the full meaning of a "charge upon the premises" in his judgment. His lordship, after referring to section 150, says: "Therefore, it is clear that the person against whom the judgment is to stand is the owner. Indeed, the whole machinery of the Act shows that

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

the owners and occupiers are the persons against whom the proceedings are to be taken. There can be no doubt as to the meaning of the statute with respect to the word 'owner.' It includes all persons who have an interest in the property." Then passing on to the judgment of Fry, L.J., to whose judgment I more particularly refer, he says: "All the Act does is to create a charge on the premises—that is, on the land—that is, on all the interests of the owners of the land. But here we have to deal with the rights of a person against the owners of the land." Now, in the present case there is no outside owner; there are the trustees, and there are the persons who would become entitled to the land after them upon the failure of the trust, if such persons took steps to recover the land, such persons and the trustees are the only people who can be said to be owners of this land. On this ground, therefore, it seems to me that I am following all the cases as well as the general law in saying that this money must be raised by a sale or mortgage of the land free from the present trusts.

Solicitors, *L. J. Tatham; Lee, Bolton, & Lee.*

Chan. Div. } Dec. 10.
Kekewich, J. }

In re FEARON.
HOTCHKIN *v.* MAYOR. (*a.*)

Will—Married woman—Legacy and share of residue "to be paid" to married woman with restraint upon anticipation—Absolute unfettered gift.

A bequest of a fund in trust for a married woman "to be paid to her for her separate use without power of anticipation," there being no further indication that the income only is to be paid to her during coverture, will be construed as a direction that the corpus *is to be forthwith paid to her, and the words "in restraint of anticipation" will be disregarded.*

In re Bown, 33 *W. R.* 58, 27 *Ch. D.* 411, *followed.*

This was an originating summons by the trustee of the will of Isabel Fearon, deceased, for the determination of the following question, which arose upon the construction of the said will—namely, Whether the defendant (Mrs. Mayor), who was a married woman, was entitled to have a legacy and a share of residue paid to her forthwith, or whether the same should be retained by the trustee and the income thereof paid to her during coverture?

By her will the testatrix bequeathed a legacy of nineteen guineas to the defendant, and directed her trustees "to stand possessed of" one equal fourth part of her residuary estate upon trust, in the events which have happened, for her four nieces (including the defendant) and her nephew, therein named, in equal shares. The will contained this subsequent provision: "And I declare that the aforesaid legacies and shares of my said nieces or grand-nieces shall be paid to their separate use free from the control of any present or future husband, without power of anticipation."

No settlement had been made upon the defendant's marriage.

Harman, for the trustee.

Hatfield Green, for the defendant.—On the will itself it is clear that the testatrix meant the share of residue as well as the legacy to be paid at once; there is nothing to show that the fund is to be retained and the income paid to the defendant: *In re Bown*, 33 W. R. 58, 27 Ch. D. 411; *In re Grey's Settlement*, 35 W. R. 560, 34 Ch. D. 712; *In re Tippett & Newbold's Contract*, 36 W. R. 597, 37 Ch. D. 444.

KEKEWICH, J.—It is my earnest deside, as it is my clear duty, to follow the judgment of the Court of Appeal, and if I apparently make any criticism on the decision of the Court of Appeal, I must crave indulgence, and not be understood to have lost sight of or be disregarding such desire and duty. The cases cited have puzzled me. I do not see how words restraining anticipation can be upheld if the court, notwithstanding them, allows the *corpus* of the fund to be paid to the legatee. The rule giving effect to words restraining anticipation is an annex to the doctrine of separate estate. In the case of *In re Bown*, 27 Ch. D., on p. 422, Cotton, L.J., says: "It is not enough that it should be an income-bearing fund, but the intention of the testator must be shown that the married woman is to have the enjoyment of it in the way of income. In that case the words restraining anticipation must have their effect given to them." In other words, if it is not shown that she is to have it as income—I am now paraphrasing the lord justice's words—but if the words show that she is to have it as *corpus*, then the words restraining anticipation need not have that effect. If left to myself I should say that effect ought to be given to the words in restraint of anticipation in the present case, but I am precluded from such a decision, as the Court of Appeal has decided otherwise. In the subsequent cases the Court of Appeal has explained *In re Bown* in the same way as I have done. The test seems to be, Is there a direction that the legatee should have the *corpus*? If so, then the words "in restraint of anticipation" must be disregarded; if not, then effect must be given to them. In the present case the testatrix, by the ultimate declaratory clause, seems to indicate her intention that not only shall Mrs. Mayor have independent control over the fund, but that she shall not anticipate it; effect cannot be given to this intention except by the trustee retaining the fund, but the testatrix expressly says that the fund shall "be paid to" the legatee, and construing these words in the light of the decisions referred to, I come to the conclusion that Mrs. Mayor is entitled to have the money paid to her forthwith.

Solicitors, *C. E. Beal*, for *T. Ponting*, Warminster; *W. H. Matthews.*

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Chan. Div. } July 31, 1896
Romer, J. }

FILBY *v.* HOUNSELL. (*a.*)

Contract—Specific performance—Undisclosed vendor—Acceptance by agent—Reference in contract to an unsigned document — Terms of contract — Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

Acceptance of an offer by the agent of a vendor whose name is not at the time known to the purchaser, is a sufficient acceptance on the part of such vendor to satisfy the Statute of Frauds.

If a signed memorandum of agreement refers definitely to an unsigned contract in which all the terms of the contract are definitely stated, such memorandum constitutes a binding contract, and is not conditional on the drawing up of a formal agreement.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Trial of action.

This was an action on the part of Mrs. M. A. Filby for the specific performance of a contract to sell a leasehold house, No. 1, Kenmure-road, Hackney, London. The defendant, in his defence, pleaded—first, that he entered into the contract through the misrepresentation of the agents of the plaintiff; and secondly, that the Statute of Frauds had not been complied with. The case only calls for a report on the second point. The facts were as follows: On the 24th of September, 1895, Messrs. Frank Jolly & Co., auctioneers, put up the property for auction with printed conditions of sale. On the memorandum indorsed outside the conditions of sale the purchaser declared that he had purchased the premises for the sum of £——— and had paid to the auctioneers the sum of £——— as a deposit and in part payment of the purchase money, and further agreed to pay the balance of the purchase money and to complete the purchase according to the within conditions of sale. The name of the vendor, Mrs. Mary Ann Filby, did not appear in this document. The premises were not sold at the auction, but on the same day the defendant wrote to the auctioneers: "I hereby offer the sum of £350 for No. 1, Kenmure-road, Hackney; lease about 81 years, ground-rent £8; and if my offer is accepted I will pay the deposit and sign the contract on the auction particulars." On the 25th of September the auctioneers replied accepting the offer subject to contract as agreed, "on behalf of our client, Mrs. M. A. Filby." "We enclose draft contract herewith and shall be glad to receive the same signed, together with cheque for deposit, at your early convenience." A draft contract was enclosed similar to that in the conditions but it was never signed by the defendant.

Bucknaster, for the plaintiff.—There is a sufficient contract.

Beddall, for the defendant.—The contract does not satisfy the Statute of Frauds, as it does not disclose the vendor's name, which does not appear on any document signed by the defendant. The word vendor is not sufficient: *Potter* v. *Duffield*, 22 W. R. 585, L. R. 148 Eq. 4; *Williams* v. *Jordan*, 26 W. R. 230, 6 Ch. D. 517; *Thomas* v. *Brown*, 24 W. R. 821, 1 Q. B. D. 714; *Coombs* v. *Wilkes*, 40 W. R. 77, [1891] 3 Ch. 77; *Jarrett* v. *Hunter*, 35 W. R. 132, 34 Ch. D. 152; *Sale* v. *Lambert*, 22 W. R. 478, L. R. 18 Eq. 1. The memorandum contemplates the drawing up of a formal contract, and is not, therefore, of itself a contract: *Lloyd* v. *Nowell*, 44 W. R. 43, [1895] 2 Ch. 744.

Bucknaster, in reply.—The cases cited differ from the present case in that in none of them was there any contract on which an action could be brought. The auctioneers in this case, however, could have sued on the contract. It is a sufficient acceptance for the agent of an undisclosed principal to accept.

He referred to *Morris* v. *Wilson*, 5 Jur. (N.S.) 168, 7 W. R. Ch. Dig. 91; *Commins* v. *Scott*, 23 W. R. 498, L. R. 20 Eq. 11, at p. 16. The contract was not conditional. All the terms could be ascertained from the document to which it referred. It does not matter that that document was not signed: *Rossiter* v. *Miller*, 26 W. R. 865, 3 App. Cas. 1124.

ROMER, J.—The only defence on the merits raised by the defendant is that he was induced to contract with the plaintiffs, if there be a contract, by certain misrepresentations of the plaintiff's agents. All I need say as to this is that the defendant has failed to prove it.

The next defence raised before me is that of the Statute of Frauds, and this certainly gives rise to some nice questions. But I have come to the conclusion that the plea of the statute does not avail the defendant. The point arising on the statute is that which concerns the name of the vendor. The defendant says that he has signed nothing which directly or by sufficient inference sets forth in writing who the plaintiff is. And it is true that the plaintiff's name as vendor does not appear in the offer of purchase of the 25th of September, 1895, signed by the defendant, and that you cannot gather who the vendor is from the auction form of contract or particulars which are sufficiently referred to for identification in the offer. But the offer does contain the names of the contracting parties. The offer is to Frank Jolly & Co., and I think it makes no difference that the offer is made to them as agents for an undisclosed principal.

For the purpose of satisfying the Statute of Frauds it appears to me sufficient, so far as parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of agency from the written document or not. Who the principals are may be proved by parol. That is well settled. This was pointed out by Wood, V.C., in *Morris* v. *Wilson*, and by Sir George Jessel in *Commins* v. *Scott*, where he says: "There can be no doubt that if a written contract is made in this form, A. B. agrees to sell Blackacre to C. D. for £1,000, then E. F., the principal of A. B., can sue G. H., the principal of C. D., on that contract." The offer, then, in the case before me signed by the defendant, does in my opinion, sufficiently give the names of the contracting parties. If that be so, then the statute is satisfied in that respect, for it is settled law that a signed offer in writing, which sufficiently sets forth particulars, may be accepted by parol, and that the signed offer simply accepted by parol sufficiently complies with the statute: see *Warner* v. *Willington*, 4 W. R. 531, 3 Drew 523, and *Reuss* v. *Picksley*, 14 W. R. 924, L. R. 1 Ex. 342. Now, for the purposes of the point I am now considering, the defendant's offer was accepted, and it is not necessary that he should have recognized that acceptance in writing. Nor does it appear to me material that the acceptance disclosed the name, and was on behalf of the vendor, the previously undisclosed principal. A simple acceptance by Frank Jolly & Co. would be clearly sufficient, and later on they might have disclosed the fact that they accepted on behalf of their principal. And I cannot see that it makes any difference that they disclose at the time of acceptance the name of the principal, or accept directly on behalf of the principal, instead of first simply accepting it and then stating who the principal is. I therefore hold that this objection fails. And, indeed, I do not think the point is novel. Substantially the same point was decided by Wood, V.C., in *Morris* v. *Wilson* mentioned above, in accordance with the view I have expressed. And the cases relied upon by the defendant are distinguishable. In *Potter* v. *Duffield*, you could not gather by anything signed by the defendant's agent who the contracting parties were. The defendant's agent was not mentioned as a contracting party. There was no offer of any kind in writing to him as agent for the vendor or otherwise. And the same observations apply to *Commins* v. *Scott*, so far as relates to the first point taken by counsel on behalf of the plaintiffs in that case and decided against them by Sir George Jessel. In *Williams* v. *Jordan* the offer to take a lease was only addressed "Sir," and you could not gather from it to whom the offer was addressed. It certainly was not addressed to the person who subsequently purported to accept it on

behalf of the lessor. Lastly, in the case of *Jarrett* v. *Hunter*, though that gives rise to more difficulty, the contract did not show who the vendor was or who were the contracting parties. I gather that the solicitor for the vendor, who signed, did not purport to sign as a contracting party or on behalf of his undisclosed principal. And the point that the writing signed could or might be taken as a contract between the purchaser and the solicitor, as agent for the undisclosed principal vendor, was apparently not taken on behalf of the counsel for the plaintiffs or considered by the judge who decided that case.

The only other point taken on behalf of the defendant in the case before me is that the acceptance of his offer was not a simple one, but was conditional, because of the words "subject to contract as agreed." Now, at first sight, those words may appear to make the acceptance conditional. But when the offer is carefully looked at it appears to me that the acceptance was absolute and not conditional. The offer stated in effect that if accepted the defendant would pay a deposit of £35 and sign the form of contract on the auction particulars. Now, that form of contract was in writing, and was definitive in all its terms and clearly identified by the offer. It left nothing to be agreed upon thereafter. The signing it was a form. The contract between the parties was complete on acceptance of the offer, whether the form on the auction particulars was signed or not. I might make in this case somewhat similar observations to those which Cairns, L.C., made in *Rossiter* v. *Miller* with regard to the provision as to a further agreement to be signed by the purchaser in that case. The acceptance, therefore, in the case now before me, when it spoke of "subject to contract as agreed," was clearly only referring to the form of contract mentioned in the offer, and which the defendant had offered to sign. The acceptance of the offer was not made subject to any new terms, but was one in accordance with the terms of the offer; this being sufficiently shown by the important words "as agreed." It follows that the defendant fails in all his defences, and that the plaintiff is entitled to specific performance of the contract, with costs up to and including judgment.

Solicitors, *Lewin & Co.; J. R. Pakeman.*

Q. B. Div.
(Wright and Wills, JJ.) Dec. 16.

REG. v. SODEN AND OVEREND. (*a.*)

Election law—Registration—Parliament—Franchise—Objection to name—Closing the list—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict.* c. 26), *s.* 40, *sub-sections* 8, 9, 10, 11.

A revising barrister gave notice that his court would be held on certain days, and that after the last sitting the lists would be closed. This was done, and on the day after the lists were closed the revising barrister sat for the purpose (inter alia) *of expunging from the list the names of those persons whose names had been objected to and who had not appeared and announced their intention of contesting the objection at the previous sittings. On the name of S. being called evidence was given of the service of the notice of objection, and S. thereupon claimed to be heard in answer to the objection. The revising barrister refused to hear him and expunged his name.*

Held, that a mandamus *would not be granted to compel the revising barrister to state a case on the question whether or not he was right in expunging the name of S. from the list.*

Rule *nisi* for a *mandamus* to the revising barrister for the borough of Leeds to state a case in the matter of an objection by one Overend to the name of Sykes being retained on the list of parliamentary voters for the Central Division of Leeds.

The revising barrister had filed an affidavit, from which the following facts appeared:

It was the custom of the revising barrister to hold a revision court for each of the five parliamentary divisions of Leeds, and also to separate contentious from non-contentious business.

In September, 1896, four sittings were fixed for the Central Division of Leeds—*i.e.*, one on the 12th, one on the 14th, and two on the 15th, and notice was given that the lists would be closed on the evening of the 15th. On that day at the conclusion of the sitting the revising barrister satisfied himself that there were no more persons present desirous of being heard in support of claims or in answer to notices of objection.

On the 16th the revising barrister sat to go through the list of persons objected to for the purpose of striking out the names of those persons who, having been duly objected to, had not appeared at either of the previous sittings.

The name of Sykes appeared on this list, and when the overseer called out that name, Linforth, a registration agent appearing on Sykes' behalf, said "No objection."

The revising barrister took this to mean that the notice of objection had not been served. Evidence of the service of the notice of objection was then given, and the revising barrister removed the name of Sykes from the list of parliamentary voters.

Linforth then stated that Sykes was present, and asked the revising barrister to hear his evidence, upon the ground that *primâ facie* evidence having been given in support of the objection, the person objected to was entitled to be heard in answer.

The revising barrister declined to hear Sykes' evidence on the ground that the lists had been closed on the previous evening, when Sykes had had an opportunity of being heard if he had desired it.

An affidavit had been filed by Linforth and Sykes, in which it was stated that Linforth had told the revising barrister on the evening of the 15th that he was prepared to prove that the objection to Sykes was bad.

The revising barrister, in his affidavit, denied having heard this, and said that the first time he heard the name of Sykes mentioned was on the 16th.

H. Sutton, for the revising barrister, appeared to show cause against the rule.

W. Graham, for Overend, the objector, also showed cause, and contended that if the rule was made absolute it would be futile, for there was no means by which it could be complied with.

Lewis Thomas, in support of the rule.—The Parliamentary and Municipal Registration Act, 1878, s. 28, sub-section 9, provides that, unless the objector appears in support of the objection, the name objected to shall remain on the list. Sub-section 10 provides for the giving of *primâ facie* evidence in support of the objection. Then, by sub-section 11, if such proof is forthcoming, unless the person objected to appears, his name is to be struck off. It is said that in this case Sykes ought to have given his answer to the objection on the 15th of September, but at that time there was nothing for him to answer. The

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

objector did not give his evidence till the 16th, and until that had been given Sykes could not have been heard even if he had come forward. If the list was re-opened on the 16th, then Sykes ought to have been heard. If it was not re-opened, there was no power to expunge his name from the list. *Reg.* v. *Soden*, 44 W. R. 449, [1896] 1 Q. B. 634, was a case of a person claiming a vote, and is not in point here.

WILLS, J.—I am of opinion that this rule ought to be discharged. I think that it is a great pity that people should spend all their energy in making things difficult for the revising barrister, instead of loyally assisting him in the discharge of his onerous duties. In this case it appears that the revising barrister has made convenient rules for carrying on the necessary business of his court, and he says that the practice is perfectly well known. The practice of separating the opposed from the unopposed business certainly appears to be most reasonable and convenient. As to what occurred on this particular occasion, I entirely accept the revising barrister's version. No effectual steps were taken to bring to the revising barrister's notice on the 15th that the parties wanted to contest the objection to Sykes' name. The case, therefore, went over to the next day as a case which was not going to be contested, the only question left to be settled being the formal proof of the service of the notice of objection. Unless some such reasonable arrangement was made it would be absolutely impossible for the revising barrister ever to get through his work in a place like Leeds.

There is no point of law which could be raised by a case, and the application for a *mandamus* must be refused.

WRIGHT, J.—I entirely agree. I do not think that the court has power to order a case to be stated in the circumstances of this case. The application should have been for a *mandamus* to the revising barrister to hear and determine the objection.

Rule discharged.

Solicitor for the revising barrister, *Solicitor to Treasury.*

Solicitors for the objector, *Hickin, Smith, & Capel Cure.*

Solicitors for the applicant, *A. Scott Lawson*, for *Walker & E. H. Foster*, Leeds.

Q. B. Div. (Wills and Wright, JJ.) Dec. 12.

KILLIN (*Appellant*) *v.* SWATTON (*Respondent*). (a.)

Licensing law—Licence—Intoxicating liquors—Exemption claimed under 56 Geo. 3, c. 67—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3.

The benefit granted by 56 Geo. 3, c. 67, to the children of the officers and men who served his Majesty in the Peninsular War to set up and exercise a trade "in any city, town, or place within this country without let, suit, or molestation, notwithstanding any statute, law, ordinance, custom, or provision to the contrary," does not exempt this class of persons from the provisions of the general public statutes, but has reference only to customs, charters, bye-laws, and the like existing in particular localities.

Held, therefore, that K., the son of a soldier who had served in the Peninsular War, was properly convicted for having sold intoxicating liquors without obtaining a licence as required by section 3 of the Licensing Act, 1872.

Special case stated by an alderman of the City of London.

The appellant was summoned by the chief acting inspector of the City police for selling by retail at his premises, 45, Fish-street-hill, intoxicating liquors without having a licence. It was proved before the magistrate that the appellant had openly sold intoxicating liquors at these premises for the last thirty-eight years, and that he had not taken out a licence at any time to do so, as he was now required to do by section 3 of the Licensing Act, 1872. It was also proved that the appellant was a lawful son of Thomas Killin, formerly a soldier in the 43rd Regiment of Foot, who had served in the Peninsular War, and was in 1824, after fifteen and three-quarter years' service, admitted as an out-pensioner at Chelsea Hospital. The appellant was born in November, 1833. It was, on behalf of the appellant contended that it was unnecessary for him to take out a licence to carry on his business as a retailer of wines, spirits, and beer, because he came within the benefit of the statute of 56 Geo. 3. c. 67, and was therefore entitled to trade in any business without having to conform to any regulations imposed on the ordinary trader by statute or otherwise. That Act was passed in 1816 for the "benefit of the officers, mariners, soldiers, and marines who had served his Majesty in the Peninsular War by sea and land," and after setting forth that the war being ended, many of those who had served their country would willingly employ themselves in trades, but were hindered from so doing in certain cities and corporations and other places within the Kingdom, because of certain bye-laws and customs of those places, it enacted that "all such officers and men as had been employed since the 22nd of June, 1802, and also their wives and children," might set up and exercise such trades as they were apt and able for in any city, town, or place within the Kingdom, without any let, suit, or molestation of any person or persons whatsoever for or by reason of the using of such trade, and if they were "sued, impleaded, or indicted" for so doing, they should, upon the general issue pleaded, be found not guilty by all judges who were to conform to that statute—"any statute, law, ordinance, custom, or provision to the contrary anywise notwithstanding," and "they in that case were to be enabled to recover double costs of the suit, to be recovered as any other costs at common law might be recovered."

In support of the charge it was contended before the magistrate that the Act of Geo. 3 did not apply so as to exempt the appellant from the provisions of section 3 of the Licensing Act, 1872, and alternatively, if the Act did apply in such a case, it was repealed by implication by the Licensing Acts of 1828, 1869, and 1872, and further that it was expressly repealed by the Statute Law Revision Act, 1873.

The magistrate held that having regard to section 3 of the Licensing Act, 1872, the appellant should have obtained a licence, and he convicted him of the offence.

Avory, against the conviction.—The appellant does not require a licence. The special right to carry on any trade given by 56 Geo. 3 c. 67, to this class of persons is not to be restricted by any general public statute or by any local bye-law. It is expressly provided that the benefit of the Act shall not extend to give "liberty to any person to set up the trade of a vintner or to sell wines or other liquors within the University of Oxford or Cambridge." It is therefore clear that except in the Universities the Act was

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

intended to give these persons the right now claimed by the appellant. [WILLS, J.—Could the son of a Peninsular soldier keep a slaughter-house without a licence?] The Act says that such a person shall be permitted to carry on any trade in spite of any statute, law, ordinance, custom, or provision to the contrary. Before the magistrate it was contended that the statute did not apply to the case of a man carrying on the business of a licensed victualler who, in spite of the Act, could still be required by the Excise authorities to take out a licence. It was also said that the Act was repealed. [WILLS, J.—We think the statute does give a man the right to carry on the business of a licensed victualler.] Then it is unnecessary to argue that the Act has not been repealed.

R. D. Muir, in support of the conviction was not called upon.

WILLS, J.—The appeal must be dismissed with costs. It is perfectly clear that the Act of 1816, passed in favour of a certain class, was intended merely to get rid, so far as they were concerned, of the difficulties imposed on persons desiring to trade in particular towns by the special "charters, bye-laws, and privileges" which existed in those particular localities. To hold that this particular class of persons are to be exempted from the necessity of taking out a licence or otherwise conforming with the provisions of the general laws of the Kingdom, would be to my mind the *ne plus ultra* of absurdity. In my opinion, the magistrate was right in the decision he came to, and the conviction must be upheld.

WRIGHT, J.—I am of the same opinion.

[During the argument it was stated that the appellant had from time to time received notice from the Excise authorities to take out a licence, but that on his pleading the statute they had previously held the exemption claimed to be good. His brother carried on the business of a silversmith, and for the same reason the Inland Revenue authorities had not insisted upon certain payments.]

Solicitors for the appellant, *Tiddeman & Enthoven.*

Solicitor for the Excise authorities, *The City Solicitor.*

Prob. Div. & Adm. Div. Probate. } Aug. 10, 1896.

In the Goods of HUNT. (a.)

Probate—Company executors—Administration with the will annexed to nominee—Company sole surety.

A testator appointed a limited company trustees and executors of his will. The court on motion, upon evidence of the sufficiency of the company and its power to act, granted letters of administration with the will annexed to a nominee of the company with the company as sole surety.

Motion for a grant of letters of administration with the will annexed of William Henry Hunt, deceased, to James Archibald Stirling, the nominee of The Trustees, Executors, and Securities Insurance Co. (Limited), executors of the will, and that the said company might be permitted to be surety for the said administrator, and that further surety might be dispensed with.

William Henry Hunt, late of Douglas, in the Isle of Man, died on the 14th of June, 1896, having duly executed his last will on the 2nd of February, 1891, whereby he appointed the said company to be executors and trustees thereof.

On the 22nd of July, 1896, the company, by deed-poll under their seal, appointed J. A. Stirling, their general manager, to be their syndic for the purpose of obtaining letters of administration of the estate with the will annexed for their use and benefit.

By the memorandum of association the objects for which the company was established were stated to be *inter alia* (section 3, sub-section 1) "the undertaking and executing of the office of trustee, executor, receiver, and liquidator; and the undertaking and executing of all kinds of trusts, both public and private; and the performing and carrying out of the various kinds of business incident and connected therewith, either gratuitously or otherwise," and (sub-section 21) "doing all such things as are incidental or conducive to the attainment of the above objects."

A copy of the last report, balance-sheet, and profit and loss account of the company was produced, showing that the liabilities of the company, apart from their share capital stood on the 31st of May last at £476,108, and the assets were taken at £975,470, and the company had, in addition to these assets, an uncalled capital of £600,000.

The amount of the deceased's estate was sworn under £5,000.

Bargrave Deane, for the company.—In similar cases it has been hitherto usual for two directors of the company to become sureties, but there is no reason why the company should not be accepted as sole surety, for, although they have not express power to become surety, section 3, sub-section 1 and section 31, by implication, confer such power. But for a technicality the company would be the executors. The administrator will, of course, give the usual bond.

BARNES, J., granted the motion.

Solicitors, *Fishers.*

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) [and Q. B. Div. (Pollock, B., and Bruce, J.)] } July 2; Dec. 3.

ATTORNEY-GENERAL v. BARON WOLVERTON. (a.)

Inland Revenue—Succession duty—"New succession"—Annuity—"Valuable consideration in money or money's worth"—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss*, 2, 15, 17, 18.

A testator, a peer, by his will bequeathed his residuary estate to his widow for life, with remainder to his nephew, if living, but, if not, to the person who should then be the testator's right heir at common law absolutely. The nephew died without issue in the lifetime of the testator's widow, and the testator's nieces having survived the widow were then the testator's co-heiresses and right heir at common law. The defendant succeeded to the title, and a deed of settlement was then executed by which the widow assigned her life interest in certain shares and the nieces and the defendant assigned all their

(a.) Reported by E. G. STILLWELL and W. F. BARRY, Esqs., Barristers at-Law.

interest under the will, subject to the life interest of the widow, to trustees upon trust, by clause 1, *to pay out of the income* (inter alia) *an annuity of* £15,000 *during the widow's life to the defendant for life; and by clause* 2, *after the death of the widow out of the income "to continue to pay the said annuity of* £15,000" *to the person for the time being holding the title, with trusts over. Upon the death of the testator's widow legacy duty was paid on his estate, and the Crown claimed succession duty in respect of the annuity which the defendant then became entitled to receive under clause* 2 *of the deed.*

Held, that the annuity under clause 2 *was not the same as the annuity under clause* 1, *as the former was payable out of the estate of the nieces and the latter out of the life estate of the widow, the annuities being also limited in favour of different persons, and that therefore there was a "succession" within section* 2 *of the Succession Duty Act,* 1853, *in respect of the annuity under clause* 2 *of the deed; that the deed did not create an "alienation not conferring a new succession" within the meaning of section* 15; *that the deed was not a "contract made for valuable consideration in money or money's worth" so as to come within the exemption in section* 17; *and that the payment of legacy duty upon the testator's estate on the death of his widow did not bring the case within the exemption in section* 18, *as the legacy duty was not paid "in respect of the same acquisition of the same property."*

Held, therefore, that the defendant was liable to pay succession duty.

This was an information by the Attorney-General, claiming on behalf of her Majesty succession and estate duty upon a certain annuity of £15,000.

The facts in the information, in so far as they are material were as follows: It set out a deed of arrangement, dated the 31st of December, 1888, between Lady Wolverton (since deceased), widow of George Grenfell, second Baron Wolverton, of the first part; Constance Gertrude Glyn, Florence Elizabeth Mary Portal, Edith Theodosia Glyn, Mabel Glyn, and Beatrice Ellerie Fetherstonhaugh (nieces of the aforesaid Baron Wolverton, who were daughters of St. Leger Glyn, a younger brother of the second Baron Wolverton, and who may conveniently be called the co-heiresses, of the second part; Albert Henry Wilmot Williams, William Wyndham Portal (husband of the said Florence E. M. Portal) and Horatio Noble Pyne, trustees of the marriage settlement of the said Beatrice Ellerie Fetherstonhaugh, of the third part; the said Lady Wolverton, Sir Richard George Glyn, and the Hon. Pascoe Charles Glyn, of the fourth part; the defendant Frederic Baron Wolverton, of the fifth part; the said Lady Wolverton (the defendant), the said Pascoe Charles Glyn, and Cecil Alfred Grenfell, of the sixth part; and the said Albert Henry Wilmot Williams and William Wyndham Portal, Pascoe St. Leger Grenfell and the said Horatio Noble Pyne, of the seventh part. This deed recited the will of the said George Grenfell, second Baron Wolverton, dated the 16th of January, 1885, whereby he bequeathed all his share and interest in the banking company of Glyn, Mills, Currie, & Co., to his nephew, Henry Richard Glyn, who, on the testator's death, became third Baron Wolverton, upon trust to receive the annual produce thereof until the 31st of January, 1892, if he should so long live, and to invest so much of that produce as in any year exceeded £15,000 per annum in Government securities in the names of himself and another trustee, and to accumulate the produce thereof in like manner for his own use and benefit until the 31st of January, 1892. The will then disposes of the residuary estate of the testator by bequeathing it to the testator's wife for life, with remainder to the said Henry Richard Glyn, if living; but, if not, to the person who should then be the testator's right heir at common law for his absolute use and benefit. The deed then recited that the testator died on the 6th of November, 1887, and that on the 2nd of July, 1888, Henry Richard Glyn died without issue, having succeeded to the title; also that the parties of the second part were co-heiresses-at-law and "right heir at common law of the testator." That under these circumstances it was apprehended that according to the true construction of the said will, except in the event of all the parties of the second part dying in the lifetime of Lady Wolverton without leaving issue at her death, no part of the residuary estate of the testator, including the bank shares, would devolve or come to the person for the time being holding the title of Baron Wolverton under the trusts of the will, contrary to the supposed intention of the testator. That in pursuance of an arrangement entered into between Lady Wolverton, the co-heiresses, and Frederic Baron Wolverton for the purpose of determining all questions relating to the residuary estate of the testator, and with the object of carrying into effect his supposed intention, Lady Wolverton as to her life interest in the said bank shares, and the co-heiresses as to their respective shares and interests of and in the residuary estate of the testator, inclusive of the bank shares, and Frederic Baron Wolverton as to his contingent interest in the residuary estate inclusive as aforesaid, had agreed to make such assignments as were thereinafter contained to the parties thereto of the sixth part as trustees to the intent that the premises intended to be assigned might be held upon the trusts and with and subject to the powers and provisions therein contained. The deed then further recited the marriage settlement of Beatrice Ellerie Fetherstonhaugh, by which all her interest in the residuary estate of the testator was assigned to the parties to the said deed of arrangement of the third part, and then the operative part is as follows: Lady Wolverton assigned to the parties of the sixth part the income to accrue during her life on the bank shares and investments representing the same as from the 31st of August, 1888, to be held upon trusts after declared; the parties of the second and third parts assigned all their respective interests under the will in the residuary estate of the testator and in the bank shares subject to the prior life interests of Lady Wolverton to the parties of the sixth part, to be held upon trusts after declared; and the said Frederic Baron Wolverton assigned all his interest under the trusts of the will to the same parties of the sixth part, to be held upon the trusts after declared.

The trusts of the property so assigned, and thereinafter called "the settled property," were (so far as is material to be here stated) declared as follows: By clause 1, subject to the life interests of Lady Wolverton, the settled property was to be held upon trust to pay out of the income during the life of Lady Wolverton an annuity of £15,000 to Frederic, Baron Wolverton, for life, determinable in certain events, and upon further trusts during her life to pay an annuity of £15,000 to Mrs. Portal for her separate use, a like annuity to the trustees of Mrs. Fetherstonhaugh, and an annuity of £1,000, to be increased on marriage to £1,500 to each of the other co-heiresses, and upon further trust during the life of Lady Wolverton to pay out of the annual income the clear yearly sum of £35,000 to the parties thereto of the seventh part (thereinafter called "the trustees of the accumulated fund"), to be held and applied by them in accordance with the trusts after declared. And certain further trusts were declared with regard to the

ultimate balance (if any) of the income of the settled property during the life of Lady Wolverton.

By clause 2, after the death of Lady Wolverton, until the sums of £100,000 thereinafter mentioned, and all duty thereon, and all costs and claims thereinafter mentioned, should have been satisfied, and until the trust for accumulation thereinafter directed should have ceased, the trusts of the settled property were as follows: After payment of duty out of the annual income, to continue to pay the said annuity of £15,000 (which "continuing annuity" was thereinafter called "the said annity of £15,000") in like manner as thereinbefore provided with regard to Frederic Baron Wolverton, to the person for the time being holding the title of Baron Wolverton during his life. Then follow trusts for investment of the accumulated fund, and the accumulation of the income, and upon the death of Lady Wolverton for the payment to the co-heiresses—*i.e.*, the parties of the second part (but in the case of Beatrice Ellerie Fetherstonhaugh, to her trustees) of £100,000 each, with further trusts, in case the accumulated fund should not at such death be sufficient to satisfy the said sums of £100,000 and all duty thereon, to further accumulate and satisfy all claims in respect thereof, and all duty, and subject thereto to pay over the surplus of the accumulated fund to the trustees of the settled property—*i.e.*, the parties of the sixth part; and the ultimate trust was to invest in freehold hereditaments in England and Wales to be held to the use of Frederic Baron Wolverton, during his life, with remainders in tail male and remainder over. The information then alleged that the arrangement made by the deed of the 31st of December, 1888, took effect, and the defendant enjoyed the annuity of £15,000 per annum stipulated by clause 1 of the indenture, until it determined by the death of Lady Wolverton on the 10th of January, 1894, at which time the "accumulated fund" consisted of £118,007 6s. 8d. Consols, and £70,374 14s. 6d. Metropolitan Three per Cent. Stock, and of certain cash. That upon the death of Lady Wolverton (the trust for accumulation still continuing) the trusts declared by the second clause of the deed of the 31st of December, 1888, came into operation, and the defendant, as the person for the time being holding the title of Baron Wolverton, became entitled in possession to another annuity of £15,000 out of the annual income of the trust funds called the "settled property"; that under these circumstances succession and estate duties had become payable in respect of the annual sum of £15,000, which the defendant, the present Baron Wolverton, became entitled to receive under clause 2 of the deed from the date of Lady Wolverton's death, until the trust for accumulation should have ceased, which annual sum was derived by him from the parties of the second part to the said indenture (being the co-heiresses of George Grenfell, Baron Wolverton) as predecessors, or, if not, then from Lady Wolverton, or from the said co-heiresses and Lady Wolverton jointly.

The defendant in his answer denied that the deed in question created any succession under section 2 of the Succession Duty Act of 1853, and said that, if it did, it was created for a valuable consideration and was therefore not chargeable with duty under that Act.

It appeared that legacy duty on the testators' estate was paid on the death of Lady Wolverton.

Sir R. E. Webster, A.G., *Sir R. B. Finlay, S.G.*, and *Vaughan Hawkins*, for the Crown.—The defendant is liable to pay succession duty in respect of the annuity of £15,000 as it is a new annuity derived out of the estate of the co-heiresses, who were his predecessors, and of whom the defendant is the successor. The annuity granted by Lady Wolverton under clause 1 only came out of her estate for life and ceased with her death; this, therefore, is not a continuation of such annuity. The present annuity comes out of the estate of the co-heiresses to the defendant under a disposition made by them to take effect on the death of Lady Wolverton. It comes out of a different property and its destiny is different: *Attorney-General* v. *Floyer*, 10 W. R. 762, 9 H. L. Cas. 477; *Attorney-General* v. *Cecil*, 18 W. R. 949, L. R. 5 Ex. 263. This was not a contract for money or money's worth, and therefore does not come within the exemption contained in section 17 of the Succession Duty Act, 1853: *Stockley* v. *Parsons*, 38 W. R. 712, 45 Ch. D. 51; *Floyer* v. *Bankes*, 12 W. R. 28, 3 De G. J. & S. 306; *Davis* v. *Angel*, 10 W. R. 722, 4 De G. F. & J. 524. Lord Wolverton's interest was not one in point of law, but was a mere remote contingency: *Tetley* v. *Tetley*, 4 Bing. 214. It is no answer to the claim that legacy duty was paid on the death of Lady Wolverton. The co-heiresses became legatees when she died, but they settled the property on the defendant, thus creating the relation of predecessors and successor: *Attorney-General* v. *Mitchell*, 29 W. R. 683, 6 Q. B. D. 548. Moreover, the legacy duty was not paid "in respect of the same acquisition of the same property" within section 18 of the Succession Duty Act, 1853.

Cozens-Hardy, Q.C., *C. A. Cripps, Q.C.*, and *Danckwerts*, for the defendant.—Succession duty is not payable by the defendant. Only one annuity was created by the deed—namely, that of £15,000; there is no new annuity, and therefore the case does not come within the Succession Duty Act. *Attorney-General* v. *Cecil* is distinguishable, for there it was admitted that there was a new succession. Legacy duty has been paid upon the residuary estate by the co-heiresses, and therefore they could not be liable for succession duty as well. The defendant is in the same position as they would be, being a purchaser for money or money's worth: *Solicitor-General* v. *Law Reversionary Interest Society*, 21 W. R. 854, L. R. 8 Ex. 233; *Attorney-General* v. *Littledale*, 20 W. R. 473, L. R. 5 H. L. 290; *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675.

Sir R. B. Finlay, S.G., replied.

Cur. adv. vult.

July 2.—POLLOCK, B., delivered the judgment of the court. [Having stated the facts as above set out the learned judge proceeded:—] The defendant denied his liability upon two grounds—first, that the annuity of £15,000, to which he became entitled upon the death of Lady Wolverton, was one and the same annuity as was created and granted by the first clause of the deed, and, therefore, on the death of Lady Wolverton there was no succession; secondly, that the arrangement which was carried out by the deed of the 31st of December, 1888, was between Lady Wolverton, the co-heiresses, and the defendant, for valuable consideration, and that the defendant and the co-heiresses were purchasers for value; and, therefore upon the true construction of the Succession Duty Acts and also under section 17 of the Act of 1853, no duty was payable.

For the determination of the first of these questions we must turn to section 2 of the Succession Duty Act, 1853, which provides as follows: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after

the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution, a succession; and the term successor shall denote the person so entitled, and the term predecessor shall denote the settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." Before effect can be given to this section the first thing to inquire is, Who is the successor and who is the predecessor of the annuity in question? If there be a succession at all there is no doubt that the defendant is the successor. If, however, the annuity to which he is said to succeed is one and the same annuity as was granted by the first clause of the deed, the predecessor was George, second Baron Wolverton. The real question would seem to be, What was the interest which the defendant took under the deed upon the death of Lady Wolverton? It is true that the defendant or his children might, under the extremely improbable event of the issue of all the co-heiresses failing, have succeeded to the residuary estate of George, second Baron Wolverton, but the annuity created by the second clause of the deed was, in the event which happened, an annuity derived out of the estate of the co-heiresses, and after the death of Lady Wolverton came direct to the defendant. It differs also from the annuity created by the first clause of the deed in this, that it is limited, not to the defendant, but to the person for the time being holding the barony of Wolverton, so that, in the event of the defendant dying during the lifetime of Lady Wolverton it would have gone, after her death, to his successor in the title. A further distinction was pointed out to us during the argument between the annuity created by the first clause and that which is given by the second clause of the deed. The former is charged only upon the testator's share and interest in the bank, whereas the latter is charged upon the same share and interest in the bank and also upon the whole of the residuary estate of the testator and any future investments representing it. In this particular case this variation may be of no great moment, but on principle the defendant, should the interest in the bank decrease in value, derives a new and further security from the provision made by the co-heiresses.

These facts lead us to the conclusion that the annuity to which the defendant succeeded was not the same as was granted by the first clause of the deed, but was a new annuity created by the deed, and that when the defendant became entitled to it, it was as successor, and that either the co-heiresses or they and Lady Wolverton together, were the predecessors. In the case of *Attorney-General* v. *Floyer*, Lord Cranworth in his judgment as Lord Chancellor, after referring to *Lord Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. Cas. 150, says: "The decision of this house shows that in order to ascertain who is the settlor, within the second section—*i.e.*, the settlor 'from whom the interest of the successor is derived,' we must inquire not who are the parties by whose conveyance the estate has been created, but who is the conveying party out of whose estate the interest in question has been derived." Applying this to the present case, the interest which the defendant took after Lady Wolverton's death was derived, not from Lord Wolverton, the testator, but from the co-heiresses, out of whose interests it came. It is not to be expected that any case can be cited in which the facts are identical with those now before the court, but on principle it seems to us that the present case is governed by the decision in the case of *Attorney-General* v. *Cecil*.

With regard to the second point urged by the defendant, although it was based upon the true construction of the Succession Duty Acts as well as upon the provision contained in section 17 of the Act of 1853, it will be convenient to refer to the language of that section, the material part of which is as follows: "No bond or contract made by any person *bonâ fide* for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such . . . bond or contract, if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession." Apart from section 17 it would seem to need no authority to show that when property passes from one person to another by sale or mortgage for a money consideration, no succession takes place. The question, however, has been fully dealt with by Jessel, M.R., in *Fryer* v. *Morland*.

In the present case it is sufficient to say that the effect of the deed cannot be said to amount to a sale, and that Lady Wolverton and the co-heiresses were in no sense vendors, nor was the defendant a vendee. When, however, we turn to section 17 the words used are that no contract made by any person *bonâ fide* "for valuable consideration in money or money's worth, for the payment of money or money's worth after the death of any other person shall create the relation of predecessor and successor"; and it was argued on behalf of the defendant that there was a consideration in "money or money's worth" for the re-settlement by the deed, and that in effect the defendant and the co-heiresses were purchasers for value; that each party had a *spes successionis* and as such, had interests which were "money's worth"; that the five co-heiresses acquired an interest in £100,000, which, under the will, had they died first, would not have come to them, and also got the annuities out of income to which, under the will, Lady Wolverton was entitled. In support of this view the dictum of Lord Westbury in *Floyer* v. *Bankes*, 3 De. G. J. & S. 306, was cited, where, at p. 312, speaking of money or money's worth, he says: "These words appear to have been selected for the purpose of excluding the consideration of marriage"; but the case itself is a decision in favour of the Crown. The remarks of Lord Westbury in that case upon section 17 are so valuable as bearing upon the present case that it is worth while to give them more fully. He says: "To explain the intention and the effect of the 17th section, it is desirable to make a few remarks on the general object and design of the Succession Duty Act. In framing the Act, the word "succession" was adopted for the purpose of denoting any property passing upon death from one person to another by virtue of any gift or descent, or of any contract not being a *bonâ fide* contract of purpose. Money or property, the right to receive or possess which might arise upon death under a contract made *bonâ fide* in return for other money or property, was not as between the contracting parties to be treated as a succession; but it was not intended to except property arising upon death under contracts for valuable considerations generally. Marriage is by the law of England a valuable consideration for a contract, and that of the highest

kind; but property arising under a contract in consideration of marriage is not excepted, even in favour of persons coming directly within that consideration. A contract to be excepted must be *bonâ fide* made in consideration of money or money's worth, words which appear to have been selected for the purpose of excluding the consideration of marriage. Where, under a contract, money or money's worth is to be received by one person from another on the expiration of some life or lives, and such contract is made *bonâ fide* for the consideration of money or money's worth, the 17th section declares that the relation of predecessor and successor shall not arise between the person contracting to pay or transfer and the person entitled to receive, otherwise *post obit* bonds and contracts for the purchase of deferred annuities would create succession. So, if the owner of a freehold estate in fee simple contracts to sell it for a sum of money subject to and reserving a life interest in himself, the relation of predecessor and successor will not arise between the vendor and the purchaser. So, if two persons contract with a third for a purchase of a freehold estate and pay for it jointly, directing the conveyance to be made to one for life, remainder to the other in fee, there will not be the relation of predecessor and successor between the vendor and the remainderman, although it is clear that the remainder in fee will be a succession. These are examples of the purposes which the 17th section was intended to answer. It is true that if the words of the 17th section do, according to their ordinary meaning, apply to and exclude other cases than those to which it was intended to be limited, the words being found in an Act taxing the subject, must not be restrained by construction, even although the giving them their full latitude of meaning may defeat the object of the Act. On the other hand, the word 'contract' in the 17th section must not, for the purposes of exemption, be extended beyond those limits which the context plainly shows to be the true meaning and intent of the words."

The view which has been taken in these cases is supported by older decisions under the Annuity Act, (53 Geo. 3 c. 141). Section 10 excepted annuities "granted without regard to pecuniary consideration or money's worth" from the operation of the statute, and it was held in several instances that annuities granted in consideration of the conveyance of an estate, or as part of a family arrangement, or in consideration of marriage, were granted without regard to money's worth within the meaning of the Act, and consequently did not require enrolment: see *James* v. *James*, 2 Brod. & B. 702; *Blake* v. *Attersoll*, 2 B. & C. 875; *Tetley* v. *Tetley*; *Mestayer* v. *Biggs*, 1 C. M. & R. 110; *Massey* v. *Nanney*, 4 Scott, 258. It seems to us that, according both to reason and authority, the Crown is entitled to judgment for the amount claimed.

Judgment for the Crown.

Lord Wolverton appealed.

Dec. 2, 3.—*Cozens-Hardy*, *Q.C.*, and *C. A. Cripps*, *Q.C.* (*Danckwerts* with them) for the appellant.

Sir R. B. Finlay, *S.G.*, *Sir R. E. Webster*, *A.G.*, and *Vaughan Hawkins* for the Crown.

Lord ESHER, M.R.—Taking the sections in their inverse order, it is admitted that section 18 does not apply to this case unless the case can be brought within section 15. It may be that even if it is within section 15, section 18 does not apply, but we have not got to deal with that here. If we decide that the case is not within section 15, we have no need further to consider section 18.

Now, we have already intimated that section 17 cannot apply to such a case as this, because that section cannot apply to such a family settlement as this, which is not a contract between any parties such as is described in that section. Therefore the question before us depends upon sections 2 and 15 alone. It was argued that this case was not within section 2 because there is but one succession or a continuing succession. If therefore we determine that there are two successions and that the one does not continue at all, then that argument falls to the ground and the case is *primâ facie* within section 2. If the case is *primâ facie* within section 2, does it come within section 15? It is said on the part of the Crown that it does not. First of all it is said that we should construe section 15 according to the view of Martin, B., in *Attorney-General* v. *Cecil*, 18 W. R. 949, at p. 951, L. R. 5 Ex. 263, at p. 272, which was that section 15 does not apply where there is an alienation upon a family settlement, but that it refers to an alienation in the ordinary sense, as a sale of the whole interest to a third person before it comes into possession. But the Crown goes further and says that the case is not within section 15 because, if there has been an alienation, it is an alienation which confers a new succession.

Now we come to the deed. There was the first annuity. Then that was done away with and the second annuity created. Is the succession in the second case the same as the first? Supposing that we do not decide this case upon the larger proposition of Martin, B., then it is said that there is a new succession because the two annuities are in favour of different persons. That is true. One is in favour of a particular Lord Wolverton, but not in favour of any succeeding Lord Wolverton; the second is in favour of the person for the time being holding the title of Lord Wolverton. Then it is said that the two annuities are payable out of different sources. The first was not payable out of the estate of the coheiresses; the second is. The second was payable out of a much larger fund than the first. There is, therefore, a new succession. Section 15 only applies to a case where there is not a new succession. It follows, therefore, that either under the larger proposition of Martin, B., or under the second objection stated above, this case is not within section 15. If so, then it is within section 2, and the Crown is right in this case.

Now, I shrink from deciding the construction of this Act in all succeeding cases; but the principles which we lay down must determine all cases which can be brought within them. As regards those principles we have to choose between the proposition of Martin, B., in *Attorney-General* v. *Cecil*, and that of Lord Wensleydale in *Braybrooke* v. *Attorney-General*, 9 H. L. C. 150, at p. 178, two very formidable authorities. When I find that Martin, B., laid down a proposition which is perfectly clear in its terms, and that not one of the other judges who were sitting with him dissented from it, when I find that the proposition laid down by Lord Wensleydale was dissented from by the other lords who were sitting with him, and by succeeding Lord Chancellors and law lords, I cannot adopt Lord Wensleydale's view and I must adopt that of Martin, B. I should therefore be prepared to decide this case upon the proposition laid down by Martin, B., and in any future case raising that same point I should be prepared to act upon that proposition. But even if that proposition were not adopted, it is clear that in this case, as we have already pointed out, there is a new succession, and therefore the case is not within section 15. The appeal must, therefore, be dismissed.

LOPES, L.J.—A great many questions of considerable difficulty have been discussed in this case, as

a great many of them are absolutely unnecessary for the determination of this case, and about them I propose to say nothing. There was a family settlement in the Wolverton family in 1888, and there are two clauses in that settlement which are material. They relate to an annuity of £15,000. It is said against the Crown that there is only one annuity. It is said on the other side that there are two annuities. In my opinion clause 2 of the settlement deals with an annuity granted out of the estate of the co-heiresses, and clause 1 deals with another annuity granted out of the life estate of the widow. Those are two distinct annuities arising out of different funds, arising at different times, and limited in favour of different persons. If that is so, there must be a succession within section 2. It is said, however, section 15 applies. Section 15 only applies if the alienation is one not conferring a new succession. Now, I agree with the Master of the Rolls that a new succession has been created here within section 2, and it seems clear that section 15 can have no application to this case. That section appears to me to have for its object the protection of the Crown for the purpose of putting it in the same position where alienation has taken place as it would have occupied if there had been no alienation.

Now the only other sections which have been discussed are sections 17 and 18. It is admitted that section 18 can have no application unless this case can be brought within section 15. I have already said that, in my opinion, it cannot be brought within section 15, and therefore there is an end to section 18. Then as to section 17, it seems to me impossible to contend that a family arrangement such as this can be brought within that section. The most material word is "contract," and I do not think that this case can be brought within the words of that section.

RIGBY, L.J.—I am of the same opinion. With regard to the question of there being a continuing annuity I do not think it is necessary to add anything. There never was anything more unlike one continuing annuity than this. As to section 17, I consider that there is nothing like a contract for payment of money or money's worth on the death of the Dowager Lady Wolverton. The real question is whether the case comes within section 15 or not. Now, in the first place, I adopt the decision of Sir George Jessel in *In re Cooper and Allen's Contract*, 25 W. R. 301, 4 Ch. D. 802, at p. 824, with reference to the connection of the word "alienation" with the words "not conferring a new succession." I find that I am supported in that view by Lord Wensleydale, who has been cited as an authority upon a different point, in *Braybrooke* v. *Attorney-General*, and I think I am right in saying that it is a view which has been adopted over and over again, and I adopt it as part of the reasoning upon which I found my judgment here. Section 15 deals with a case in which the alienation does not confer a new succession within section 2, as it was foreseen that, if that were not provided for, the Crown might lose duty to which it is entitled. That seems to me to be the reasoning of Martin, B., in *Attorney-General* v. *Cecil*, and I do not see how it can be controverted. Section 15 is only to apply when section 2 of its own force would not apply. Putting aside section 15 for the moment, Does section 2 apply? Putting the question in that form I do not suppose anyone would argue that it does not. Here are certain co-heiresses who, in the events which have happened, may be treated as the owners subject to the life interest of the Dowager Lady Wolverton. That being so, they create for the first time an annuity which is vested in the present Lord Wolverton. He takes it from them by virtue of a settlement, and he comes plainly within the language of section 2; and that, it seems to me, is sufficient to enable us to say that the case cannot come within section 15.

Now it seems to me that "alienation" in section 15 cannot be treated in its most general sense. If one can find one instance of alienation which would not create a new succession then section 15 would be satisfied. One case was pointed out—namely, where the whole property is sold out and out; then, although there is a transfer of a reversion which will only come into possession on the death of a living person, the purchase does not fall within the Act. That is a case which will satisfy the word "alienation." There may be other dispositions.

I have given the grounds which appear to me to be satisfactory for the determination of this case. But I go further, and say that I am inclined to think that Martin, B., was right in the next step which he took—namely, in distinguishing "alienation" from family settlement. I do not think the word alienation was ever intended to include such a family arrangement as this. Every family settlement must contain some elements of alienation, but I am not satisfied, though I do not rely entirely upon it, that Martin, B., was at all wrong when he said that the section was looking to an alienation out and out. I am aware of the *dictum* of Lord Wensleydale in a different direction, still I am not satisfied, if ever the case comes up for decision, that Martin, B., was not right in that. I principally rely upon this being a succession within section 2, a succession—that is, from the co-heiresses to Lord Wolverton—which had no existence antecedently to the family settlement. It is therefore a new succession, and that is enough to decide this case.

Appeal dismissed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendant, *Waterhouse, Winterbotham, Harrison, & Harper.*

From Chambers.
(Lord Esher, M.R., and Lopes, L.J.) — Jan. 15.

In re AN ARBITRATION BETWEEN SPILLERS & BAKER (LIMITED) AND H. LEETHAM & SONS. (*a.*)

Arbitration—Practice—Special case—Power of court to order—Question of law—No decision by arbitrator—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 19.

The court or a judge has power under section 19 *of the Arbitration Act*, 1889, *to order an arbitrator to state a case for the opinion of the court on questions of law submitted to the arbitrator by one of the parties to the arbitration, although the arbitrator has not given any decision on the question of law, and has not indicated what his decision will be.*

Appeal of H. Leetham & Sons from an order made by Collins, J., in chambers.

It appeared from the affidavits which had been filed that the parties had entered into a contract for the purchase and sale of a cargo of bran. The contract provided that in the event of any dispute arising under it it should be settled according to the

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

rules of the Hull Corn Trade Association. These rules provided that disputes should be referred to two arbitrators, one to be appointed by each party, and in the event of difference between the arbitrators they were to appoint an umpire. The rules further provided that either party had a right to appeal to the executive committee of the association. The committee were bound to affirm the award unless two-thirds of the members of the committee were of opinion that the award should be reversed.

Disputes arose under the contract which were referred to two arbitrators, who appointed an umpire. The umpire made his award and there was an appeal to the executive committee. The facts of the case were gone into by the committee, and on the facts certain submissions of law were made to the committee by the respondents. The committee had not given any decision upon the points of law nor had any intimation been given as to what the decision would be. The respondents then applied at chambers for an order directing the committee to state a case for the opinion of the court on the questions of law which had been submitted. The master made the order asked for and the judge affirmed the order.

The Arbitration Act, 1889, s. 19, enacts that: "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

Montague Lush, for the appellants.—This application for a special case is premature, for until the decision of the arbitrators is given on the questions of law it is impossible to say whether the decision may not be in favour of the applicants.

He referred to *In re An Arbitration between Gray, Laurier, & Co. and Boustead & Co.*, 8 Times L. R. 703.

R. M. Bray, for the respondents.—Questions of law have arisen in this case, and therefore, although the arbitrator has not yet given his decision, the case comes within section 19 of the Act and a special case may be ordered. Otherwise an arbitrator need only refuse to give a decision on the legal points raised in order to defeat the operation of the Act.

A. Neilson, for the executive committee.

Lord ESHER, M.R.—The affidavits in this case are somewhat conflicting, but it appears that all the facts in dispute were before the executive committee, and that the points of law were taken before the committee. The committee did not say which way they would decide those points, nor did they give any indication as to what their ultimate decision would be.

It is said that under these circumstances the judge in chambers had no jurisdiction to order the committee to state a case in which the points of law could be raised for decision by the court. If that is so, arbitrators can always prevent any case being stated on any point of law which may palpably arise on the facts of a case. The remarks of Lord Halsbury in *Tabernacle Permanent Building Society* v. *Knight*, 41 W. R. 207, [1892] A. C. 298, have a bearing upon this question, although in that case it was not necessary to decide the question now before us. We therefore have now to decide the question. In my opinion it is not a condition precedent to an application for an order directing an arbitrator to state a case that the arbitrator shall have given his decision upon the point raised, or shall have given an indication of what his decision will be.

Therefore, upon the facts in this case the judge had jurisdiction to make the order appealed from, and I cannot see anything wrong in the way in which he exercised his discretion.

It has been stated that this executive committee intend to make rules with the object of preventing anyone who appears before them from applying to a judge to order a case to be stated. As to that I have only to say that the courts will pay no attention to any such rules, and will treat them as absolutely futile.

LOPES, L.J.—The question in this case is as to the power of a judge to order an arbitrator to state a special case on a point of law when no opinion has been expressed by the arbitrator adverse to the party applying for the special case. All the facts appear to have been brought before the executive committee on which the question of law arose, and then the question of law also was raised. If an arbitrator, by declining to give any opinion on points of law which are taken before him, can prevent any application for an order to him to state a case, it would render section 19 of the Arbitration Act, 1889, useless. A party would be absolutely precluded from raising a question of law which the Legislature intended that the party should have an opportunity of raising.

I am of opinion that there was power to make the order appealed from, and the judge in chambers rightly exercised his discretion in making the order.

Appeal dismissed.

Solicitors for the appellants, *Pritchard & Sons*, for *Jackson & Cottrell*, Hull.

Solicitors for the executive committee, *J. & A. A. Tilleard.*

Solicitors for the respondents, *Chester & Co.*, for *Holden, Son, & Hodgson*, Hull.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 15.

CHICAGO RAILWAY TERMINAL ELEVATOR CO. v. COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp duty—Marketable security—Bond of foreign company — Security "issued," "offered for subscription," or "assigned or transferred" in United Kingdom—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (b).

An arrangement for reconstructing an English company and transferring its business, property, and liabilities to a new company formed in America provided that the debenture-holders of the old company should receive in lieu of their debentures bonds issued by the new company. The holders in London of a debenture of the old company lodged it with the London agent of the new company, who sent it to the officials of the new company in Chicago, and such officials presented it there to a trustee for the debenture-holders and received in exchange from him a bond which they sent to their agent in London, by whom it was given in London to the owners in exchange for their debenture.

Held, that this bond did not come within section 82, *sub-section* 1 (b), *of the Stamp Act*, 1891, *as having been either "issued," "offered for subscription," or "assigned or transferred" in the United Kingdom.*

Judgment of the Queen's Bench Division (Pollock, B., *and* Bruce, J.), ante, *p.* 138, *affirmed.*

Appeal from the judgment of a divisional court (Pollock, B., and Bruce, J.) on a special case stated

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891, *ante*, p. 138.

The instrument upon which the Commissioners were required to express their opinion was a bond for 500dols. under the seal of the Chicago Railway Terminal Elevator Co.

The question was whether the bond was either "issued in the United Kingdom" or "offered for subscription and given or delivered to a subscriber in the United Kingdom," or "assigned, transferred, or in any manner negotiated in the United Kingdom," so as to be chargeable with stamp duty as a marketable security under section 82 of the Stamp Act, 1891.

The circumstances under which the bond was issued are fully set out *ante*, p. 139.

The Commissioners were of opinion that the bond was issued in the United Kingdom, and that it was, therefore, chargeable with duty under section 82, and they assessed the duty at 11s.; but they stated a case to enable the company, who were dissatisfied with the assessment, to appeal.

The Queen's Bench Division were of opinion that the bond was neither issued nor offered for subscription nor assigned in the United Kingdom, and they accordingly held that it was not chargeable with stamp duty.

The Commissioners appealed.

Sir R. B. Finlay, S.G., and *Danckwerts*, for the appellants.

Cohen, Q.C., and *T. T. Paine*, for the respondents.

Lord ESHER, M.R.—This seems to me to be a perfectly clear case, and I have no doubt that the judgment of the Divisional Court is right. The question resolves itself into one of fact, and in my opinion the facts stated in the case show that this bond was not issued in the United Kingdom, but that it was issued in America. Neither was it offered for subscription or assigned in the United Kingdom. The provisions of the Stamp Act therefore do not apply. The appeal must be dismissed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the appellants, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Paines, Blyth, & Huxtable.*

High Court of Justice.

Chan. Div. } Chitty, J. } Dec. 16, 17; Jan. 13.

LIST v. THARP. (a.)

Metropolis—Building—Party structure notice—Adjoining owner—Possession of premises under building agreement—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90, *s.* 5, *sub-sections* 29, 32.

The defendant, who was owner of premises in London, desiring to do certain work upon a wall dividing his premises from the adjoining premises, duly served C. O. with the notice required by section 90 *of the London Building Act*, 1894, *to be served by a "building owner" upon the "adjoining owner," but omitted to give any such notice to the plaintiff, who at the time the notice was served on C. O. was in possession of the adjoining premises under a building agreement with C. O. for a lease to the plaintiff for a long term of years. By such agreement the grant of the lease was made conditional upon the production of a surveyor's certificate, and it was stipulated that nothing in the agreement should be construed into a demise at law of the premises. At the time the defendant commenced work the plaintiff had erected the buildings, and was in possession thereof under a lease granted pursuant to the agreement. On motion to continue, until trial of the action, an injunction obtained by the plaintiff* ex parte *to restrain the defendant from proceeding with the work to the wall,*

Held, that, inasmuch as the plaintiff was in possession of the adjoining premises under the agreement "otherwise than as a tenant from year to year or for any less term, or as a tenant at will," and was therefore owner within the meaning of sub-section 29 *of section* 5 *of the Act, the defendant was not entitled to exercise any rights under the Act, assuming him to have any, in respect of the wall in question without having served on the plaintiff a notice under section* 90 *of the Act; that the plaintiff's rights in this respect had not become merged in the lease on the granting of the lease pursuant to the agreement; and, consequently, that the injunction must be continued.*

Motion.

By an agreement made the 12th of December, 1894, Sir Charles Oppenheimer agreed to demise certain property in St. James's-place, held by him under the Commissioners for Woods and Forests, to the plaintiff for a long term of years, at a rent of £550, after Michaelmas, 1895, and the plaintiff agreed within a specified time to erect buildings on the land at the expense of not less than £100,000. The agreement made the production of a certificate signed by the Commissioners' architect and surveyor, a condition precedent to the granting of the lease. It provided also (clause 6) that the plaintiff should forthwith upon the signing of the agreement be entitled to possession of the land, and reserved (clause 7) to the surveyor, and all the officers and workmen of the surveyor and of Sir C. Oppenheimer acting under the authority of the surveyor, a right to enter upon the land at all times during the erection of the buildings for the purposes of examining the buildings and otherwise as therein mentioned. It also stipulated (clause 18) that nothing in the agreement should be construed "into a demise at law" of the premises, so as to vest any estate in the plaintiff, but that he should only have a right to enter upon the premises for the purpose of performing the agreement.

Pursuant to the agreement the plaintiff entered upon the land and proceeded to erect the buildings.

The defendant, who was the adjoining owner, being desirous of executing certain works upon a certain wall (about which there was a controversy whether it was a party wall or a party fence wall), gave in February, 1896, the necessary notices under the London Building Act, 1894, to Sir C. Oppenheimer, but omitted to give any way to the plaintiff.

At that time the plaintiff had nearly completed the buildings, but had not obtained the lease, which was granted to the plaintiff in August, 1896.

Shortly afterwards, the defendant having commenced work, the above action was brought for an injunction, and an *ex parte* injunction obtained by the plaintiff restraining the defendant, as building owner under the Act, from interfering with the wall. The present motion was to continue the injunction until the trial.

By the London Building Act, 1894, s. 90, a building owner is (except with the consent of the adjoining

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

owner) in effect prohibited from exercising any of his rights under the Act in respect of a party structure without first serving on the adjoining owner the prescribed notice.

By section 5, sub-section 31, building owner means such one of the owners of adjoining land as is desirous of building, and by sub-section 32 adjoining owner means the owner or one of the owners of land or buildings adjoining those of the building owner.

The meaning of the term owner in the Act is explained in the judgment.

The nature of the party structure in this case was fully argued, but the decision turned on the single point whether the plaintiff was entitled to notice, and that point only is dealt with in this report.

Byrne, Q.C., and *R. Cunningham Glen*, for the plaintiff.—Notice ought to have been served on the plaintiff under the London Building Act, 1894, ss. 90, 5, sub-sections 29, 32. The defendant was building owner, section 5, sub-section 31, and was bound before exercising rights in relation to a party structure under section 88, to serve the prescribed notice on the adjoining owner. When the notice was served on Oppenheimer the plaintiff was in possession under the building agreement, and he was therefore the person who ought to have been served as adjoining owner: section 5, sub-section 29. This view is supported by *Caudwell* v. *Hanson*, 20 W. R. 202, L. R. 7 Q. B. 55, decided on the Metropolitan Building Act, 1855. [CHITTY, J., referred to *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9.]

Levett, Q.C., and *Christopher James*, for the defendant.—The plaintiff was in possession merely for the purpose of erecting the buildings, and that was not sufficient to make him owner within the meaning of section 5, sub-section 29. Moreover, the plaintiff's lease was granted before the defendant actually began to work, and the plaintiff could not stand in a better position than his lessor, to whom the prescribed notice had been duly given. [CHITTY, J., referred to *Beddington* v. *Atlee*, 35 W. R. 799, 35 Ch. D. 317.]

Byrne, Q.C., in reply, cited *Fillingham* v. *Wood*, 39 W. R. 282, [1891] 1 Ch. 51.

Cur. adv. vult.

Jan. 13.—CHITTY, L.J., delivered a reserved judgment. After stating the facts as above, his lordship said: The question is whether the defendant was bound before commencing the work on the wall in controversy to give notice to the plaintiff under the London Building Act, 1894.

This question turns on section 5 (29) of that Act, which enacts that, unless the context otherwise requires, the expression "owner" shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of any land or tenement otherwise than as a tenant from year or year or for any less term, or as a tenant at will.

Now, regard being had to the statutory definition of the expression owner, the first inquiry is whether the plaintiff was in February, 1896, in possession of the land. It appears to me that the only answer must be that he was. The 6th clause of the agreement was precise; he was entitled to the possession, and having entered upon the land he was lawfully in possession accordingly. The reservation in clause 7 of a right of entry for the surveyor and others during the erection of the buildings shows that the term "possession" is used in clause 6 in its ordinary sense; the power is reserved as against the plaintiff's possession. It was argued that he was in possession only for the purpose of erecting the buildings, and consequently that, as his right to possession was thus limited, he was not in possession within the meaning of the definition in the Act. But I cannot accept this argument. A man is not the less in possession because as between himself and the person from whom he receives it he is under a contractual obligation to use the property for some particular purpose, as, for instance, where he is under a covenant to use a house for the purpose of a private dwelling-house only.

The next inquiries are whether he was in the occupation of the property as tenant from year to year, or for any less term, or as tenant at will. Here, again, the agreement itself supplies the answer. Nothing in the agreement was to be construed into a demise at law or to vest any estate in the plaintiff. Consequently he was not tenant from year to year, or for any less term. The provision in the 18th clause, that he was only to have the right of entry for the purpose of performing the agreement, I have already dealt with incidentally. It cannot, in my opinion, be made use of for the purpose of cutting down the right to the possession which was previously conferred by express terms. After his entry on the land he was in possession as between himself and Sir C. Oppenheimer, although he was bound by the contract as to the user of the land. As against strangers he had all the ordinary rights and remedies incidental to possession.

It was further argued for the defendant that, inasmuch as the plaintiff had taken his lease before the work on the wall was actually begun, and as the prescribed notices had been given by the defendant to Sir C. Oppenheimer, the plaintiff was in no better position than the latter, and accordingly was not in a position to insist upon the notices being given to himself. The substance of this argument was that the plaintiff's rights had become merged in the lease. In my opinion this argument is not sound. As between himself and the defendant I think that, notwithstanding the lease, the plaintiff is entitled to refer his title back to the agreement under which he had possession at the time, and that the question between him and the defendant is not affected by any doctrine of merger. I see no reason for questioning the conclusion I arrived at in *Beddington* v. *Atlee*. The plaintiff, in February, 1896, had, by virtue of the building agreement, an equitable interest of great value in the land and the buildings which he had then erected. Such being my opinion, it becomes unnecessary to decide at the present stage of the proceedings any question as to the character of the wall, whether it was a party wall or a fence wall in the whole or in part.

Injunction continued, but without prejudice to the defendant's rights, if any, under the Metropolitan Building Acts, the hearing of the motion to be treated as the trial if the parties should so agree.

Solicitor for the plaintiff, *W. H. Southern*.

Solicitors for the defendant, *Stibbard, Gibson, & Co.*

Chan. Div. North, J. } Dec. 9.

In re MCMURDO.

PENFIELD *v.* MCMURDO. (*a.*)

Solicitor—Costs—Taxation—Interest—Administration.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

action—General Order under Solicitors' Remuneration Act, 1881, *r.* 7.

The "person liable" and on whom demand for payment of a bill of costs due from a deceased client is to be made is the legal personal representative. Where, therefore, a bill of costs due from the deceased had been delivered by direction of the chief clerk to a creditor having the conduct of an action in which the estate of the deceased was being administered,

Held, that there had been no demand on the person liable within the meaning of rule 7 of the General Order under the Solicitors' Remuneration Act, 1881, *so as to entitle the solicitors to interest under that rule.*

Motion.

This was a motion that solicitors might be allowed interest on their bill of costs. The solicitors had done work for the testator and were solicitors to the executrix, the defendant in the action. The administration order was made on the 25th of July, 1889. The estate was insolvent, and in the course of the proceedings, the question having arisen to whom the solicitors should deliver their bill of costs in respect of which they claimed a lien on a fund in court, the chief clerk, with the consent of all parties, directed them to deliver it to the solicitor of a creditor who had the conduct of the proceedings. The bill was so delivered, the chief clerk allowed the lien claimed by the solicitors and the bill was taxed. The solicitors claimed interest at 4 per cent. from a month after the delivery of the bill and their contention was based on rule 7 of the General Order made under the Solicitors' Remuneration Act, 1881, which says (*inter alia*) "a solicitor may charge interest . . . on his disbursements and costs . . . from the expiration of one month from demand by the client. And in cases where the same are payable by an infant or out of a fund not presently available, such demand may be made on the parent or guardian or the trustee or other person liable."

The judge in chambers had refused the claim for interest and the present motion was to rescind the order made in chambers and to have an order made allowing the interest claimed.

Swinfen Eady, Q.C., and *Eustace Smith* for the motion.—Delivery of a bill of costs is a demand for payment: *Blair* v. *Cordner*, 36 W. R. 64, 19 Q. B. D. 516. The person liable to pay here is the person having the conduct of the proceedings.

Eastwick, for the creditor having the conduct of the proceedings.—The present case is not within the terms of the rule.

Eady, Q.C., in reply.

NORTH, J.—In respect of interest the solicitors are no better off than other creditors; the only way in which they can get it is under rule 7 of the General Order made under the Solicitors' Remuneration Act. They are not persons entitled to special favours or to be preferred over ordinary creditors, but they are entitled to what the law gives them. The question is, do the solicitors come within the meaning of that rule?—if they do they get a benefit above their fellow creditors. [Reads the rule.] In the present case the testator was liable; but the person liable for the debts of the testator is the executor if there are assets. That is the meaning, in my opinion, of words in the rule "or other person liable"; and where the assets are deficient the "person liable" within the rule is also the executor even though there be an administration suit. In my view, therefore, the executrix was the person liable here. If their demand had been made on the executrix their demand would have been made on the "person liable," but the bill of costs was not delivered to her. The direction by the chief clerk was a mere direction and nothing more, assented to by all. In my opinion the solicitors are not entitled to interest because their bill was not delivered to the person liable and the delivery was not made in such a way as to amount to demand on the person liable.

Solicitors, *Hurford & Taylor; E. F. B. Harston.*

Chan. Div. }
Stirling, J. } Dec. 17; Jan. 13, 19.

In re POMEROY AND TANNER (*Solicitors*). (*a.*)

Solicitor—Costs—Taxation after bill delivered more than twelve months—Agency charges—Disbursements—Complete bill.

The charges of the London agent of a country solicitor, as between the country solicitor and his client, are taxable items, and should not be treated as disbursements in the country solicitor's bill of costs.

A bill of costs which fails to set forth the details of such agency charges is not a complete bill so as to preclude taxation more than twelve months after delivery.

This was a summons by a client for taxation of his solicitor's bill of costs.

The facts were as follows:—

The applicant, as the legal personal representative of a Mr. Sampson, who died in 1887, employed Mr. Pomeroy, one of the two solicitors whose names appear in the title of the proceedings, in winding up his testator's estate.

In 1891 Mr. Pomeroy took Mr. Tanner into partnership, and the judge was of opinion that from that date the applicant must be taken to have retained and employed both of them.

In 1894, the executorship affairs having been wound up, the applicant asked for a bill of costs; and in January, 1895, Messrs. Pomeroy & Tanner delivered a bill for £283 11s. 8d., commencing on the 31st of May, 1892. The last item in this bill was as follows: "Paid agent's charges (including disbursements, counsel's fees, court charges, &c.) in the dispute and subsequent action against Mrs. Mann and Miss F. A. Sampson and the compromise thereof, £54 5s. 8d."

On the same date a cash account was also delivered in respect of other business between the applicant and the respondents.

A prior bill for work done before the 31st of May, 1892, by Mr. Pomeroy alone was not included.

Subsequently, on Messrs. Pomeroy & Tanner threatening to sue for the balance on the bill and the cash account delivered at the same time, the applicant demanded delivery of a bill and cash account for the work done by Mr. Pomeroy alone from the beginning of the transaction.

On the 1st of April, 1896, Mr. Pomeroy delivered certain other bills, including a bill of charge of his London agent, which gave particulars of the lump item contained in the bill delivered in January, 1895. He also delivered two cash accounts—one in respect of transactions between himself alone and the applicant, and the other between the respondents and the applicant.

An application was made for taxation of the bills delivered in April, 1896, with the exception of that which included the agency charges.

A special application, however, was made with

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law

reference to the bill delivered in January, 1895, and the London agent's bill.

G. Hastings, Q.C., and *E. Ford*, for the applicant.—This application is resisted on the ground that the bill sought to be taxed was delivered more than twelve months ago. The rule is that if a bill has been delivered more than twelve months special circumstances must be made out to justify taxation. A judge has a discretion to order a bill to be taxed if it contains items unusually large or charges requiring explanation or gross blunders, and it is not necessary to make out overcharge amounting to fraud: *In re Norman*, 34 W. R. 313, 16 Q. B. D. 673. Here this lump item of £54 5s. 8d. is a charge requiring explanation which would justify the court in ordering taxation.

Buckley, Q.C., and *H. Terrell*, for the respondents.—The bill of January, 1895, is a complete bill, and more than one year has elapsed since its delivery. The item for the agent's charges is a disbursement, and the bill is complete even though the particulars are not set out. To justify taxation at this time it is necessary to show items amounting to fraud. There is nothing of the kind here. The court is being asked to take on itself the duties of a taxing-master.

b*Graham Hastings, Q.C.*—T he bills are continuous, deing one matter. A solicitor cannot sue when he has 3one only half the work: *In re Nelson, Son, & Hastings*, 3 W. R. 645, 30 Ch. D. 1. A solicitor cannot put himself in a better position as against his client by taking in a partner. [STIRLING, J., referred to *Hall & Barker*, 26 W. R. 501, 9 Ch. D. 538.] If the agent's bill is a disbursement, the only right the client would have against the agent would be under the general jurisdiction: *Ex parte Edwards*, 7 Q. B. D. 155, 29 W. R. Dig. 288. I submit that a clear case has been made out that this bill should be taxed.

Jan. 19.—STIRLING, J., stated the facts as above, and continued: The case has been argued on the footing that the bill had been delivered more than twelve months, and that accordingly it would be necessary to make out special circumstances to justify taxation. But the question has been raised, whether the bill of January, 1895, was a complete bill, so as to exclude the right to tax in the absence of special circumstances. That depends on the view to be taken of the last item in that bill. [His lordship read the item for the London agent's charges, and continued:] That, of course, is what I may call a lump item, and it is a substantial item amounting to between one-fifth or one-sixth of the whole. It is contended that these agent's charges are merely disbursements, and that it was a mistake to include them in the bill of costs at all, but that there was no necessity for delivering a detailed statement of them. On the other hand, it was said that the agent's charges ought to be included in the bill of costs in detail.

The question is which of these two contentions is right. Let us first look at it as a matter of principle. It is well settled that as between the client and the London agent of a country solicitor there is no privity at all. The relationship of solicitor and client does not exist between the client and the London agent. What is done by the London agent is part of the work done for the client by the country solicitor. What the country solicitor does, he does or may do personally or by clerks employed by him in the country; or, if necessary—and the necessity occurred in this case—by his London agent; but as between the client and the country solicitor the whole work is done by the country solicitor. It follows, therefore, that these items are not disbursements, but are items taxable in the strictest sense between the client and the country solicitor, just as much as items for work done by the country solicitor personally or by his clerks in the country. That, I take it, is the view according to strict law. But it has been suggested in the course of the argument that the practice was the other way, and that these items were usually treated as disbursements in the bills of costs. I have thought it right to make inquiry of the taxing-masters what the practice as a matter of fact was. The taxing-masters considered the question at a meeting at which all were present but one, and they have informed me that they were unanimously of opinion that, as a matter of practice, this item of £54 5s. 8d. was wrongly charged as a disbursement, and that the items should appear in detail, and that it was proper and regular to include them in the bill of costs, and that the country solicitor should incorporate them in one and the same bill. It appears therefore that both upon strict law and as regards practice this item cannot be treated as a disbursement, but the details of such item ought to be included in the bill of costs delivered. I am of opinion therefore, this being a substantial item, that the whole bill on which the solicitors rely was not delivered more than twelve months before the application to tax was made, and that accordingly an order for taxation must go.

As regards the costs it seems to me the proper course would be that the costs of this adjournment into court must be the applicants in any event, and that the other costs must abide the result of the taxation.

Solicitors, *J. J. Harlow*, for *H. King*, Bristol; *Carthew & Wheeler*.

Chan. Div. } Dec. 16.
Kekewich, J. }

BLUMBERG v. THE LIFE INTERESTS AND REVERSIONARY SECURITIES CORPORATION (LIMITED). (a.)

Mortgage—Tender—Cheque—Authority of mortgagee's solicitor—Payment under protest.

A mortgagee's solicitor is not authorized to accept a cheque in payment of the debt due in respect of the mortgage unless he is expressly empowered to do so. The tender, therefore, of a cheque to a mortgagee's solicitor not having such express authority is not a good tender even though he consent to accept the cheque.

Motion by the plaintiffs, Edgar James Blumberg, Cecil Percy Blumberg, and Vivian Horace Blumberg, to restrain the defendants and their agent, W. B. Mulling, from selling or dealing with the mortgaged property mentioned in an indenture of mortgage dated the 10th of July, 1896, and made between the plaintiffs of the one part and the defendant corporation of the other part, and from transferring or otherwise dealing with the said mortgage securities until after the trial of the action.

The mortgaged property consisted of the plaintiffs' reversionary interests expectant upon the death of their mother in certain legacies and policies.

The mortgage deed provided that the mortgagees' power of sale should become exercisable immediately upon default in payment of any principal, interest, or other moneys at the time thereby appointed for payment of the same.

The mortgagors made default in payment, and on the 12th of October the corporation served them with notice that unless the money was repaid the securities

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law

would be sold on the 5th of November. On the morning of that day the plaintiffs' solicitor attended by appointment at the office of the mortgagees' solicitor for the purpose of paying in cash the amount of principal, interest, and costs due on the mortgage, and he tendered such amount in cash. A further sum, however, in respect of auctioneer's costs, &c., was demanded on behalf of the corporation by their solicitor's managing clerk, who was conducting the business.

The plaintiffs' solicitor offered to get cash for the payment of the further sum, but the clerk said he would be satisfied with the solicitor's cheque and would accept it on the understanding that payment should not be made under protest, as he was anxious to have the matter finally settled.

The plaintiffs' solicitor drew the cheque and tendered it and the cash under protest in payment of the total amount claimed by the mortgagees. The clerk thereupon refused to accept the tender because it was made under protest, and his refusal was ratified and adopted by the mortgagees' solicitor himself.

On the afternoon of the same day the mortgagees sold their security, and the purchaser was subsequently added as a defendant in this action.

Warrington, Q.C., and *Frank Evans*, for the plaintiffs.—Tender ought no doubt to be made in cash, but it is open to the person who receives the tender to waive the nature of the tender. In this case the objection was not to the nature of the tender, but to the manner in which it was made—viz., under protest. The objection to the nature of the tender therefore must be taken to have been waived, and consequently the cheque was a good tender: *Jones* v. *Arthur*, 8 Dowl., p. 442; *Polglass* v. *Oliver*, 2 Cr. & J., p. 15; and Chitty on Contracts, 10th ed., p. 737. Payment under protest is a good payment: *Greenwood* v. *Sutcliffe*, 40 W. R. 214, [1892], 1 Ch. 1; this tender, therefore, was a good tender.

Renshaw, Q.C., and *Ribton*, for the corporation.—The solicitor had power only to receive cash, and not to take a cheque instead of cash. The defendant corporation is not disentitled to rely on the fact that the tender was not good because its agent exceeded his authority in waiving the objection to the cheque.

Edward Ford, for the purchaser.

Warrington, Q.C., in reply.—An attorney has power to accept a tender (*Kirton* v. *Braithwaite*, 1 M. & W. 310), and in the ordinary course of business he has power to accept a cheque.

KEKEWICH, J.—In this case a tender of a certain kind was made to the solicitor of the mortgagees; it was a tender consisting partly of cash and partly of a cheque. The question to be decided is, Was this tender good? If the tender had been made to the principals themselves—the mortgagees—I do not doubt that it would have been a good tender. I think, on the evidence, that the solicitor was willing to accept the cheque, but in an unhappy moment he refused to accept payment under protest. Assuming, therefore, that he was authorized to receive the money and cheque, then I do not doubt that there was a good tender. But there is this novel question: Assuming the solicitor to be authorized to receive cash in payment, is he also authorized to receive a cheque which is not a legal tender? Counsel for the plaintiffs urged that he could do so, if such acceptance would be in the ordinary conduct of business; he could not accept a pledge or security, but as money was ordinarily paid by cheque he could have accepted a cheque in the present case. Now, I think that this would be an extension of the solicitor's authority which might prove very mischievous. The mere fact of accepting a cheque passes judgment on the solvency of the person giving the cheque. In this case the mortgagees' solicitor thought that this cheque was good, but it might have turned out that the cheque was worthless, and then would there have been a good tender as against the reversionary society? Certainly not. Had he accepted the cheque he would have done so at his own risk. The mortgagee's solicitor had no authority to take the cheque, and therefore I hold that there was not a sufficient tender, and on this ground I am of opinion that the injunction should not be granted.

Solicitor for the plaintiffs, *Braham Barnett*.

Solicitor for the corporation, *H. Stanley-Jones*.

Solicitors for the purchaser, *Surman & Quekett*.

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 18.

REG. v. JUSTICES OF LONDON. (a.)

Poor law—Rating—Valuation list—Notice of objection—Assessment committee—Appeal—Union Assessment Committees Act, 1862 (25 & 26 *Vict. c.* 103), *ss.* 18, 19—*Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 11, 32.

The Union Assessment Committees Act, 1862, *s.* 18, *provides that any person who may feel himself aggrieved by the valuation list of any parish may give to the Assessment Committee a notice in writing of his objection, and by section* 19 *the Assessment Committee shall not hear any objection unless notice of the objection has been given aforesaid. The Valuation* (*Metropolis*) *Act*, 1869, *s.* 32, *gives a right of appeal to quarter sessions from any decision of the Assessment Committee on an objection made before them.*

Held, that the Assessment Committee had no power to entertain any objection unless notice thereof in writing was given; and that an appeal to quarter sessions only lay from a decision of the Assessment Committee on an objection, notice of which had been given in the prescribed manner to the committee.

Rule *nisi* for a *mandamus* to the justices of London in quarter sessions to hear and determine an appeal against a decision of the Assessment Committee.

The East London Waterworks Co. gave notice in writing to the Assessment Committee of an objection against the rateable value at which their premises had been assessed in the valuation list. The Assessment Committee disallowed the objection. The water company appealed to quarter sessions, and their notice of appeal contained objections, not only to the rateable value, but also to the gross value, at which the premises had been assessed.

The justices in quarter sessions declined to permit the question of the gross value to be gone into, on the ground that in the notice of objection to the Assessment Committee the gross value had not been objected to. The company did not proceed with the appeal so far as it related to the rateable value, but obtained this rule *nisi*.

Affidavits had been filed in support of the rule, alleging that, as a matter of fact, although there had been no formal objection to the gross value in the notice to the Assessment Committee, the question of gross value had been considered by the Assessment Committee. This was not admitted to be so by the Assessment Committee.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The Union Assessment Committees Act, 1862, s. 18: "Any . . . person who may feel himself aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditament included therein . . . may . . . give to the committee and to the overseers a notice in writing of his objection specifying the grounds thereof . . ."

Section 19 provides that ". . . where a meeting is holden for hearing objections to the valuation list of any parish, the committee shall not hear any objection to such valuation list unless such notice as aforesaid of such objections have been given to the committee and the overseers . . ."

The Valuation (Metropolis) Act, 1869 (with which the Union Assessment Committees Act, 1862, is incorporated), s. 11, enacts that "objections may be made before the Assessment Committee by any person authorized by this Act and the Acts incorporated herewith to object who feels himself aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament, or by reason of the insertion or incorrectness of any matter in the valuation list, or by reason of the omission of any matter therefrom . . . The notice of objection shall specify the correction which the objector desires to be made."

Section 32: "Any ratepayer . . . who may feel aggrieved by any decision of the Assessment Committee on an objection made before them to which he was a party . . . may appeal against such decision to the assessment sessions."

The Local Government Act, 1888, s. 42 (10), enacts that the quarter sessions for the county of London shall be substituted for the general assessment sessions under the Valuation (Metropolis) Act, 1869.

W. C. Ryde (*Balfour Browne, Q.C.*, with him) for the Assessment Committee, showed cause against the rule,—First, *mandamus* is not the proper remedy in this case. The waterworks company should have proceeded with their appeal so far as it related to the rateable value, and should then have asked for a case to be stated. But, secondly, the quarter sessions were right in refusing to hear the appeal as to the gross value. Section 18 of the Act of 1862 provides for the giving of the notice of objection, and by section 19 the Assessment Committee shall not hear any objection unless notice of it has been given. Then, section 11 of the Valuation (Metropolis) Act, 1869, provides what objections may be taken, and requires the notice to specify what correction is desired. By section 32 the appeal to the quarter sessions only lies from a decision of the committee on an objection made before them. The words "shall not hear" in section 19 of the Act of 1862 are imperative, and the Assessment Committee had no jurisdiction to hear any objections to the gross value which was not referred to in the notice of objection. As a matter of fact the proceedings before the committee did only relate to the rateable value.

Cripps, Q.C., and *Barnes* (*Littler, Q.C.*, with them), for the Waterworks Co. in support of the rule.—The provisions of section 19 of the Act of 1862 merely relate to matters of practice and procedure. The Assessment Committee have power to waive any question of insufficiency of notice, and there was such a waiver, and the committee dealt with both the gross and the rateable value: *Coates* v. *Park Gate Iron Co.*, 18 W. R. 928, L. R. 5 C. P. 634.

WRIGHT, J.—The question in this case arises primarily under section 32 of the Valuation (Metropolis) Act, 1869, which says that a ratepayer who is aggrieved by a decision of the Assessment Committee on an objection made before them may appeal to the assessment sessions. Since the Local Government Act, 1888, the appeal lies to the quarter sessions. In the present case there was an appeal to quarter sessions, purporting to be an appeal against a decision of the Assessment Committee on both the gross and the rateable valuation of the company's premises. We have, therefore, to decide whether there was a decision by the Assessment Committee on the gross value. The notice of objection specified only an objection to the rateable value. The effect of the notice depends partly on the Union Assessment Committees Act, 1862, and partly on the Valuation (Metropolis) Act, 1869, with which the former Act is to be read as one. Section 18 of the Act of 1862 provides for the notice of objection to be given; and section 19 says that the committee "shall not hear any objection unless notice has been given as provided." These provisions are amended by the Act of 1869, section 11 of which says what objections may be taken, and further, that the notice shall specify what corrections it is desired should be made. *Primâ facie* that is enough to dispose of the case, because the notice of objection did not refer to the gross value, and therefore the committee were, by reason of section 19 of the Act of 1862, confined to hearing objections to the rateable value, and the appeal to quarter sessions by section 32 of the Act of 1869 only lies from a decision of the committee on an objection taken before them.

But then it is said that the Assessment Committee had power to waive any irregularity or insufficiency in the notice of objection, and that there was such a waiver in this case, and that the Assessment Committee entertained and decided an objection to the gross value. I am not satisfied that they did entertain any objection to the gross value; but even if the Assessment committee had purported to do so, I think it would have been beyond their powers. I do not think the Assessment Committee have power to give a decision on any point unless notice of objection has been given in the manner provided in the sections referred to. The case of *Coates* v. *Park Gate Iron Co.* does not cover this case, for there there was merely a direction to the parties that something should be done before an appeal from a county court could be heard; but in this case the statute expressly provides that the court itself—that is, the Assessment Committee—shall not hear an objection unless the conditions precedent have been complied with.

For these reasons this rule *nisi* must, in my opinion, be discharged.

BRUCE, J.—I am of the same opinion. I am not satisfied that the Assessment Committee decided the question of gross value. I think that the "objection" referred to in section 32 of the Act of 1869 refers to an objection taken before the committee in the formal manner provided by the statutes, and, in my opinion, there cannot be an appeal on a question which was not formally before the Assessment Committee.

Rule discharged.

Solicitors for the Assessment Committee, *Stone, Morris, & Stone.*

Solicitors for the Waterworks Co., *Bircham & Co.*

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., and Hawkins, Grantham, and Lawrance, JJ.)

Aug. 1, 1896; Nov. 7.

REG. v. SMALLMAN. (a.)

Criminal law — Embezzlement — Assistant overseer — Rural parish—Form of indictment—Local Government Act, 1894 (56 & 57 *Vict.* c. 73), *s.* 5 (1), (2) (c); *s.* 6 (1); *s.* 81 (3).

Notwithstanding that under the Local Government Act, 1894, *an assistant overseer in a rural parish is appointed by the parish council, he is the servant of the inhabitants of the parish, and not of the parish council; and in an indictment for embezzling the moneys collected by him from the ratepayers he is well described as the servant of the inhabitants, and the moneys embezzled are rightly alleged to have been received by him on account of such inhabitants, his employers.*

Case stated by Hawkins, J.

The prisoner was tried at the Herefordshire Assizes in July, 1896, upon an indictment containing three counts, each of which alleged that on a certain date (in December, 1895, or January, 1896) the prisoner, "then being in the employment as servant of the inhabitants of the parish of Upton Bishop did then, whilst he was so employed as aforesaid, receive and take into his possession certain money," therein mentioned, "for and in the name and on the account of the said inhabitants of the said parish of Upton Bishop, his employers, and the said money then fraudulently and feloniously did embezzle," &c.

The jury found the prisoner guilty on each count.

In the course of the trial the question of law arose whether the prisoner was rightly described in the indictment as "being in the employment as servant of the inhabitants of the parish of Upton Bishop," and as having "whilst he was so employed" received in their name and on their account the moneys alleged to have been embezzled.

The prisoner was duly nominated, elected, and appointed assistant overseer for the parish of Upton Bishop under 59 Geo. 3, c. 12, s. 7, in December, 1893.

On the 16th of April, 1895, he was also appointed to that office and to the office of clerk to the parish council by the parish council for the parish of Upton Bishop under section 5 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

Neither of the appointments above mentioned was in form revoked, and he continued to hold his offices until the 30th of January, 1896, when he was dismissed from them. The embezzlements were each committed after the month of April, 1895, and before his dismissal.

He was never appointed by the guardians of the Ross Union, within which the parish of Upton Bishop was comprised, either as collector of poor rates or as assistant overseer of the parish, nor could he have been so appointed after 56 & 57 Vict. c. 73, ss. 3, 81 (6).

For the prisoner it was contended that he was wrongly described in the indictment as the servant of the inhabitants for the reason that, by virtue of the Local Government Act, 1894, he was the servant of the parish council.

The enactments bearing on the case are referred to in the arguments and judgments.

For the prosecution *Reg.* v. *Carpenter*, 14 W. R. 733, L. R. 1 C. C. R. 29, was relied on.

Hawkins, J., reserved the question for the consideration of the court.

If the objection taken by the prisoner's counsel was a valid one the conviction was to be quashed, otherwise not.

Cranstoun, for the prisoner.—Before the Local Government Act, 1894, came into operation an assistant overseer was appointed either by the guardians under 7 & 8 Vict. c. 101, s. 61, or by the justices on the nomination of the vestry of the parish under 59 Geo. 3, c. 12, s. 7. By the Local Government Act, 1894, a new corporate body, the parish council, was created to represent the inhabitants of a rural parish, and to that body was transferred, by section 5 (1), the power of appointing and revoking the appointment of an assistant overseer, and by sections 5 (2) (c) and 6 (1) the powers and duties of the vestry and the legal interest in parish property. The result is that the prisoner is the servant of the parish council, and not of the inhabitants of the parish. It is expressly provided by section 81 (3) that an assistant overseer existing when the Act came into operation should, unless appointed by the guardians, become an officer of the parish council. This provision applied to the prisoner, who was an existing assistant overseer, and he has also since been re-appointed by the parish council. He was their officer and servant, and the indictment was wrong.

Macmorran, Q.C. (*Gwynne James* with him), for the prosecution.—Before the Local Government Act, 1894, it is clear that an assistant overseer appointed on the nomination of the vestry was correctly described in an indictment for embezzlement as the servant of the inhabitants of the parish: *Reg.* v. *Sampson*, 1 Cox C. C. 355; *Reg.* v. *Watts*, 7 A. & E. 461, 469; *Points* v. *Attwood*, 6 C. B. 38, 49; *Reg.* v. *Carpenter*. The Local Government Act, 1894, has made no difference in this respect. The duties of the assistant overseer are the same as before; he is bound to obey the overseers as before; he has to account to them for the money he receives, and not to the parish council. The only difference is that in rural parishes he is now appointed by the parish council, and in small parishes where there is no parish council, by the parish meeting; but that council or meeting represent the inhabitants, and the assistant overseer remains the servant of the inhabitants. The moneys collected by the assistant overseer belong to the overseers as trustees for the inhabitants; they have not become vested in the parish council by virtue of section 5 (2) (c) or section 6 (1) (c) (iii.) of the Act of 1894. The word "property" in those clauses cannot include moneys arising from the rates, for the parish council has nothing to do with the levying of the poor rate. The overseers do not account to the parish council, and the parish council obtain money for their expenses by means of a precept to the overseers (under section 11 of the Act of 1894), which would be unnecessary and absurd if the moneys in the hands of the overseers were already vested in the parish council. The prisoner was therefore correctly described as the servant of the inhabitants, and the money as the money of the inhabitants. If this is not so it would be impossible to indict an assistant overseer for embezzlement at all.

Cranstoun.—It may be difficult to frame an indictment of an assistant overseer on account of his being the servant of the parish council and the moneys embezzled not being their moneys; but that does not alter the fact that under the Act of 1894 he has become the servant of the parish council.

Cur. adv. vult.

Nov. 7.—HAWKINS, J., read the following judgment of

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

POLLOCK, B. — The prisoner was tried before Hawkins, J., at the last Summer Assizes at Hereford, and found guilty of embezzling money which he had collected as assistant overseer of the parish of Upton Bishop.

In the indictment the prisoner was described as "being in the employment as servant of the inhabitants of the parish of Upton Bishop," and it was alleged that whilst he was so employed he received certain money "on the account of the said inhabitants, his employers." The prisoner's counsel contended that the indictment was bad, inasmuch as the prisoner's employment was wrongly described.

The material facts, as stated in the case, are as follows:

The prisoner was duly nominated and appointed assistant overseer for the parish of Upton Bishop under 59 Geo. 3, c. 12, s. 7, in December, 1893.

On the 16th of April, 1895, he was also appointed to that office and to the office of clerk to the parish council by the parish council for the parish of Upton Bishop, under section 5 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

Neither of the appointments above mentioned was in form revoked, and he continued to hold these offices until the 30th of January, 1896, when he was dismissed from them. The embezzlements were each committed after April, 1895, and before his dismissal. He was never appointed by the guardians of the Ross Union, within which the parish of Upton Bishop was comprised, either as collector of poor rates or as assistant overseer of the parish, under 7 & 8 Vict. c. 101, s. 61, nor could he have been so appointed after the 56 & 57 Vict. c. 73, s. 81.

The 59 Geo. 3, c. 12, s. 7, provided for the election of assistant overseers by "the inhabitants of any parish in vestry assembled." The same section enacted that two justices are to appoint such persons so elected. It is clear, however, that they were, when so elected and appointed, the servants of the inhabitants of the parish, although this formal appointment was by the justices, and accordingly, when it became necessary to prosecute an assistant overseer for embezzlement, he was usually described as in the present indictment; and in *Reg.* v. *Sampson* it was decided by Rolfe, B., that an indictment describing an assistant overseer as "a clerk or servant to the overseers" was bad; and in *Reg.* v. *Carpenter* it was held that an assistant overseer was properly described as "a servant of the inhabitants of the parish." Thus far there seems no difficulty. But in 1894 the Local Government Act, 56 & 57 Vict. c. 73 was passed, and this Act materially alters the mode of appointing assistant overseers, and uses language which creates a doubt and has given rise to the question raised by the present case. This Act constitutes, for the first time in rural parishes, a "parish council," and to this council are transferred certain powers and duties which had before been discharged by the vestry.

Section 5 (1) is as follows: "The power and duty of appointing overseers of the poor and the power of appointing and revoking the appointment of an assistant overseer for every rural parish having a parish council shall be transferred to and vested in the parish council, and the council shall in each year at their annual meeting appoint the overseers of the parish, and shall as soon as may be fill any casual vacancy occurring in the office of overseer of the parish, and shall in either case forthwith give written notice thereof in the prescribed form to the board of guardians."

By section 6 (1): "Upon the parish council of a rural parish coming into office there shall be transferred to that council: (*a*) The powers, duties, and liabilities of the vestry of the parish except (i.) so far as relates to the affairs of the church or to ecclesiastical charities, and (ii.) any power, duty, or liability transferred by this Act from the vestry to any other authority."

By section 81: "Where the powers and duties of any authority other than justices are transferred by this Act to any parish or district council, the officers of that authority shall become the officers of that council. "(3) Any existing assistant overseer in a parish for which a parish council is elected shall, unless appointed by a board of guardians, become an officer of the parish council. "(4) Every such officer, vestry clerk, and assistant overseer as above in this section mentioned shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same duties shall receive not less salary or remuneration than heretofore."

The statute under which the prisoner was indicted is the 24 & 25 Vict. c. 96, which, by section 68, provides that, "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer."

This Act, it will be observed, says nothing about the appointment of the clerk or servant. The two material facts are that the prisoner should be a "clerk or servant," and that he should embezzle the money received by him "on the account of his master or employer." Now, it may well be that one person or body of persons may have the appointment of a clerk or servant, and yet, when he is appointed, he becomes, not the servant of those who appointed him, but the servant of those whose affairs he has to manage and whose money he has to receive and pay over according to their instructions. It was upon this ground that, in the cases of *Reg.* v. *Watts* and *Reg.* v. *Carpenter*, an assistant overseer was held to be the servant, not of the magistrates who appointed him, nor of the overseers, but the servant of the inhabitants of the parish whose affairs he had to manage and whose money he had to receive.

Now, it seems that notwithstanding the parish council, under the Local Government Act, 1894, s. 5 (1), have the power and duty of appointing and revoking the appointment of assistant overseers, their duties, when appointed, are the same as they were when they were elected and nominated by the vestry and appointed by justices. The rates collected, the persons from whom and the purposes for which they are collected, remain as before, and the money can in no sense be said to be the money of the parish council, nor can that council direct how it shall be dealt with. It would seem, therefore, that the prisoner was "employed" to collect the rates for the inhabitants of the parish, and that he received the money on their account and was accountable to them for it, and not to the parish council, and therefore in the indictment under consideration he was properly described as "being in the employment as servant of the inhabitants of the parish," and as having received whilst so employed "money on the account of the said inhabitants, his employers."

It may be said that this conclusion is inconsistent with the language of section 81 (3), which declares that an existing assistant overseer, unless appointed by a board of guardians, shall "become an officer of the parish council." In one sense, as the parish council appoint and revoke the appointment of

assistant overseers, they are officers of the council, but they may, not the less, in so far as the receiving and holding of money collected as rates is concerned, be the servants of, and employed by, the inhabitants, especially when it is clear that with respect to the discharge of these duties the council could not give any orders or directions, having no interest in their proper discharge. The object and effect of the Parish Councils Act, *quoad* the assistant overseer, is to place the council in the position formerly occupied by the inhabitants of the parish in vestry assembled, whilst it leaves the duties and employment of the assistant overseer the same as they were before that Act was passed. The description in the indictment, therefore, is correct, and the conviction must be affirmed.

Lord RUSSELL OF KILLOWEN, C.J., concurred in the judgment of Pollock, B.

HAWKINS, J.—I entirely concur in the judgment of my brother Pollock, which I have just delivered. There can be no doubt that the money received by an assistant overseer in respect of the poor rates is not the money of the parish council, and no action could be maintained by or against the parish council in respect of it. It is money which it is the duty of the assistant overseer to pay over to the overseers for distribution by them on behalf of the inhabitants of the parish for which they are appointed. For the purposes of such an indictment as this the money is properly described as the money of such inhabitants.

If the contention of the prisoner's counsel were correct, it would seem to follow that no prosecution under the statute 24 & 25 Vict. c. 96, s. 68, for embezzlement of rates by an assistant overseer appointed by a parish council could be sustained. For that section only makes it embezzlement for a clerk or servant to embezzle money received in the name or on account of his master or employer; and if the parish council is to be considered as the master or employer of the assistant overseer, and the money said to be embezzled is not received in the name or on account of the council, but on the account of the inhabitants of the parish, the requirements of the statute to constitute the crime of embezzlement would not be fulfilled, for the clerk or servant of the one body would have received money belonging to, and on account of, the other.

It may be that for some purposes the assistant overseer is the servant of the parish council, but for the purpose of collecting the poor rates he is the servant of the inhabitants whose money he collects.

GRANTHAM, J.—In my judgment this conviction must be confirmed. The only doubt that has arisen in this case has been caused by the appointments of assistant overseers being now transferred by the Local Government Act, 1894, from the vestry of the parish and the local justices of the peace to the parish council. It is alleged that in consequence of that transfer of the power of appointment the assistant overseer ceases to be the servant of the inhabitants of the parish, and becomes the servant of the parish council.

To make that contention logical it must be also contended that the money in the hands of the assistant overseer is the money of the parish council, and not the money of the inhabitants of the parish, but an examination of the Local Government Act, 1894, will show, I think, conclusively that neither contention is valid.

To determine the question properly it is necessary to see what were and are the duties of the assistant overseer, by whom he was appointed, and what is now the position of the parish council in reference to him and to the parish it represents. The office of assistant overseer is comparatively a modern appointment, for though overseers were appointed by a statute of Elizabeth, which is the foundation of all our poor law system, yet assistant overseers were not appointed till the 59 Geo. 3, c. 12.

His duties were practically the same that those of overseers had been—viz., to assess the poor rate on the inhabitants of the parish, to collect the money from them and then to pay it over to the person authorized to receive it (now the guardians of the union in which the parish is situated). The chief difference between the position of the overseers and the assistant overseers being this, that the first were not paid for their services, whereas the assistant overseer was paid a salary, which salary was included in the amount required to be raised, and he became therefore a servant of those who were his employers, and the money in his hands was the money also of his employers—*i.e.*, those on whose behalf he had collected it. On whose behalf was it, then, collected? Not of the overseers to whom he was assistant, but of the persons to whom it still belonged after collection, and whose liability to pay that particular amount so collected did not cease until it was paid over by him on their behalf—viz., on behalf of the inhabitants of the parish. That being his position and these being his duties, let us now see how he was appointed. He was appointed, or rather elected, by the vestry of the parish, the vestry being the only corporate representative of a parish at that time, and he was then on that nomination appointed by the justices of the peace for the division in which the parish was situated.

But that system of appointment did not make him the servant of the overseers any more than the servant of the justices, and the cases of *Reg.* v. *Sampson* and *Reg.* v. *Carpenter* are distinct authorities for saying the assistant overseer was not the servant of the that overseer, but was the servant of the inhabitants, on whose behalf he received the money of the ratepayers or inhabitants of the parish. That being, I think, a correct description of his duties, and the way in which he was appointed, let us next turn to the position of the parish council, and see whether the Local Government Act, 1894, has in any way altered the position of the assistant overseer to the inhabitants of the parish, though it may have altered the machinery by which he is elected to or confirmed in his post. By that Act the power of the vestry to nominate or select him, and the power of the justices to appoint him is taken away, and in lieu of that method of dual appointment, the appointment is to be at once made by the parish council. But that seems to me to be the beginning and end of the change in his position to the inhabitants of the parish. If he ceased to be their servant in collecting their money, it would be because he was collecting their money for someone else—viz., the parish council, but the parish council have no interest in or control over the money he collects. He makes no return to them, and he gives no account to them, and they cannot control one single penny that he collects, although he often, nay, generally is, the clerk to the parish council, because it is convenient and economical that he should be; yet he need not be so appointed, but if he is appointed, his duties and position as clerk are quite independent of his position as assistant overseer, and the salary for such duties is independent of and in excess of what he gets as assistant overseer.

It may be that as section 81 (3) of the Local Government Act, 1894, says he shall (except as therein mentioned) become an officer of the parish council, he might be correctly so described in the indictment, but on that I give no opinion, as it is not before us, and it does not in any way affect the

question we have to determine—viz., whether he is still the servant of the inhabitants of the parish.

For these reasons I think the conviction good.

LAWRANCE, J., concurred.

Conviction affirmed.

Solicitors for the prisoner, *M. L. B. Braund*, for *Hebb*, Ross.

Solicitors for the prosecution, *Prior, Church, & Adams*, for *Burt*, Ross.

Court of Appeal.

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) — March 13, 16, 17, 19, 20, 31, 1896.

HINDSON *v.* ASHBY. (*a.*)

Water—River—Bed of river—Recession of water—Change of bed—Riparian owner—Owner of several fishery.

Whether a particular spot is or is not part of the bed of a river is a question of fact.

The plaintiffs, by virtue of an inclosure award made in 1803, *were entitled to certain lands described in the award as being of a certain area and bounded on one side by a river which was at that point non-tidal, but navigable. Between the top surface of the plaintiffs' land and the water there was a bank of about* 6 *feet high. The defendant was the owner of a several fishery in the river, and as such owner was admitted to be owner of the bed of the river opposite the plaintiffs' land. In* 1840 *the defendant's predecessor in title planted trees in the bed of the river near the foot of the* 6*ft. bank, and in* 1860 *the defendant's father cut a small ditch at the foot of the bank. Gradually and by slow degrees, chiefly in consequence of the removal in* 1878 *of a weir lower down the river, the water receded from the foot of the plaintiffs' bank, and the evidence showed that a strip of land had been formed between the foot of the bank and the water, which in summer was dry but in winter was under water. Upon this strip the defendant in* 1894 *laid down a concrete path for convenience of access to eyots belonging to him in the river. The plaintiffs claimed, as an accretion to their land, the strip of land on which the path was made; the defendant claimed it as part of the bed of the river, and also under the Statute of Limitations by virtue of his possession for twelve years before action brought.*

Held, that during the period of transition from bed of the river to land which no longer answered that description the Statute of Limitations could not be invoked by the defendant against the plaintiffs for the purpose of changing the ownership; but

Held (reversing the decision of Romer, J., 44 *W. R.* 184, [1896] 1 *Ch.* 78), *that upon a true view of the facts of the case, the strip of land in dispute was still bed of the river, and as such belonged to the defendant.*

Whether the doctrine of accretion applies where, as in the present case, there is a fixed boundary, quære. *The cases dealing with that question and with the rights of owners of several fisheries considered.*

This was an appeal by the defendant from the decision of Romer, J., reported 44 W. R. 184, [1896] 1 Ch. 78.

The facts are set out in the report below and in the judgments of the Court of Appeal.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Crackanthorpe, Q.C., Bucknill, Q.C., and *Stuart Moore*, for the appellant.—The land in question has never lost its physical condition of bed of the river, and no law of accretion is applicable to the case. The plaintiffs' award could not have passed any of part of the river bed as against the defendant. The evidence shows that the defendant's predecessor, thirty-four years before the action was brought, cut a ditch in the land in dispute, and the cement path has been made upon the site of that ditch. The defendant is therefore entitled under the Statute of Limitations. The *locus in quo* is still for the greater part of the year under water. There is no authority for the statement "once a riparian owner always a riparian owner." If a sudden diminution of water takes place a riparian owner ceases to be a riparian owner. This land is not dry land, and there can be no accretion.

The following authorities were referred to: *Jones* v. *Williams*, 2 M. & W. 326; *Bristow* v. *Cormican*, 3 App. Cas. 641, 26 W. R. Dig. 90; *Pryor* v. *Petre*, 42 W. R. 435, [1894] 2 Ch. 11; *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263, 36 W. R. Dig. 217; *Marshall* v. *Ulleswater Steam Navigation Co.*, 11 W. R. 489, 3 B. & S. 732; *Curzon* v. *Lomax*, 5 Esp. 60; *Lyon* v. *Fishmongers' Company*, 25 W. R. 165, 1 App. Cas. 662; *Howard* v. *Ingersoll*, 13 Howard's Reports Sup. Court, U.S., 381; *State of Alabama* v. *State of Georgia*, 23 *ib.* 505; Bracton's *De Legibus Angliae*, lib. ii., cap. 2; Britton, lib. ii., cap. 2; Fleta, lib. iii., cap. 2; Year-book, Ass. 22, Ed. 3, p. 106, placitum 93; Moore's Foreshore, pp. 370 *et. seq.*, citing Hale's *De Jure Maris*; *Ford* v. *Lacey*, 7 H. & N. 151, 9 W. R. C. L. Dig. 79; *Attorney-General* v. *Chambers*, 2 W. R. 636, 4 De G. & J. 55, at p. 71; Callis on Sewers, [51]; *Foster* v. *Wright*, 4 C. P. D. 438, 28 W. R. Dig. 94; *Rex* v. *Lord Yarborough*, 3 B. & C. 91; *In re The Hull and Selby Railway Co.*, 5 M. & W. 327; *Marshall* v. *Ulleswater Steam Navigation Co.*, 20 W.R. 144, L. R. 7 Q. B. 166; and *Malcolmson* v. *O'Dea*, 12 W. R. 178, 10 H. L. Cas. 593.

Moulton, Q.C., A. àB. Terrell, and *Baden Fuller*, for the respondents.—The defendant sets up two cases which are contradictory, not alternative. If attacked he calls the *locus in quo* bed of the river. While not attacked he relies on acts of possession. If the defendant is right there will be, or may be, strips of land all over England between the lands of riparian owners and the rivers. Bed of the river is a definition by function, not by metes and bounds. It is no doubt a question of fact. In the present case the bed has become dry land. If once it is admitted that land may be bounded by fluctuating water, then there must be such a thing as a moveable freehold, and that theory is much more convenient than the metes and bounds theory. The same principles apply to the case of rivers as to the case of seas. The right of accretion is implied in the rights of riparian owners, and it is immaterial whether the accretion is caused by alluvion or by recession of water, whether by the act of nature or by the act of some person. We rely on *Attorney-General* v. *Chambers* and *In re The Hull and Selby Railway Co.*

They also referred to *Leigh* v. *Jack*, 28 W. R. 452, 5 Ex. D. 264, and *Scratton* v. *Brown*, 4 B. & C. 485.

Crackanthorpe, Q.C., in reply.—There is no analogy between the case of the sea and the case of a river. In *In re The Hull and Selby Railway Co.* it was impossible to distinguish the boundary, and *Attorney-General* v. *Chambers* was a foreshore case. The *jus accretionis* has no place where the boundary is ascertainable. If the plaintiffs' contention is right, a riparian owner can, directly the river recedes, build a wall and shut out the river.

Cur. adv. vult.

LINDLEY, L.J.—This is an appeal by the defendant from a judgment of Romer, J., declaring a strip of land claimed by the plaintiffs and by the defendant to be the property of the plaintiffs. The dispute has arisen in this way. By an inclosure award made in 1803 a piece of land, situate in the parish of Wraysbury, in the county of Bucks and adjoining the Thames, was allotted to trustees, who are now represented by the plaintiffs. This piece of land is marked on the plan annexed on the award "No. 233, Church Land," and is described in the award as containing 3a. 2r. 8p. and as bounded on the south-west by the river Thames. The plan shows the same boundary. The other boundaries are also described and shown, and exist and are well known now. The terms of the award and the plan annexed show that on the south-west the allotment was bounded by the river; by which I understand the water of the river. There was no other boundary on that side. The allotment, however, did not slope gradually down to the water's edge; but, except when the river was much swollen, there was a drop of about 6ft. from the surface to the plaintiffs' allotment to the water. In other words, there was a bank of about 6ft. high between the top of the allotment and the water. This bank was part of the allotment, but was not its true boundary; the true boundary was the water of the river in its normal state. When much swollen the water came over the bank and flooded the allotment. On the other hand, when the water was low it may not even have reached the bank. The river at Wraysbury was and is a public non-tidal but navigable river.

The defendant claims to be, and is admitted to be, the owner of a several fishery in that part of the river which bounds the plaintiffs' land, and his fishing extends both above and below it. The defendant also claims to be, and he is admitted to be in respect of his fishery, the owner of the bed of the river and to be entitled to all such rights as his several fishery confers upon him. I do not understand that the admission goes further than this. We do not know the origin of his right to the fishery nor how he or his predecessors acquired the right to the bed of the river. Before considering the rights of the parties, I will state what has happened since 1803. In 1840 the defendant or his father planted a row of willows in the bed of the river at a short distance from the plaintiffs' bank. These willows are still growing. They are now large trees, and the defendant has lopped them from time to time, and has always claimed them as his. For many years silt and mud have been gradually accumulating in the river and on what was in 1803 unquestionably its bed; and those accumulations have been forming both at the foot of the plaintiffs' bank and also in the river above and below. In 1860, this mud having become tolerably firm, the defendant or his father cut a small ditch or grip in it at the foot of the plaintiffs' bank, and this ditch or grip has constantly been cleared out by the defendant. Shortly before the commencement of this action he filled up this ditch or grip with concrete in order to form a path for his own convenience to a bungalow on an eyot which he claims as his, and the ownership of which is not in dispute. The mud from this ditch has always been thrown on the river side of it, and has helped to raise the mud which kept gradually accumulating on the bed of the river. The defendant's evidence shows that this ditch or grip was cut and kept open to mark the boundary between the bed of the river and the land belonging to the plaintiffs. There is a mass of evidence and much contradiction about this ditch, some witnesses even denying its existence. But it is impossible to believe this, and I take the truth to be what I have stated. In 1877 or 1878 a weir known as Penton Hook Weir, and situate at Laleham some distance down the river, was removed by the Thames Conservancy. This caused the water in the river above to fall; and by the plaintiffs' land the fall amounted to about 2ft., more or less. This fall in the river increased the distance between the plaintiffs' bank and the water of the river, at least in the summer months. The fall also facilitated the gradual accumulation of mud on what had unquestionably once been the bed of the river. Gradually and by slow degrees the water has receded from the foot of the plaintiff's bank, and mud has accumulated between the foot of the bank and the water of the river in the summer and autumn months. The strip of land thus formed is dry in summer, but is under water in winter; it is of considerable length, and extends along the banks of the river both above and below the plaintiffs' land. The plaintiffs claim so much of this strip as lies between their land and the water, and they claim it as an accretion to their land. The plaintiffs, however, have never taken possession of this strip or used it as their property. On the other hand, the defendant claims it as part of the bed of the river. He also claims it under the Statute of Limitations by virtue of his possession for twelve years before action brought.

Romer, J., has decided that the land in dispute has ceased to be the bed of the river and belongs to the plaintiffs, and from this decision the defendant has appealed.

In order to determine the rights of the parties to this strip of land it is necessary to consider—first, the rights of the plaintiffs; and, secondl, they rights of the defendant. The owners of the allotment made in 1803 were clearly riparian proprietors, and the river being a public navigable river they had a right as members of the public to use the river as a public highway. They had also as riparian proprietors the right to pass to and fro between the water and their own land, and to pull their boats up from the water on to their own land, and to push them down again from their own land into the water. They had also as riparian proprietors the right to take water from the river provided they did not injure others by so doing. Those rights, at least, the allottees acquired, and those rights, at least, the plaintiffs are now entitled to: see *Lyon* v. *Fishmongers' Co.* The right of navigating a non-tidal river does not, however, entitle the public to fish in it: see *Smith* v. *Andrews*, [1891] 2 Ch. 678, 40 W. R. Dig. 90, and the authorities there cited. Consequently, as the defendant's predecessors had an exclusive right to fish in the river where it bounded the allotment, the plaintiffs' predecessors never had as riparian proprietors or otherwise any right to fish in the river either from their own land or in boats. Nor have the plaintiffs ever claimed such right. As regards the bed of the river, the presumption of ownership in the defendant's predecessors as owners of the several fishery displaces the presumption that would otherwise arise in favour of the riparian proprietors being the owners of the bed of the river *usque ad medium filum*, as to which see Hale, *De Jure Maris*, cap. 1. There is no question here of any right on the part of the Crown to the bed of the river; for at Wraysbury the river, though navigable, is not and never was tidal. The bed of the river clearly did not pass to the plaintiffs' predecessors by the allotment made in 1803; nor do I see upon what principle they can claim by accretion of mud or lowering of water any soil which, although dry at times, is still, as a matter of fact, bed of the river. Nor do I understand Romer, J., to be of a different opinion. His judgmant proceeds upon the footing that the strip of land in dispute has ceased to be bed of the river. I will consider this presently; but I will first state what I conceive to be the rights

of the defendant as owner of a several fishery to the bed of the river within its limits.

Both upon principle and according to the authorities a several fishery may exist in a public navigable river either apart from or as incident to the ownership of the soil over which the river flows. Moreover (according to the law which governed pleadings and forms of action before the Judicature Acts passed), the owner of a several fishery, whether he owned the soil or whether he did not, could maintain trespass for a disturbance of his right of fishery; for, even if he did not own the soil, his several fishery was an incorporeal hereditament and a profit *a prendre* for the disturbance of which trespass was the appropriate remedy. The authorities on this point are *Smith* v. *Kemp*, 2 Salk. 637; *Seymour* v. *Lord Courtenay*, 5 Burr. 2814; *Holford* v. *Bailey*, 13 Q. B. 426, in the Exchequer Chamber. See also *Marshall* v. *Ulleswater Steam Navigation Co.* If the origin of a several fishery is known, if a grant creating it is produced or its terms can be inferred from those of more recent documents, the terms of that grant will show whether the grantee is the owner of an incorporeal hereditament only, or whether he is also the owner of the soil of the river in which his right of fishery exists. In *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875, the terms of a grant of a several fishery in a public navigable and tidal river were inferred to have been such as to have conferred on the grantee an incorporeal hereditament only. If the existence of a several right of fishery is proved, and the owner of the several fishery can also prove that he has so used the soil over which his fishery extends as to give rise to the inference that he is the owner of the soil as well as of the fishery, he will establish his ownership of both. This was the case in *Attorney-General* v. *Emerson*, [1891] A. C. 649, 40 W. R. Dig. 90, when a several fishery was established over the foreshore of the Maplin Sands in the estuary of the Thames. But, further, it must be taken as now settled that, if the right to a several fishery in a public navigable river is proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary. The reasoning on which this presumption is based is not satisfactory, and the difficulties involved in it were very forcibly pointed out by Cockburn, C.J., in *Marshall* v. *Ulleswater Steam Navigation Co.*, but the presumption is supported by Mr. Butler in his note to Coke upon Littelton (122*a*); it has the great authority of Bayley, J., and the other judges who decided *Duke of Somerset* v. *Fogwell*; it was deliberately sanctioned by the Court of Queen's Bench and by the Exchequer Chamber in *Holford* v. *Bailey*; it was recognized as law and was acted upon as such by Cockburn, C.J., himself and by his colleagues in *Marshall* v. *Ulleswater Steam Navigation Co.*; and, lastly, it was treated by the House of Lords in *Attorney-General* v. *Emerson* as no longer open to question. But, treating this presumption as established, what does it involve? Is the owner of a several fishery to be treated as if he were the grantee of a defined strip of land, with all subjacent mines and minerals? Or is his presumed ownership of the soil to be limited to the right to make such a use of it as is necessary for the purposes of his fishery? Are the limits of his soil fixed by metes and bounds, or do they change as the bed of the river changes? Again, what are his rights as regards riparian owners? What as regards accretions to the banks or to the bed of the river? And what are his rights as regards soil from which the bed of the river has permanently receded? The answer to all these questions must depend primarily on the real meaning of the doctrine under consideration, and on the extent to which the owner of a several fishery is to be treated as the owner of the bed of the river within the limits of his fishery; and on this subject there is as yet very little authority in our books. *Scratton* v. *Brown* is a very important authority to show that water boundaries of land may fluctuate in law as well as in fact. In *Foster* v. *Wright* it was decided that the owner of a several fishery had the exclusive right to fish in a river which had gradually encroached upon and into the land of a riparian proprietor, the limits of whose land were known. This decision was, in my opinion, quite right, although in one part of my judgment I may perhaps have gone too far. I am not, however, satisfied that I did, for in that case the river was the boundary. In *The Mayor of Carlisle* v. *Graham*, 18 W. R. 318, L. R. 4 Ex. 361, it was held that the owner of a several fishery, in a part of a river which had been permanently left dry, had no right to fish in an entirely new channel which the river had made for itself in quite a different place. No such questions arise here, but those cases are useful as throwing some light on the rights of owners of several fisheries. Treating the defendant as the owner of a several fishery, and as presumptively, as well as by the admission of the plaintiffs, the owner of the bed of the river within the limits of his fishery, it is very difficult to see how either his rights or those of the riparian proprietors can be affected either by accretions to the bed or by the lowering of the level of the water, so long as the accretions or the soil from which the water has receded are still in fact part of the bed of the river. So long as this is the case so long will the riparian proprietors continue to be such, and to be entitled to free access to and from their lands to the water across the accretions and soil left dry, and otherwise to use those accretions and soil to the same extent as they were entitled to use the bed of the river before any change in it became observable. On the other hand, in the case supposed, the owner of the several fishery will have the same rights to those accretions and soil, as parts of the bed of the river, as he had to the old bed of the river before any change took place. Moreover, the defendant's acts of ownership go far to show that he has not yet, at all events, lost his right to the accretions. *Ford* v. *Lacey* strongly supports his case on this point. Further, during the period of transition from bed of the river to land which no longer answers that description, the Statute of Limitations cannot be invoked by the owner of the several fishery against the riparian proprietors for the purpose of changing the ownership. The statute cannot begin to run against them in respect of ownership until the right to the soil accrues to them and this cannot be the case until the land has ceased to be bed of the river, and ceased, therefore, to belong to the owner of the fishery. On this point I agree with Romer, J. No doubt if the defendant had excluded the plaintiffs long enough from the use of the land in question the plaintiffs would have lost their rights over it, but there has not been any exclusion proved, and the Statute of Limitations, therefore, is out of the question: see *Leigh* v. *Jack*. Whether, apart from the Statute of Limitations, the accretions or the land left by the water can become the property of the plaintiffs or cease to be the property of the defendant is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale's *De Jure Maris*, 1 and 6, and the Year-book, 22 Ed., 3 fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is ea

to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Reg.* v. *Lord Yarborough*, affirmed by the House of Lords in *Gifford* v. *Lord Yarborough*, 5 Bing., 163, and *In re The Hull and Selby Railway Company*, seem opposed to those authorities if applied to fluctuating water boundaries. The judgments in *Scratton* v. *Brown* (pp. 498, 499, 502, 505) point in the same direction. On the other hand *Attorney-General* v. *Chambers* seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration or decision when it shall arise. The conclusion at which I have arrived from a careful study of the evidence is that the strip of land in dispute has not yet ceased to be part of the bed of the river, and has not yet become, even if it ever will become, the property of the plaintiffs. In 1803 the water reached the bank of the river on the plaintiff's side; so it does now, although not so constantly as then. In summer the water is lower than it used to be, and since 1803 the river shore near the bank has risen from the constant accumulation of silt and mud, sided by willows, osiers, and vegetation. Still this strip of land is under water, except when the river is low. It is not under water only when the water is swollen by an unusual flood; its normal state in winter is under water, and it is under water when the river is well within its old banks. As stated by one of the plaintiffs' own witnesses, the least push of water brings the river over most, if not all, of the land in question. Notwithstanding, therefore, the photographs taken in the autumn of last year, and which show this strip of land to be dry land and covered with vegetation, I cannot come to the conclusion as a matter of fact that the strip in dispute has yet ceased to be bed of the river, and, if it has not, the plaintiffs' claim to it as their land cannot be supported. The defendant still has exclusive fishing rights over it, and the presumption that the soil is his is not rebutted by the fact that there is in summer and autumn less water there than there formerly was. If the doctrine of accretion is to be invoked, the accretion seems to me to be rather on and to the defendant's soil than on or to the soil of the plaintiffs. I do not see how the doctrine of accretion can assist the plaintiffs, so long as the accretion is in fact on what is still bed of the river. I do not propose to examine the evidence which has led me to the above conclusion as to the true state of the strip of land in dispute. My brother Smith has done this very fully in his judgment, and it is unnecessary for me to go over the same ground. I do not differ from the American authority (*Howard* v. *Ingersoll*) to which Romer, J., has referred, as affording criteria for determining what is and what is not bed of a river, but I am unable to concur with Romer, J., in his inference from the proved facts. I attach more importance than he did to the history of the case, and to the extent to which the place is still under water. The defendant's acts of ownership, although important from one point of view, do not throw much, if any, light on the question of fact on which this case really turns.

I am of opinion that the appeal must be allowed, and judgment be entered for the defendant, with costs here and below. But I think that our judgment should be prefaced by a declaration that the strip of land claimed by the plaintiffs was, at the time of the commencement of the action, part of the bed of the river, and as such is the property of the defendant, and that the plaintiffs have all the rights of riparian proprietors, so far as their land extends. This declaration will preserve the plaintiffs' rights over the strip of land as part of the bed of the river, and at the same time preserve to the defendant his right to the soil of the bed, including the strip in question.

KAY, L.J.—The plaintiffs are owners in trust of a piece of agricultural land which was allotted, under an inclosure award in 1803, to their predecessors in title, and was described in the award as bounded on the south-west side by the River Thames. This land is on the northern side of the river at Wraysbury, in the county of Bucks, where the river is navigable, but not tidal. The land is about 7 ft. above the river bed, and the bank is an irregular slope, upon which grow trees and bushes. The river opposite to the plaintiffs' land is divided into two streams by eyots now forming an island. These eyots belong to the defendant. He has also land on the northern bank, adjoining to the plaintiffs' land on the western side, and separated from it by a ditch. The defendant, in 1880, built a bungalow on the eastern end of the eyot opposite the plaintiffs' land, and for a convenient access to this bungalow, which is called "The Nest," the defendant has recently made a concrete path at the foot of the bank of the plaintiffs' land and a bridge of wood from the end of it to "The Nest."

The plaintiffs say that the land on which this path is made is part of the land belonging to them, and they have brought this action against the defendant for this alleged trespass. The learned judge has made a declaration that the land on which the path has been made was and is the plaintiffs' land and not part of the bed of the river. Against this the defendant appeals.

It seems to be admitted that the defendant is owner of a several fishery in this part of the river, and as such owner the bed of the river opposite the plaintiffs' land belongs to and is vested in the defendant. The question mainly argued in this case is whether the site of the path is bed of the river. The defendant says that it is. If not, he says it has not become property of the plaintiffs, and he relies on certain acts of ownership, which, he claims, have confirmed his title.

I will consider this last point first. The site of the path was no doubt originally part of the river bed. No act of the defendant while it was vested in him as *alveus* of the river can affect the question. If it has ceased to be river bed, there is no evidence when this took place. It cannot be affirmed that it happened more than twelve years before the acts complained of, and therefore no other title to it, except as bed of the river, is established by the defendant in this action. This, as I understand, was the view of the learned judge, and I cannot come, on this point, to any other conclusion. The question whether this site is bed of the river is of much more difficulty.

The plaintiffs are bound, in order to maintain an action of trespass like the present, either to prove that they are in actual possession of the land in question, or to establish a title which will sustain the action. There is no evidence of any act of ownership by the plaintiffs on any of the land below the bank. They or their tenants have always cultivated the land above the bank, and they claim that their possession of that land is possession of all the land down to the river. But no actual use or occupation of the land below the bank by the plaintiffs' predecessors in title is proved by the evidence. However, the plaintiffs contend that the water is their boundary, and that if that boundary gradually shifts by silting up of soil or by the stream receding, whether from a natural or an artificial cause, their boundary is still

the water. Alternatively, the plaintiffs say, this river has receded by slow and imperceptible degrees, and this has caused an accretion to their land. They contend that the land in question is no longer bed of the river, but dry land, which, by the law of accretion, belongs to them.

There does not seem to be much dispute upon the main facts of the facts. *Primâ facie* the defendant, as owner of the fishery, is entitled to the bed of the river. This was a narrow branch of the river. In 1860 or thereabouts the defendant's father dug a shallow ditch, a foot deep, at the foot of the bank of the plaintiffs' land. At that time this land was river bed. I suppose it was apprehended that it might some day cease to be so, and this was a precaution taken to preserve the defendant's title to it if that should happen. In my opinion, as I have said, this was useless. Nothing of this kind done in the bed of the river could better the defendant's title or affect that of the plaintiffs. This ditch has been cleaned out from time to time by the defendant since its formation. It had no use except as a boundary. The cement path has been made in this ditch. The small quantity of soil thrown out in cleaning it was put on the side next the stream. A bank seems to have been slowly forming, which this soil somewhat increased. On this bank the defendant, in 1866 or about that time, planted oziers and willows, some of which have now become large trees, and from time to time he has lopped and trimmed these trees. About 1878 the Thames Conservators removed Penton Hook Weir, which caused the water to sink in this part of the river about 2 ft. From these causes, but chiefly by the last, the river has receded opposite the plaintiffs' land, so that during a great part of the year the bed where this cement path is made is dry land.

The learned judge has found that the site of the cement path is not now part of the river bed. It certainly is a somewhat strange way to use the bed of a river, to lay down along it a permanent pathway. This proves, at anyrate, that the defendant knows it will be dry for a great part of the year. The evidence proves that this is the case. How long it is dry is not distinctly shown, perhaps it would be difficult to estimate this. It must vary with the seasons. This year, we are told, it has been dry until the rains of this month, which have flooded the river so much that the water is over, not only the path, but also the mound of silt between it and the stream beyond. The defendant says that when he first recollects the land between the site of the path and the river, which is about forty years ago, "it was much lower than it is now; it accumulates year by year, it increases. It was more often under water than now, because some eighteen years ago the Thames Conservancy did away with Penton Hook Weir. They lowered the level of the Thames some 18in. or 20in." Mott, who was tenant of the plaintiffs' land from 1887 for some years, says that the ditch, on the site of which the path now is, was about a foot deep and 18in. wide. "Oftentimes, when the water was high in the winter time, it was full of water." Being questioned by the judge, he says that in heavy floods the water goes over the plaintiffs' field, and in the ordinary winter "it would be up over where the concrete was." Low, a surveyor, says that between the 8th of May and the 16th of July last year the water fell 20in., and that on the 16th of May the lowest point of the path was 2ft. 3in. above the water. He cannot say how often it is over the path. Gardam, a timber merchant, has known the locality since 1860. He says that the stream opposite the plaintiffs' land was, even in those days, in winter perhaps a strong stream, and in the summer practically almost a dry ditch. Now it is much lower. These are witnesses for the defendant.

Taking the plaintiffs' evidence, H. D. Buckland says that since 1866 he can state that the land below the bank of the plaintiffs' land has in some places silted up, in others the bank has fallen or been trodden in. Haldane knew the place in 1863 and 1869, and the water then, in flood, used to come over the bank. Simmons, a builder, living a mile and a-half away, has been accustomed to go to this part of the river all his life to bathe, fish, punt, or shoot. He says that years ago the water laved the bank all along the plaintiffs' land, and it is only within the last two or three years it has showed as much land as now. In cross-examination, he says that the stream will lave the bank now "at the least push of water." Rowles, aged sixty-six, has known the place all his life. He says that this was formerly the main stream of the river; but he does not believe you could row a skiff up it now. There were 14ft. of water there, and now there are not above 3ft. Hore fished in the stream last winter; the water was then 3ft. deep at the foot of the plaintiffs' bank. In winter it is generally from 2ft. 9in. to 3ft. 6in. in depth.

The plaintiffs have put in a useful plan, giving sections from the bank of their land to the water, when it was low in the summer. The first of these sections at A. is near the defendants' land on the north bank. The bank is here 14ft. 5in. above the water and the path, 6ft. 5in. below the bank, and 8ft. above the water. At B., which is about half way along the path, the bank is 12ft. 5in. above the water, the path 7ft. 5in. below the bank, and 5ft. above the water. At this point the mound between the path and the stream is about 3ft. higher than the path. At C., which is near the bridge to "The Nest," the bank is 13ft. 5in. above the water, the path 8ft. 5in. below the bank, and 5ft. above the water. The mound here is 4ft. above the path. C. is at the foot of the bridge. The path is 7ft. 5in. below the bank, and 5ft 2in. above the water. There is no mound between the path and the water at this point. The bridge is about 5ft. above the path and is reached by steps.

This gives the height of the bank above the path an average of about 7ft.

Photographs were taken last autumn, by the direction of the court, in the presence of the agents of both parties. The water was then very low, the path is strewn with leaves, and the place does not look much like the bed of a river.

This is not so much a question of disputed facts as of the inference to be drawn from facts not in dispute. But the words of Lopes, L.J., in *Savage* v. *Adam*, W. N. 1895, 109, recently adopted by the Court of Appeal in *Colonial Securities Trust Co.* v. *Massey*, 44 W. R. 212 [1896] 1 Q. B. 38, apply: "The presumption is that the decision of the court below on the facts was right and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a rehearing, the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the court below."

Is, then, the case left in doubt? There is a well defined bank at the river end of the plaintiffs' land. Undoubtedly it was formerly the margin of the river bed, which ended, at any rate, not sooner than the foot of this bank. The river still overflows it and reaches to this bank, so as to be, according to the plaintiffs' evidence, from 2ft. 9in. to 3ft. deep in ordinary winter seasons. Sometimes, even now, the water in flood comes over this bank, which is about 7ft. above the land at the foot of it. It comes to the foot of this bank according to the plaintiffs' witne

Simmons, "at the least push of water." No doubt the river is lower since the removal of Penton Hook Weir in 1878. Also the bed has been rising, by an accumulation of silt, which the defendant has somewhat encouraged. But I cannot come the conclusion that the site of the defendant's path has ceased to be part of the river bed. I differ from the learned judge with reluctance; but I cannot help thinking he relied too much upon the appearance of the locality as shown in the photographs, and upon the inference to be drawn from the defendant's act in putting down the cement to form the pathway.

Assuming then, as I think, that the land up to the foot of the plaintiff's bank is still part of the bed of the river, the next question is, What are the relative rights of the parties? The plaintiffs have claimed it as their freehold. That claim fails. The defendant, however, has no other right to the bed of the river than that which he has as owner of the fishery. I do not find any definition of the extent of such a right. It must, in my opinion, be a limited ownership, in support and for the purposes of the fishery. Unquestionably any act done by the defendant in the bed of the river, which would interfere with the navigation, would be illegal. So also would any act, which interfered with the access from the plaintiffs' land to the water of the steam adjoining, whether it was low or high. The plaintiffs' right of access over the bed of the river to the water, in any state of its flow, I think is indisputable. The plaintiffs are riparian proprietors, and while the land up to the foot of the bank is bed of the river any act done by the defendant which would interfere with the rights of the plaintiffs as riparian proprietors would be illegal.

This action is not framed or intended to raise the question whether what the defendant has done in laying down the cement path is an act of this kind. The plaintiffs claim the site of path as their freehold, and the learned judge state that this was the question which both parties agreed to submit to him at the trial.

I am obliged to differ with respect from the conclusion of the learned judge. I think that the land in question has not ceased to be part of the river bed; but that the bank extends to the plaintiffs' land.

I think there should be a declaration to this effect, and also that the plaintiffs have all the rights of riparian proprietors on the northern side of the river so far as their land extends.

A. L. SMITH, L.J.—This is a common law action of trespass in which the plaintiffs complain that the defendant has broken and entered their close and laid down thereon a concrete footpath. The defendant denies that the land upon which he has laid down this footpath is the land of the plaintiffs, and he also sets up the defence of *liberum tenementum*. The substantial question is whether the land is the land of the plaintiffs.

It was proved that the plaintiffs are riparian proprietors upon the left bank of the River Thames near Staines, which at this part is a non-tidal, public, navigable river. Their predecessors in title having in the year 1803 had awarded to them, as trustees of the Wraysbury Church lands, a piece of arable and meadow land containing 5a. 2r. 8p. bounded on the south-west by the River Thames. It is not denied that the defendant is owner of a several fishery in the River Thames opposite to the plaintiffs' land, and it is not disputed that upon authority which cannot be questioned, *Holford* v. *Bailey*, *Marshall* v. *Ulleswater Steam Navigation Co.*, and *The Attorney-General* v. *Emerson*, this ownership of the several fishery is evidence of the defendant's ownership of the soil underlying it. As to what acts an owner of a several fishery may or may not perform upon the soil underlying his fishery that question does not arise in this case, the question being, whether the land whereon the defendant has laid down the concrete path is or is not the plaintiffs'.

The plaintiffs being riparian proprietors and the defendant being owner of the soil of the bed of the river the question is to where, in the year 1894, when this action was brought, did the plaintiffs' land extend; in other words, where did their *ripa* end?

This seems to me so far, *primâ facie*, easy to answer, for where the bed of the river began (the soil of which was the defendant's) there the plaintiffs' *ripa* ended, but where as a matter of fact this boundary was in 1894 is the great question in this case. If the plaintiffs' land ended upon the river side of the concrete path, then, apart from some further questions which would arise under the Statute of Limitations, the plaintiffs are in the right; on the other hand, if it ended upon the land side of this path the plaintiffs are in the wrong. The burthen of proof is upon the plaintiffs to show that in 1894 their land extended to the land in dispute.

My brother Romer came to the conclusion that in 1894 the bed of the river ended outside—*i.e.*, on the river side of the concrete path, and that the land of the plaintiffs therefore embraced the *locus* in dispute, and he gave judgment for the plaintiffs accordingly. The learned judge held, and I think quite rightly, that whether a particular spot is or is not part of the bed of a river is one of fact. To help him to decide this question he ordered that photographs should be taken of the locality and they were taken by the joint surveyors of the plaintiffs and the defendant. After having seen these photographs and heard the case out, the learned judge in his judgment says: "And but for the fact that this land did formerly form part of the bed of the river I doubt whether anyone would have the boldness to contend that in its present state and under its present conditions it formed part." This is a strong statement, and when I first saw the photographs which the learned judge had had taken they appeared to me to show that the learned judge's conclusion was justified, and if they had shown what I may call the average state of things as shown by the evidence, which I have since found out they do not, they would have been of much more value than they are. Whilst we were hearing this appeal three other photographs were taken—viz., upon the 19th of March, 1896, and were produced before us. If photographs were anything more than pictures representing a particular place at a particular time I should have thought that these last photographs should not have been looked at, but as photographs, unless verified upon oath, are not of themselves evidence; we looked at them as mere pictures. The two sets of photographs show two entirely different states of things—the one a dry autumn time and no water, the other a wet spring time with water. The latter show the water of the river a considerable way up what we know to be the left bank of the Thames, and which bank in my opinion plays a very important part in this case. These last photographs, unlike the previous, would lead to the conclusion that the *locus in quo* was bed of the river on the 19th of March, 1896. In these circumstances I part with the photographs which show such totally different scenes and turn to the evidence upon which the case must be decided to see where, in the year 1894, the bed of the river extended, and consequently where the plaintiffs' land ended.

The history of this part of the Thames for the last hundred years is by no means left in obscurity. The

evidence shows that in the year 1803 the plaintiffs' field was situated some 6ft. or so above the river, and at its river end there was a steep sloping bank down to the river, in some places 6ft. and more, and in other places somewhat less, from its top to its foot. This bank I shall hereafter call the 6ft. bank. This bank has been described by the different witnesses as a shelving bank, almost perpendicular—not quite, as a steep bank, a sloping bank, rather steep with bramble growing along it, a sloping bank, the ordinary bank with the wash of the water coming against it. From the award in 1803 and the plan annexed, it would seem that at this date the bed of the river extended up to this 6ft. bank, and it is part of the plaintiff's case that this was so, and no one denies it. The plaintiffs say, and with truth, that they were then—*i.e.*, in 1803—riparian proprietors, which they could not have been unless their land had extended down to the water's edge, for, as Lord Selborne said in *Lyon* v. *Fishmongers' Co.*, "it is of course necessary for the existence of a riparian right that the land should be in contact with the flow of the stream." It is obvious, in a river like the Thames, rising, as we know it does, and as the evidence shows, in freshets and floods, and falling again in dry times and in droughts, that its waters, when freshets are on, would extend up the face of the 6ft. bank, and that in time of floods, as is the evidence, over the top of this bank, and that in dry times and drought the exact opposite would take place, and the waters would dwindle and recede from this bank. That this 6ft. bank in 1803 was the limit of the plaintiffs' land, and that it was also then the limit of the defendant's soil, I do not doubt. It is proved that where this bank stood in 1803 there it stands to-day, and it can be seen by anyone in exactly the same place, and in substantially the same condition as of old. It appears upon the evidence that within living memory the land lying on the river side of this 6ft. bank, and upon which the concrete path has been made, was much lower than it is now, and that accumulations have been taking place thereon year by year, that this land used to be more often under water than it is now, and more especially so since some eighteen years ago (1877 and 1878), when the Thames Conservancy did away with the Penton Hook Weir, which had the effect of lowering the level of the Thames at this point of the river some 18in. to 20in., one witness putting it at 30in., but no accurate measurements were made as to this.

It was shown that as long ago as 1832 Willing Eyot, Chitling Eyot, Billy's Eyot, and Pancake Eyot were in existence, and evidence was given, which I do not doubt is correct, that the planting of these eyots with willows and osiers, which has for some years been going on, resulted in the flow of the river at these parts being retarded, the consequence being the silting up of mud and soil brought down by the river, and thus these eyots became enlarged and altered and of different dimensions to what they theretofore had been, and the bed of the river near to its left bank at the spot in dispute thereby became raised. That the bottom of the river—*i.e.*, the *fundus* or bed of the river as distinguished from its area and limits—became altered I do not doubt; the question to my mind is, Has its area or have its limits been curtailed? It was show that in 1840 the defendant's father planted willow trees in the bed of the river, which are to be seen there at the present day outside of the foot of the 6ft. bank, and it was proved by uncontradicted evidence that these trees had been continuously trimmed by the Ashby's from when they grew up to the present time. It was proved by an overwhelming body of evidence, although there was some contradiction as to this, that in 1860 Mr. Ashby's father had a grip, some call it a ditch, cut when the river was small along the toe of the 6ft. bank to mark his boundary, and at some places along this bank where the water stood up to this bank, he placed stumps for the like purpose.

It was also proved that continuously from 1860 to the present time Mr. Ashby had cleaned out this grip and had thrown what was dug out of it upon the place where the willow trees which had been planted by his father in 1840 grew. This, together with the continued silting up of the bed of the river around these trees, has created the outside bank at the foot of these willows which now exists.

It was proved that the concrete path was recently made by Mr. Ashby for the convenience of those inhabiting the bungalow which he had built upon his Billy's Eyot, so that when the river was low they might get thereto and therefrom dry shod, and it was also proved that this concrete path was made upon part of the site of the old grip or ditch.

That these willow trees, when planted in 1840, were planted in the bed of the river as distinguished from dry land is not denied by the plantiffs; it is part of their case that they were, and that this grip, when cut in 1860, was also cut in the then dry bed of the river is clear, and had either the trees been planted or the grip been cut upon dry land which had then ceased to be part of the bed of the river, and had then become dry land, the plaintiffs would, in my judgment, have been met by the Statute of Limitations, which they could not have got over, for it is not suggested by them that they have ever exercised a single act of ownership over the *locus in quo*, whilst the defendant, from 1840 downwards, has been exercising the acts above-mentioned. It was said that by tilling their field the plaintiffs had exercised acts of ownership over the land in dispute. This, in my opinion, is too far fetched to be adopted. Unless the defendant had been willing to waive the point, the plaintiffs would have been defeated in this action by reason of their not being able to establish any possessory title whatever upon which to maintain trespass.

Now, it must be pointed out, for it is very important, that no evidence has been produced to show that at any time the waters of the Thames, except as occasioned by the temporary and ordinary vicissitudes of the weather, have receded from their ancient bed which in 1803, as before stated, extended up to the 6ft. bank.

It is true that the general level of the waters of the river has been lowered, especially since Penton Hook Weir was abolished, and that for years silting up has taken place around the eyots as they have been planted with willows and oziers and also adjoining the left bank of the river, but as to the waters of the river having receded so as to constitute an abandonment of the ancient bed, and to leave land derelict, that has not only not been shown, but the contrary has been established. What has taken place, to use Lord Selborne's words in *Lyon* v. *Fishmongers' Co.*, has been "in the ordinary and regular course of nature," and not otherwise, that is, when the weather is dry the river recedes, and when the weather is wet the river again reverts up to its old metes and bounds —*i.e.*, to the 6ft. bank.

The evidence as to this is as follows: Mr. Ashby stated that the land—*i.e.*, "between the 6ft. bank and the river, was always covered with water in the course of the year up to the 6ft. bank." Generally speaking, during the winter months, it was covered for a long period, and he did not ever recollect a year when it was not covered at some part of the time. Mr. Mott, who had farmed the plaintiffs' land, stated that in "ordinary winter time the water would be up over where the concrete was (*i.e.*, to the

6ft. bank) not merely in heavy flood time, but in ordinary winter time it would be above the concrete path." Low stated that he had frequently seen the water over where the concrete path is. Gardam, who knew the place for the last forty-five years, having described the differences in the flow of the waters in different weathers and seasons, says, "In winter time it would be above that—*i.e.*, the concrete path." "At certain portions of the year the water would be all behind these trees (*i.e.*, up to the 6ft. bank); at other times there was a sort of a ditch and probably it might be mud, and in a week or two you could walk along there." "When the water was up I have fished close up to the bank—*i.e.*, the 6ft. bank, behind the trees. It—*i.e.*, the water between Billy's Eyot and the church lands—changes with the Thames; of course it rises and falls, probably a foot in a night. I might go there to-day and say that there is a ditch, and to-morrow I might say a running stream. A heavy rain like last night (he gave his evidence upon the 9th of August, 1895) would probably raise the Thames one foot," and Mr. Symonds, called by the plaintiffs, stated that "at the least push of water" it will be laving the bank—*i.e.*, the 6ft. bank.

This being the evidence, now comes the question, What constituted the bed of the river in 1894?

Was it the same old bed, I mean by that did it consist of the same old limits, or has the old bed been curtailed, and if so, when, and by how much?

I take the bed of a river to be where the running water of the river makes its mark. It may be there one moment and back another, and as the rains from heaven descend it will ever and again fill its old accustomed bed. I will here use the words which I find in an American case to which I have been referred, *The State of Alabama* v. *The State of Georgia*, for they in apt language convey what I mean to express as to what constitutes a bed of a river: "The bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."

If the old bed has been curtailed as the plaintiffs assert, this must have been brought about either by reason of the receding of the river from part of its ancient bed and leaving the land derelict, or by reason of the deposit of alluvion against the plaintiffs' bank, either of which in this case must have occurred since the year 1882—*i.e.*, within twelve years of action, in order to avail the plaintiffs, for otherwise they would be defeated by the Statute of Limitations.

The incidents attending, and the distinction between, land derelict and land formed by alluvion, is dealt with by Best, C.J., in delivering the opinion of the judges in the House of Lords in *Gifford* v. *Lord Yarborough*.

As regards the possibility of an owner of a several fishery having a shifting boundary to his land under his several fishery, Baron Bramwell, in the case of *Mayor of Carlisle* v. *Graham*, dealing with a several fishery, says: "The plaintiffs had a several fishery which, no doubt, must have been granted or acquired by metes and bounds; the *locus in quo* is not within those metes and bounds." If this be the law, then, even if the plaintiffs could have established that the Thames had receded from part of its ancient bed, not merely by shrinking and again growing in the ordinary and regular course of nature, but had permanently done so and left land derelict, it would be adverse to the plaintiff's contention that as the river receded so the soil underneath the several fishery of the defendant also became contracted.

It was pointed out by the plaintiffs' counsel that Bailey, J., in *Scratton* v. *Brown*, when dealing with the question as to whether there may be a shifting boundary to land, says: "That must be the case of land fronting the sea or a river where from time to time the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. The Crown by a grant of the sea-shore would convey not that which at the time of the grant is between high and low-water mark, but that which from time to time shall be between those two *termini*."

I incline to the opinion that where the water is the boundary this may be so, but whether this is so where such a line of demarcation as the 6ft. bank exists I do not decide, for there has been no such receding by the waters of the Thames in the present case so as to leave land derelict as to raise the point.

For reasons above given, in my judgment, the plaintiffs have not proved, as they were bound to do to establish this part of their case, that the Thames has receded from part of its ancient bed, but on the contrary the evidence shows that it has not.

It was said that the photographs ordered by Romer, J., showed that land vegetation had sprung up and had taken the place of water vegetation upon the *locus* in dispute, and that this showed that it had become dry land in 1895, and was consequently not in 1894 the bed of the river.

There is not a particle of evidence that this is so, and, speaking for myself, I cannot tell by looking at the photographs whether this be so or not, and even if I could, as I have before said, photographs *per se* and unverified are no evidence at all.

Being of opinion that the evidence shows that the area of the bed of the Thames extends to where it always has been during the present century—*i.e.*, up to the foot of the 6ft. bank, this in my judgment is sufficient to conclude this case in favour of the defendant, and upon this I decide it. But if I am wrong I must add that I very much doubt if the plaintiffs can invoke the doctrine of accretion as applying to a case where, as here, the old line of demarcation between the plaintiffs' land and the river has always been in existence and still remains patent for all to see. I allude to the old 6ft. bank.

It cannot be denied that authority is to be found in the books, for instance, in Hale's *De Jure Maris*, Britton, Fleta, Bracton, the Institutes of Justinian, and the Year-books, all of which will be found referred to by Lindley, J., in his judgment in *Foster* v. *Wright*, at p. 447, and also in the judgment of Chelmsford, L.C., in *Attorney-General* v. *Chambers*, at p. 71, and in other cases, which would lead to the conclusion that in a case with such metes and bounds ever existing, as in the present, the doctrine of accretion would not apply. The case upon which counsel for the plaintiffs relied to show that although there might be metes and bounds, yet the doctrine of accretion did apply, was that of *Foster* v. *Wright*. In that case, in which the question was as to whether the owner of a fishery in a river could follow his fishery when the river gradually and imperceptibly changed its course and ate into the soil of another, although after many years the encroachment upon that other's soil could be identified, Lindley, L.J., held that it could be followed, and if I may be permitted to say so, I agree with him; but that learned judge said: "The change of the bed of the river has been gradual, and although the bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from

week to week, nor in fact at all, except by comparing its position of late years with its position many years before."

This, I would point out, is not so in the present case, for, as before stated, the old 6ft. bank has been ever standing where it is. There stands the old line of demarcation of the plaintiffs' land, and there it has stood clearly defined whenever the deposit of alluvion by reason of the silting up of sand became such as to be in itself apparent, and then, at that very moment when the first, and indeed every subsequent accretion, became apparent, so also at the same identical time it became perceptible to the ordinary observer that the accretion so formed was no part of the plaintiffs' land.

This certainly differentiates this case from *Foster* v. *Wright* in an essential particular, and as at present advised I doubt extremely whether the doctrine of accretion applies at all to the present case.

The whole doctrine of accretion is based upon the theory that from day to day, week to week, and month to month, a man cannot see where his old line of boundary was, by reason of the gradual and imperceptible accretion of alluvion to his land.

How can this apply to a case like the present, when the whole thing is at once patent? The late Willes, J., in the case of *Lloyd* v. *Ingram* (the Shoreham foreshore case, which will be found reported in a report of its own, 1868) then laid down the law of accretion to the jury: "If by gradual and imperceptible accretions in the ordinary course of the operations of nature land is added on by slow degrees to the shore" (*Lloyd* v. *Ingram* had relation to the seashore, but as to this point a river stands, in my judgment, upon the same footing), "notwithstanding that after a certain period you may see that a body of land, however considerable, has accrued to the shore, yet if the steps by which that land is formed are steps gradual and in the ordinary course of nature, and happening from time to time, but you cannot perceive the change from step to step (if one may use the figure), then that land so gradually and imperceptibly accrued does belong to the owner of the shore and is given to him by the law as his property. I say 'gradual and imperceptible.' . . . The question is whether the land in question was formed by sudden, practical, perceptible addition such as ordinary observation would recognize from time to time, or whether it was formed by gradual additions such as ordinary observation would not recognize as one from step to step, but as to which from stage to stage you would say there has been an addition that I can now perceive to the place in question."

Apply this ruling to the present case. As soon as any deposit of alluvion became visible at all, a practical, perceptible addition to the plaintiffs' land would at once be by the ordinary observer recognized, and this would be seen not by stage to stage, but by step to step. As, however, I have not to decide this point I will say no more about it, excepting that there appears to me to be great obstacles in the plaintiffs' way in maintaining that the doctrine of accretion applies to this case at all. In my judgment my brother Romer has been led astray by the photographs he ordered to be taken, and has lost sight of the proved fact of the ancient and still existing boundary, the old 6ft. bank, and he does not so much as allude to the fact, which the evidence clearly shows, that what the Thames has for the last hundred years been doing and still is doing as regards its rise and fall to and from the 6ft. bank, has ever been in the ordinary and regular course of nature, both facts, in my opinion, of vital importance for the right determination of this case. I must take leave to say that, having considered the whole evidence in this case, I have the boldness to assert that in 1894 the site of the concrete path formed part of the ancient bed of the Thames.

The learned judge held that the putting down of the concrete path by the defendant was evidence that the land no longer formed part of the bed of the river, and he said that he suspected that the defendant had done so in order to acquire title to the land. With all respect I cannot agree with my brother Romer in either of these suggestions. What the defendant did was to put down this path in the dry bed of the river, so that that bed might be better utilized by passers on foot (when the waters of the river were off it) to and from the bungalow by having a dry path instead of a slimy, slippery, and at times muddy one to walk upon.

The plaintiffs are still entitled, as they have ever been since 1803, as riparian owners to access to the river, to contact with its waters as they shrink and grow in the ordinary and regular course of nature: *Lyon* v. *Fishmongers' Co.*

This right they have still, and this right the defendant cannot interfere with. If he does, then I apprehend the plaintiffs may lawfully complain, but I cannot bring myself to hold, as my brother Romer held, that the soil whereon the concrete path has been placed is the soil of the plaintiffs, for in my opinion it is not, and therefore this action must be dismissed with costs here and below.

Appeal allowed.

Solicitors, *Soames, Edward, & Sons*, for *Rowell & Lomas*, Rickmansworth; *S. Vigers & Richardson.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Jan. 29.

MARTIN v. MARTIN & CO. (*a*.)

Practice — Consolidation of actions — Application by plaintiff — Ord. 49, r. 8.

The court has power to make an order for the consolidation of actions at the instance of a plaintiff as well as at the instance of a defendant.

Appeal from an order made by Cave, J., at chambers.

The plaintiff brought an action against the defendants for breach of a contract to deliver certain shares.

The defendants alleged that the contract was subject to certain conditions, and pleaded that they had given the plaintiff a bill of exchange, which had not then matured.

On this bill being dishonoured at maturity the plaintiff brought a second action in which he claimed both for the breach of contract and also on the bill of exchange.

On the application of the plaintiff Cave, J., made an order for the consolidation of the two actions, under ord. 49, r. 8.

The defendants appealed.

Kisch, for the defendants.—There is no jurisdiction to order actions to be consolidated at the instance of a plaintiff. Ord. 49, r. 8, is as follows: "Causes or matters pending in the same division may be consolidated by order of the court or a judge in the manner in use before the commencement of the principal Act in the Superior Courts of Common Law." By the practice at common law actions could

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

only be consolidated at the instance of the defendants, and the rule adopts that practice: *Amos* v. *Chadwick*, 4 Ch. D. 869, 25 W. R. Dig. 186.

Ashton Cross, for the plaintiff, cited *Bennett* v. *Lord Bury*, 5 C. P. D. 339, 28 W. R. Dig. 174; and *Amos* v. *Chadwick*, 26 W. R. 840, 9 Ch. D. 459.

Cur. adv. vult.

Jan. 29.—Lord ESHER, M.R.—It is argued that there was no jurisdiction to make an order for the consolidation of these actions, because the application for it was made by the plaintiff. The case depends on ord. 49, r. 8. That rule says that causes pending in the same division may be consolidated in the manner in use in the common law courts before the Judicature Act. It is said that before the Act such an order could only be made on the application of a defendant. That practice was known to the framers of the rule, and if they had intended to continue that practice they could have said so. But what they have said is that, where causes are pending in the same division—that is a condition precedent to the making of an order—they may be consolidated in the manner formerly in use in the common law courts. That means that if an order is made, it is to be dealt with in the old manner. I desire to give the rule a wide interpretation which will leave the judge at chambers a large discretion, subject, of course, to an appeal to this court. I think that the only condition precedent to the making of an order is that the causes should be in the same division.

LOPES, L.J.—The old practice was that actions could not be consolidated except on the application of defendants. But we have to consider the present rule. There is nothing in that rule to show that an application for an order for consolidation can only be made by a defendant. The actions to be consolidated must be in the same division, that is the only condition precedent. I agree that it is wise that in a matter of this sort as much as possible should be left to the discretion of the judge.

CHITTY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Goldberg, Langdon, Barrett, & Newall.*

Solicitors for the defendants, *Gibson, Weldon, & Bilbrough.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Dec. 11, 19.

LANE v. COX. (a.)

Landlord and tenant—Negligence—House let in dangerous condition — Defective staircase — Injury to tenant's workman—Liability.

There is no implied obligation upon the landlord of an unfurnished house towards his tenant not to let the house in a defective or dangerous condition. Consequently, the landlord is not liable in an action for negligence brought against him by the tenant for injuries sustained by reason of such defective condition; a fortiori *the landlord is not liable in such an action brought against him by a workman employed by the tenant.*

This was an appeal from the judgment of Lord Russell of Killowen, C.J., who non-suited the plaintiff at the trial of the action with a special jury.

The action was brought to recover damages for personal injuries from the defendant, the owner of a house which he had let to a weekly tenant; and the plaintiff was a workman employed by such tenant.

It appeared at the trial that the plaintiff in company with another man was employed by the tenant to remove some furniture. While the two men were carrying a bedstead downstairs the staircase gave way and the plaintiff was badly injured. It was also proved at the trial that the staircase, not having sufficient support, was defective and unsafe, and that this defect existed at the time the tenant went into occupation. It was further proved that the tenant had complained to the landlord of the defective condition of the staircase.

The Lord Chief Justice ordered a non-suit on the ground that the plaintiff had failed to show that there was any duty towards him on the part of the defendant.

From this judgment the plaintiff now appealed.

Sinclair Cox (*F. Lampard* with him), for the appellant.—The non-suit was wrong. The defect existed at the time the premises were let, and the defendant was liable for the repair of the premises as between himself and the tenant. The tenant had complained to the defendant of the state of the stairs. There was sufficient evidence of an agreement by the defendant to do repairs to go to a jury: *Payne* v. *Rogers*, 2 H. Bl. 350; *Sandford* v. *Clarke*, 37 W. R. 28, 21 Q. B. D. 398. An action for negligence will lie against a landlord who has demised his premises knowing them to have been in a dangerous condition: *Todd* v. *Flight*, 9 W. R. 145, 9 C. B. N. S. 377. Even if he had not such knowledge he would be liable: *Gwinnell* v. *Eamer and Wife*, L. R. 10 C. P. 658, 23 W. R. Dig. 143. In the present case the staircase was a private way, whereas in the case of *Robbins* v. *Jones*, 12 W. R. 248, 15 C. B. N. S. 221, the structure in question was part of a highway. Again in *Gandy* v. *Jubber*, 12 W. R. 526, 5 B. & S. 78, the landlord was held liable for damages to a passer-by in respect of a dangerous grating over a cellar.

B. F. Williams, Q.C. (*F. R. G. Radcliffe* with him), for the respondent.—The non-suit was quite right. The action was for negligence, but there was no evidence of negligence on the part of the defendant. Moreover, there was no duty on the part of the defendant towards the plaintiff. You cannot recover against a landlord unless he has neglected some duty the omission of which constitutes a nuisance and a danger to the public: *Francis* v. *Cockrell* 18 W. R. 1205, L. R. 5 Q. B. 501; *Le Lievre* v. *Gould*, 41 W. R. 468, [1893] 1 Q. B. 491; *Heaven* v. *Pender*, 11 Q. B. D. 503.

Sinclair Cox replied.

Cur. adv. vult.

Dec. 19.—Lord ESHER, M.R.—In this case the plaintiff brought an action against the defendant, as owner of a house, to recover damages in respect of an injury he had received owing to the defective condition of such house. The evidence showed that the house was owned by the defendant, that it was let to a weekly tenant who was in occupation at the time the plaintiff sustained the injury, and that at the time of the letting to the tenant the house was in an unsafe condition owing to the defective condition of the staircase, which defect caused the injury to the plaintiff. The question for this court is whether the defendant was liable to the plaintiff. There was no contractual relation between the plaintiff and the defendant. The defendant did not invite the plaintiff into the house. Nor is this like the case of a shopkeeper who keeps his shop open for the public to enter therein.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Then it was said that there was negligence on the part of the defendant; that he was negligent in having let the house to a tenant in a dangerous condition, and that such negligence caused the accident to the plaintiff. It has been pointed out in several cases before this that you cannot accuse a person of negligence towards another unless you prove that he has some relation to or duty towards such other person, and that he had neglected to perform such duty. This was decided by *Heaven* v. *Pender*, which was followed by *Elliott* v. *Hall*, 34 W. R. 16, 15 Q. B. D. 315.

Looking at those cases we have to see if there was any duty existing between the parties here. It has been pointed out in previous cases what relation between the parties will create a duty. If, for instance, a person is on a highway, he has a duty towards any other person who may also be on that highway and near to him; on each of them is imposed a duty to take reasonable care so as not to interfere with the other. So, again, if a person has a house close along a highway or public road, the proximity of his house to such highway or road imposes a duty on him to all persons passing thereby; and if the owner, by the negligent management of such house, causes injury to passers by, he is liable in an action for damages. So also again with regard to your next-door neighbour; you must not let your house be in such a condition as to cause any injury to him.

In the present case before us, however, it is said that there was negligence on the part of the defendant in letting his house to a tenant when it was in a defective condition. It has, however, been held that, in the absence of any contract to the contrary, there is no duty on the part of a landlord towards a tenant to let his house in a condition that is not defective. There is no duty imposed on a landlord not to let an unfurnished house in a rotten condition. Any such duty must depend upon express contract. If there is no such duty then on the part of the landlord towards his tenant, much less is there any duty on his part towards a stranger. Therefore there was no duty on the part of the defendant here to the plaintiff, and if there was no duty on his part there could be no negligence. The Lord Chief Justice was therefore quite right in directing a non-suit, and this appeal must therefore, in our opinion, be dismissed.

LOPES, L.J.—The defect complained of here is the defective staircase in the house let by the defendant to a tenant. There is no liability on the part either of the landlord or the tenant, except in the case of a statutory or contractual duty to keep the house in repair, and no evidence has been produced of any such duty in this case; and where there is no duty existing there clearly cannot be any negligence. The non-suit, therefore, was right.

RIGBY, L.J.—I only desire to add the remark that, as to the contention that a landlord is liable if he lets his house in a defective condition, the duty of the landlord only relates to public buildings and does not relate to his tenant or his tenant's guests.

Appeal dismissed.

Solicitors for the appellant, *A. Savage Cooper*.

Solicitors for the respondent, *Powell & Skues*.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Jan. 20, 22.

In re ISAAC.
CRONBACH *v.* ISAAC. (*a.*)

Practice — Administration action — Costs — Defendant trustees — Severance of defence — Apportionment of costs—Discretion of court—Appeal—R. S. C., 1883, *ord.* 65, *r.* 1.

In an action to administer the estate of a deceased testator, in which the two trustees and executors S. and I. were defendants, the defendants were represented by one firm of solicitors until a certain date, when they severed, and the defendant I. appeared in person. Some time afterwards I. instructed another solicitor to act for him. The action coming on for hearing on further consideration, Kekewich, J., *gave the trustees one set of costs only out of the estate, and directed that it should be paid to S. exclusively.*

Held, on appeal, that, there being no evidence that I. had acted unreasonably in severing, the costs were not in the discretion of the judge, and therefore the appeal was competent.

Further, that the proper order to be made was that one set of costs should be given, to be apportioned by the taxing-master, but so as to give to I. only costs for work actually done by him.

Appeal of the defendant, Saul Isaac, one of the executors and trustees of the will of the testator, Samuel Isaac, from a decision of Kekewich, J., whereby his lordship had directed that in an administration action one set of costs only should be paid to the trustees out of the estate, and that those should be paid to the other trustee, Lewis Solomon, to the exclusion of Isaac.

The testator's will and codicil, dated the 3rd of July, 1886, and the 10th of November, 1886, respectively, were proved by two of the executors named therein, Isaac and Solomon, power being reserved to the others to come in and prove. He died on the 22nd of November, 1886.

The deceased was a contractor to the Mersey Railway Co., and it was stated that shortly after his death his brother, Saul Isaac, endeavoured to get those contracts transferred to him for his own benefit.

An action was commenced by writ issued the 14th of December, 1886, for the administration of the trusts of the testator's will, the two executors and trustees Isaac and Solomon being the defendants.

Judgment in the action was delivered on the 30th of April, 1887.

The chief clerk's certificate was filed the 12th of August, 1895, and the further consideration came on for hearing on the 25th of March, 1896, when Kekewich, J., made the order now appealed from.

Until the 22nd of November, 1892, both the executors were represented by Messrs. Grover, Humphreys, & Son. Isaac, however, then withdrew his retainer and put his own name on the record.

On the 24th of January, 1894, he appointed Mr. Ernest Bevir as his solicitor, who had continued to act for him since.

No evidence was before the court to explain why the trustees had severed in the course of the proceedings.

Farwell, Q.C., and *Rowden*, for the appellant.—Unless severance *per se* is misconduct, the trustees are entitled to their costs, and to share them: *Course* v.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Humphrey, 26 Beav. 402, 7 W. R. Ch. Dig. 3; *Attorney-General* v. *Wyville*, 28 Beav. 464, 9 W. R. Ch. Dig. 63. They are entitled to one set of costs only, but the taxing-master, and not the judge, decides the proportion in which it is to be divided between them. The decision of Kekewich, J., if allowed to stand, would create a new practice.

Warrington, Q.C., and *Borthwick*, for the respondent, Solomon.—This is really an appeal for costs, and is not a question of depriving a trustee of costs out of the estate. No question of principle is involved; it is merely a question for the judge to decide how the costs are to be divided; that is in the judge's discretion, and the Court of Appeal will not interfere with that discretion. It really becomes an appeal from the judge to the taxing-master.

A. H. Jessel, for the beneficiaries.

Farwell, Q.C., in reply.—If the order stands, this curious anomaly will result: the estate is not fully wound up, and Isaac is ordered to get in some of the outstanding assets; is he to do this and to give his services gratuitously?

Cur. adv. vult.

Jan. 22.—The judgment of the court was delivered by

LINDLEY, L.J.—This is an unfortunate appeal about costs, and the first question which arises is whether the appeal is competent. The case is this: [His lordship shortly stated the facts, and continued:] In the order on further consideration the costs were dealt with by the learned judge in this way. One set of costs only was given to the trustees, and they were to be paid to Mr. Solomon to the exclusion of Mr. Isaac. Mr. Isaac appeals from that order, and the appeal is based on that part of ord. 65, r. 1, relating to costs, which says: "Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

The effect of the order of Kekewich, J., as it stands, is to deprive Mr. Isaac of all his costs, because only one set of costs was allowed, and the whole of them are to go to one trustee. The question is whether, on the evidence before the learned judge, Mr. Isaac had unreasonably carried on these proceedings. Messrs. Isaac and Solomon severed in their defence, possibly for a good and sufficient reason; for some time they worked together, and then Isaac, for some reason which is unexplained, employed a separate solicitor. *Primâ facie* that is conduct which requires explanation; but the question is whether the court ought to act on that without giving him an opportunity of explaining his conduct. There is no evidence on the subject, and it would be going too far to deprive a trustee of his costs on that ground, and therefore the appeal is competent, the costs not being in the discretion of the court.

We have come to the conclusion that there is upon the evidence no ground for judicially depriving Mr. Isaac of his costs: he asks that the costs may be apportioned between him and his co-trustee, but we are met with the difficulty that the effect of that might be to deprive Mr. Solomon of costs to which he is entitled for what he has done. Mr. Farwell pointed out in the course of the argument that he had no desire to do that, but he only wished to secure to his client such costs as were attributable to his services, and he said that Mr. Isaac had been directed to take proceedings to get in some of the assets, and had got them in, and the costs of so doing could not properly be paid to Mr. Solomon. On turning the matter over in our minds, and consulting with the taxing-master, we are not satisfied with the order asked for. We vary the order, therefore, and direct that one set of costs only shall be given, and shall be apportioned by the taxing-master between Messrs. Isaac and Solomon, with the addition of these words, "but so as only to give to Mr. Isaac costs for work actually done by him."

Then with regard to the costs of the appeal. There will be no order as to the costs, except that the respondents, other than Solomon—that is to say, Mr. Jessel's clients, shall have their costs of the appeal out of the estate.

Appeal allowed.

Solicitors, *Ernest Bevir; Grover, Humphreys, & Son; McDiarmid & Teather.*

High Court of Justice.

Chan. Div. (Stirling, J.) — Jan. 12, 27.

In re WESTERN COUNTIES STEAM BAKERIES AND MILLING CO. (LIMITED). (*a.*)

Company—Winding up—De facto auditors—Officers of the company—Companies (Winding-up) Act, 1890, *s.* 10.

Persons who act as auditors of a company are officers of that company within the meaning of section 10 *of the Companies (Winding-up) Act*, 1890, *even though they have never been formally elected auditors.*

In re Coventry and Dixon's case, 28 *W. R.* 775, 14 *Ch. D.* 660, *applied.*

In re London and General Bank, 44 *W. R.* 80, [1895] 2 *Ch.* 673, *and* In re Kingston Cotton Mill Co., 44 *W. R.* 210, [1896] 1 *Ch.* 6, *followed.*

This was a summons by Charles Edward Parsons and Frederick Pring Robjent, asking that proceedings under a summons taken out by the liquidator of the company against them and other persons under section 10 of the Companies (Winding-up) Act, 1890, might be stayed on the ground that they were not "officers of the company" within the meaning of that section. The question involved was whether persons who were not formally elected auditors of the company, yet *de facto* discharged the duties of auditors, were liable to be proceeded against under this section.

The facts were as follow: The company was formed in January, 1888, with articles of association which contained provisions as to the appointment and duties of auditors substantially the same as those given in Schedule I., Table A, to the Companies Act, 1862, and also an indemnity clause beginning: "The directors, auditors, and other officers for the time being of the company."

The applicants carried on business in partnership as accountants in Newport, Mon.

In November, 1888, they were brought into

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law

connection with the company through some negotiations for an advance to the company on a mortgage, which fell through.

On the 23rd of January, 1889, the chairman of the company (carrying on business at Bath) wrote the following letter to Mr. Parsons: "We are now preparing our balance-sheet, and there are some items in it which will require, I think, the services of a valuer such as yourself. You have already looked over our business establishments pretty carefully, I think, and a day or two in Bath further would, I think, enable you to make a report upon the matter. I presume this business would be in your line, and as Newport is now such a short distance from Bath, I daresay you will think it worth your while to run over and see me on the matter, when, I make no doubt, we could readily adjust the question of terms, &c., and when I could more fully explain what it is the board wants." In consequence of this letter Mr. Parsons went to Bath and saw the chairman, and subsequently sent a clerk to the offices of the company, who prepared a balance-sheet for the year 1888. This was sent by the firm to the chairman, with the following certificate annexed:

"We have carefully examined the accounts of the Western Counties Steam Bakeries and Milling Co. (Limited), and find the same to be in accordance with the above balance-sheet, which shows the correct financial position of the company.

"PARSONS & ROBJENT.

"Newport, Mon., Feb. 13, 1889."

This balance-sheet, with the certificate annexed, was subsequently circulated among the shareholders of the company, and a dividend on the basis of it was declared at a general meeting held in February, 1889.

There was no evidence that Messrs. Parsons & Robjent were formally appointed auditors of the company by the directors previously to the last-mentioned meeting. It was clear, however, from a correspondence which passed between Mr. Parsons and the chairman that Messrs. Parsons & Robjent were aware that their balance-sheet and certificate would be submitted to the general meeting. The minutes of the general meeting were not forthcoming, but Messrs. Parsons & Robjent denied that they were elected auditors at that meeting in accordance with Article 126. There was no evidence to the contrary, and the judge came to the conclusion that they were not so elected. Messrs. Parsons & Robjent had considerable difficulty in obtaining payment of their fees; ultimately in September, 1889, these were paid by the chairman's cheque. Towards the end of 1889 the chairman again applied to Messrs. Parsons & Robjent, not to prepare a balance-sheet, but to audit the accounts. The same clerk who had prepared the former balance-sheet again visited Bath and examined the accounts, and on behalf of the firm signed a certificate appended to the balance-sheet for the year ending the 31st of December, 1889, in exactly the same terms as their previous certificate. This balance-sheet and certificate were again circulated, and a dividend on the basis thereof was declared at a general meeting.

It was in respect of this dividend that the misfeasance summons was taken out.

Graham Hastings, Q.C., and *Frank Evans*, for the applicants. Here the applicants were called in to make a particular audit, and that does not make them auditors within the meaning of the statute. This case, therefore, is distinct from that of the *London and General Bank*, 44 W. R. 80, [1895], 2 Ch. 673. The observations of the court in *In re Kingston Cotton Mill Co.*, 44 W. R. 210, [1896] 1 Ch. 6, show that the principles of the decision in *In re London and General Bank*, which was a case where the auditors had been formally elected, will not be extended to a case like the present, where there is no evidence that the applicants were ever elected auditors. The burden is on the other side to show that the applicants are within the section. The Act of 1862 contains no provision requiring a joint-stock company to have auditors at all. The proper course in this case was to proceed by action, as was done in the case of the *Leeds Estate Building Co.* v. *Shepherd*, 36 W. R. 322, 36 Ch. D. 787. This is the first attempt to bring a casual auditor within the meaning of the section.

Ward, for the liquidator of the company.—It does not matter whether the applicants were appointed auditors or not. They took on themselves the duties of auditors, and where a person takes on himself an office he must be held to take its liabilities.

He referred to *Coventry* v. *Dixon*, 28 W. R. 775; 14 Ch. D. 660; *Gibson* v. *Barton*, 23 W. R. 858; L. R. 10 Q. B. 329.

Graham Hastings, Q.C., replied.

Jan. 27.—STIRLING, J., after stating the facts, continued: The question is one of procedure. It is not disputed that an action might be brought against the auditors for misfeasance, but the question whether auditors are officers of a company is one of importance, and may be especially so to the present applicants; for, if the remedy is by action, they may have a defence to it, based on the Statute of Limitations, which would not be available in the present proceedings. If the question were free from previous decisions, there would be much to be said for the view that auditors are not officers of a company, but the matter has been dealt with in the Court of Appeal in *In re London and General Bank*, and *In re Kingston Cotton Mill Co.*, and I am bound, not merely by the decisions, but by the principles on which those cases were decided. The former case was decided with reference to a banking company, one of a class of companies as to which special provisions on the subject of audit are contained in the Companies Act, 1879. I do not go into the details of that case because in the second case that case was considered and the *ratio decidendi* explained by Lord Herschell, who presided in the Court of Appeal. [His lordship read Lord Herschell's judgment in *In re Kingston Cotton Mill Co.*, at p. 17 of [1896] 1 Ch., from the words "Let us see what *In re London and General Bank* did decide," and continued:] In *In re Kingston Cotton Mill Co.*, auditors of a company to which the special clauses of the Act of 1879 had no application were held to be officers of the company within the meaning of section 10 of the Act of 1890.

If, then, Messrs. Parsons & Robjent had been duly elected auditors of the company at the general meeting held in 1888, the present case could not have been distinguished from those to which I have referred. They were not, however, so elected, and the question is whether that circumstance entitles them to say that they are not officers of the company. Now, in *Coventry and Dixon's case* it was held by Jessel, M.R., that *de facto* directors were subject to the provisions of section 165 of the Companies Act, 1862, of which section 10 of the Act of 1890 is an extension. The decision of the Master of the Rolls was reversed on appeal, but the judgments of James, L.J., and Bramwell, L.J., show that they agreed with this portion of his judgment, and Baggallay, L.J., stated that he entirely agreed with what was said by James, L.J.

I think also that persons who have *de facto* acted as directors and officers of a company ought not to be

allowed to escape from the jurisdiction created by such enactments as section 165 of the Act of 1862 and section 10 of the Act of 1890 by setting up defects in their own title to hold such positions. If a person duly elected to fill the office of auditor be subject to this jurisdiction, in my judgment a person who *de facto* fills the office is also subject to it.

Then, did the applicants *de facto* fill the office of auditor? They were employed, in the language of article 125, "to examine the accounts of the company" and "to ascertain the correctness of the balance-sheet" for the year ending the 31st of December, 1889. They knew that the balance-sheet and their certificate of its correctness would be laid before a general meeting. They were paid by the company. Finally, the shareholders made no objection to receive their report, and acted on the footing that they were the auditors of the company. I think that, upon the assumption which I am bound to make that the cases of *In re London and General Bank* and *In re Kingston Cotton Mill Co.* were well decided, the applicants were properly made respondents by the misfeasance summons, and that the present application ought to be refused.

Solicitors, *Woodcock, Ryland, & Parker*, for *Vaughan & Hornby*, Newport, Mon.; *Talbot & Tasker*, for *Dixon & Dixon*, Bristol.

Chan. Div. }
Romer, J. } Jan. 20.

In re WEEKES' SETTLEMENT AND THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY ACT, 1860. (a.)

Will—Power—Gift for life—Power to dispose—Default of appointment—Gift by implication.

Under her marriage settlement a wife had a general power of appointment by will over certain real estate. By her will she gave the property to her husband for life and gave him "power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards other property which I have under my marriage settlement." There were several children of the marriage, but the husband died without having exercised the power of disposition given to him by the will.

Held, that the power was a mere power and not a power coupled with a trust, and that there was no gift by implication to the children in default of appointment.

Healy v. Donnery, [1853] 3 *Ir. C. L. Rep.* 213, *followed.*

Adjourned summons.

This was a summons to obtain payment out of court of a sum of £347 9s. 3d. Consols standing in court to the credit of *Ex parte The London, Brighton, and South Coast Railway Act of* 1860, *In re Weekes' Settlement.*

The said sum of Consols represented the residue of a sum of £750 paid into court by the railway company on taking compulsorily certain lands, part of a farm called Brookside Farm, in the parish of Rudgeld, Sussex.

In 1856 Emily Mary Weekes was entitled in fee, under the will of her, father Richard Weekes, to Brookside Farm, subject to the life interest therein of her mother. In April, 1857, Emily Mary Weekes married the Rev. James Slade, and by an indenture dated the 27th of April, 1857 (being one of the settlements made on the occasion of such marriage), the reversion or remainder of the said Emily Mary Weekes in Brookside Farm, expectant on the death of her mother was conveyed to trustees on trust for the said Emily Mary Weekes for life, and after her death to such uses and for such estates and in such manner as she should, whether covert or sole, by will appoint, and in default to the person who would have, at the death of the said Emily Mary Weekes, been entitled by descent in case she had died intestate and a widow.

Emily Mary Slade made her will dated the 15th of April, 1885, which, so far as material, was in the words following: "I bequeath to my husband, James Slade, a life interest in all property, real or personal, which may come to me in accordance with the will of my late father, Richard Weekes, and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlement." She appointed her husband, James Slade, and the respondent, Arthur John Slade, her eldest son, her executors. She died on the 14th of May, 1885, and her executors duly proved her will on the 7th of December, 1885.

There was another indenture of settlement made on the marriage of the said Emily Mary Slade also dated the 27th of April, 1857, whereby certain personal property was settled on trust for the husband and wife during their lives and the life of the survivor and after the decease of the survivor to the children of the marriage as the husband and wife should jointly appoint, or in default as the survivor should appoint, and in default of any such appointment, for the children of the then intended marriage who, being sons, attained twenty-one, or daughters, attained that age or married, in equal shares. This was the power of appointment to which Mrs. Emily Slade referred in her will. There were fourteen children of the said marriage, of whom eight survived the husband and wife. The husband, James Slade, died on the 23rd of February, 1893, intestate without having exercised the power of disposition by will given to him by the will of Emily Mary Slade.

The applicants, who were the surviving children of the said marriage (other than the eldest son, Arthur John Slade), asked that after certain prior payments thereout the residue of the Consols might be divided into eighths between the eight children of the said Emily Mary Slade who survived her and her husband, on the ground that the will of the said Emily Mary Slade gave to the said James Slade a life interest in the Brookside Farm, followed by a power to appoint the same among such children, and that this power not having been exercised, the said children were entitled to the said farm in equal shares. The respondent, Arthur John Slade, however, claimed that as heir-at-law of the said Emily Mary Slade, he was in the events which happened, entitled to the said Brookside Farm, and consequently to the said residue of Consols which represented the same.

Pattison, for the applicants.—If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the court will imply a trust for or gift to those objects equally, if the power be not exercised.

He distinguished *Healy* v. *Donnery*, [1853] 3 Ir. C. L. Rep. 213, and referred to *Brown* v. *Higgs*, [1799] 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Burrough* v. *Philcox*, [1840] 5 My. & Cr. 73; *Witts* v. *Boddington*, [1790] 3 Br. Ch. Cas. 94; *Forbes* v. *Ball*, [1817] 3 Mer. 437; *Birch* v. *Wade*, [1814] 3 V. & B. 198; *In re Caplin's Will*, 13 W. R. 646, [1865] 2 Dr. & Sm. 527; *In re White's Trusts*, [1860] Johns. 656,

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

8 W. R. Ch. Dig. 102; *Butler* v. *Gray*, 18 W. R. 193, [1889] L. R. 5 Ch. App. 26.

Micklem, for the respondent A. J. Slade.

J. T. Prior, for the railway company.

ROMER, J.—The question raised in this case arises under the will of Mrs. Emily Mary Slade. At the date of the will the property in question was settled by the settlement of the 27th of April, 1857. Under that the property was settled on Emily Slade for life with remainder as she should appoint by will, with a gift over in default of such appointment. In these circumstances the lady made her will, on which the question now arises.

In effect, she gave the settled property to her husband for his life, and she also gave him power to appoint in the following words: "power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards other property which I have under my marriage settlement."

The husband did not exercise the power, and the question is, Do the children take by implication in default? In my opinion they do not. Apart from authority, and dealing with this will alone, I should gather that what was conferred on the husband was a mere power, and not a power coupled with a trust that he was bound to exercise. I can see no words that would justify me in holding that the testatrix intended her children to take if the husband did not execute the power. This is not a case of a gift to children with power for the husband to select, or to such of the children as the husband should select, by exercising the power. If in the case before me, the testatrix really intended only to give a life interest to her husband, and a mere power to appoint if he chose, and intended, if he did not think fit to appoint, that the property should go in default of appointment according to the settlement only, why should she be bound to say more than she has in this will? I come to the conclusion on the words of the will, that the testatrix only intended to give a life interest and a power; certainly she has not said more than that.

Am I, then, bound by the authorities to hold otherwise? I think not. The authorities do not show in my opinion that there is a hard and fast rule that a gift by will to A. for life with a power to him to appoint among a class, and nothing more, must if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases show (though there may be found here and there remarks of a few of the learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) you must find in the will an indication that the testator did intend the class or some of the class to take—intended, in fact, that the power should be regarded in the nature of a trust—only a power of selection being given. As for example, in cases where you find a gift to A. for life with a gift over to such of a class as A. shall appoint. I will examine the authorities cited and show that this is so, though I may remark that the case before me is peculiar in this, that there is a gift over in default of the appointment by the husband under one of the settlements, so that this will would not in any case come within the general proposition above stated. The first case is an Irish case, *Healy* v. *Donnery*, which is distinctly against the general proposition which has been urged upon me. [His lordship read the headnote of the case.] There was no gift over there in default of the power being exercised; there was a residuary gift, but that is not in such cases a gift over (*In re Brierley*, 43 W. R. 36). In *Healy* v. *Donnery* it was held that there was no gift by implication to the children in default of appointment. As to the general proposition there raised by the defendant's counsel and which has been raised before me in the present case, Pennefather, B., at p. 216, says: "It is argued that the power to appoint among children is tantamount to a trust created for them. I have always considered that there was a distinction between a mere power and one coupled with a trust, and though I called on counsel for an authority to the contrary no such case has been cited. But particular cases have been cited in which courts have thought that they collected from the peculiar words of the power an intention of the testator to give to children in default of appointment. The general proposition contended for by the defendant's counsel has never been laid down, and I cannot say that the case falls within the authority of any of the cases cited."

Now, I also propose to shortly refer to the other cases which have been cited to me.

In *Brown* v. *Higgs* [1799], which is first reported at 4 Ves. 708, the testator gave his leasehold estate at Brize Norton to his nephew John Brown on trust to make certain payments and then as follows, after the above trust is performed: "I authorize and empower my said nephew John Brown to receive the remainder that arises from my estate at Brize Norton over and above the £100 I have directed to be paid to my loving wife Rupertia Brown and to dispose of it in the following manner—that is to say, to take £100 of it every year to his sole and separate use and to employ the remainder of the said rent after paying the annual rent to the college and the fines for the renewal of the leases and other necessary expenses about the farms to such of the children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving and that will make the best use of it or to the children of my nephew William Augustus Brown if any such there are or shall be."

In other words it was a gift to the children, to such of them as a certain person should appoint; this power was of selection only. That was the ground of the decision of the Master of the Rolls—he says, p. 719: "Upon the true construction of this will I am of opinion it is equivalent to saying, he gives it to the children of Samuel Brown or of William Augustus Brown with a power to John Brown to select any he thinks fit and to exclude the others; and it is too much to contend that nothing is intended for them exclusive of the appointment of John Brown."

Where you can find that the power is only a power to select among a class and no selection is made, there is a gift to that class.

The case of *Brown* v. *Higgs* came before the court again and is reported in 5 Ves. 495, this particular point being dealt with at p. 500, and the Master of the Rolls, in again considering the case, says: "Upon this disposition and the facts that have taken place the question is whether this sentence in the will upon which this question arises is to be considered as merely giving John Brown a power, if he thinks fit to give the profits of the farm of which he was the trustee to the children of Samuel Brown or William Augustus Brown, or whether upon the true construction it is anything more or less than a mere trust in him with a power to single out any he might think more deserving, but a gift to him in trust for those children at all events; and I am of the same opinion upon very full consideration and after the very able arguments I have heard to shake that opinion, that it is a trust, and not a power in John Brown, and that his non-exercise of that power or the circumstance of his being incapable of exercising it, will not

prevent the objects of the testator's bounty from taking in some manner, though the power of distribution on account of the death of the trustee cannot now be exercised."

That case again came on appeal before Lord Eldon, 8 Ves. 561, and he deals with the point at p. 570 as follows: "It is perfectly clear that where there is a mere power of disposing and that power is not executed, this court cannot execute it. It is equally clear that wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident this court will execute the the trust. The question, therefore, is whether John Brown had a trust to execute or a power and a mere power."

On the words of the will in that case he held that there was a trust. That case, therefore, is no authority for the general proposition.

Then there is the case of *Burrough* v. *Philcox*. That was a peculiar will. [His lordship read the headnote.] It was held that a trust was created in favour of the testator's nephews and nieces and their children subject to a power of selection and distribution in his surviving child. Why was this? Because by the words of the will it is clearly shown that the testator meant to dispose of the property absolutely. The ground of the decision is set forth in substance at p. 92, and the general principle is thus stated: "These and other cases show that when there appears a general intention in favour of a class and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class."

The next case is that of *Witts* v. *Boddington*. The decision there turned upon the peculiar wording of the will, and it is sufficient for me to say that the court came to the conclusion that the testator had sufficiently expressed the intention that the grand children should take; the power was in the nature of a trust. It was a special decision on special facts.

Forbes v. *Ball* is another case. The decision there was that the power had been exercised. Certainly at p. 440 there is a short statement that the court was of opinion that the words in the testator's will raised a trust for the wife's relations, and if it was so decided it is clear to my mind that it was a decision on the particular words of the will. The court must have held that the words "my will and desire" were incompatible with the idea of a mere power being given to A. C., the testator's wife. That case is no authority for the general proposition.

Then the next case is that of *Birch* v. *Wade*. I may deal with that shortly; substantially that was the same case as *Forbes* v. *Ball*. It is clear that there the power was held to be coupled with a trust by force of the words "will and desire."

The next case is *In re Caplin's Will*. In that case it will be seen that the testator, after bequeathing a fund to his wife for her life, after her death directed that it should be paid to such and so many of the relations or friends of the wife as she should by will appoint; in other words, it was a case where there was a gift to a class, the selection to be made by the donee of the power. In this case there was a general statement which went beyond the judgment which should be considered only with regard to the special case.

The next case is that of *In re White's Trusts*. That was a case of a will similar to that in *In re Caplin's Will*, there being a bequest to trustees in trust for A. for life, and if he should die childless: "I confide in the said trustees for applying the said last-mentioned sum of £2,500 capital stock to the benefit of such other of my children or their issue as they may think fit for the interest and good of my family." There again there was a general statement made by Wood, V.C., which in my opinion unless checked by the case before him, was too wide. The Vice-Chancellor said, at p. 659: "It is settled by *Brown* v. *Higgs* and *Burrough* v. *Philcox*, that, where there is a power to appoint among certain objects, and no gift in default of appointment, the court will imply a gift to the objects of the power equally."

Now, I have pointed out that in *Brown* v. *Higgs* and *Burrough* v. *Philcox* there was an intention to dispose of the property to the class, and I have no doubt that Wood, V.C., meant to confine his statement to cases similar to the above.

The last case is that of *Butler* v. *Gray*, which again was a special case where there was a sufficient indication that the class was to take in any event.

I have now gone through all the cases which have been cited to me, and have shown that it appears to me that none of them establish the general proposition that the plaintiff's counsel has urged upon me—though they do establish the more limited proposition I have indicated. For these reasons I hold that in the present case there was no gift by implication to the children in default of appointment by the husband.

Solicitors, *Nicol, Son, & Jones; Sharpe, Parker, & Co.; Rose & Co.*

Q. B. Div.
(Wills and Wright, JJ.) Dec. 15; Jan. 15.

VENNER *v.* McDONELL. (*a.*)

Metropolis—"Building structure or work"—Notice to district surveyor—Temporary seating—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 78, 145, 200 (11b).

A large public building was used for the purpose of holding exhibitions and shows therein. At some of the exhibitions and shows it was necessary to provide seating accommodation for the spectators, but at others no such accommodation was required. The owners of the hall had caused to be constructed certain wooden seating which could be temporarily fixed up in the hall when it was required. When not in use it was taken down and stored away.

Held, that the wooden seating was not a "building structure or work" within section 145 *of the London Building Act*, 1894, *and that it was not necessary to give notice under that section to the district surveyor before it was placed in position in the hall.*

Special case stated by a metropolitan magistrate.

A complaint was preferred against the appellant by the respondent, a district surveyor under the London Building Act, 1894, charging that on or before the 26th of May, 1896, at the Royal Agricultural Hall, Islington, the appellant did, without notice to the respondent, begin to execute a work, respecting which he ought to serve a building notice before commencing such work, contrary to the provisions of the London Building Act, 1894.

The following facts were proved or admitted. The Agricultural Hall was a public hall licensed for music and dancing, and occupied a large area of ground, in the centre of which was a hall, the superficial area of which was 82,728 sq. ft. On or before

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the 26th of May, 1896, certain seating was placed in the hall by the direction of the appellant. No notice of intention to place such seating in the hall was given to the respondent. There was a gallery constructed along each side of the hall supported by iron columns, which were carried through the floor of the galleries up to, and which afforded support to, the roof of the hall. Access to the galleries was obtained by means of staircases, and except when a show or entertainment was being exhibited or performed, the hall contained nothing but the galleries and staircases. The hall and galleries were erected before the passing of the London Building Act, 1894. The hall belonged to a limited company, by which it was let for the purpose of holding exhibitions and shows, about twenty of which took place each year. For some of the shows seating was required for the convenience of the spectators, and, some years since, the company, for the purpose of its business, caused seating to be constructed in such a manner that it could be placed in position when required, and when not required could be taken to pieces and stored away. The placing in position of the seating upon the occasion of the Royal Military Tournament, which took place in the hall in May and June, 1896, was the work of which it was contended by the respondent that notice should have been given. The seating, which was calculated to seat over 3,000 persons, occupied a superficial area of 17,240 sq. ft. The seating beneath the galleries consisted of tiers of wooden platforms resting upon and screwed to brackets, which were fixed to inclined wooden beams. These beams were supported by transverse beams resting at the back in sockets attached to the iron columns, and supported in front on a small iron and wood girder resting in upright wooden posts, which stood in sockets let into the floor. The sockets were part of the permanent structure of the hall. There was similar seating constructed for the gallery, except that the front of the inclined wooden beams rested on the floor of the gallery and the beams were supported at the back by transverse beams resting on the ironwork which carried the roof, and by upright wooden posts resting on the gallery floor and kept in place by foot-plates and braces temporarily placed there. The seating both beneath and above the galleries could be placed in position in separate blocks, each of which blocks beneath the galleries was situated when put up in this space between each pair of iron columns. Each block of seating could be placed in position independently of the other blocks, and on some occasions part only of the seating was required to be used. Every platform, beam, and post of which the seating was constructed was numbered so that it could be and was replaced in the same position after being taken down. No support was afforded to the hall by any portion of the seating, and no part of the seating was in any way built up, erected, or constructed other than by the placing together of the several permanent parts of the seating in the positions in which they had theretofore been placed.

In support of the complaint it was contended that whenever the seating was erected and replaced, work was thereby done in connection with or for the purposes of the hall within the meaning of section 78 of the London Building Act, 1894, and that the appellant should have served in respect of such work the notice required by section 145 of the Act, and no such notice having been served, the appellant had rendered himself liable to the penalty prescribed by section 200 (11*b*) of the Act.

On behalf of the appellant it was contended that the work contemplated by section 78 of the Act was work done to a public building during its construction and, where the work was done after the building had been constructed, was work affecting the building; and that as the erecting or replacing of the seating did not and was not likely to affect the hall, and was not done in connection with or for the purposes of the building, but for the purpose of the tenants' occupation, no notice was required to be given; and further, that if the work was held to be of a character which came within the wording of section 78, it nevertheless did not actually come within the provisions of the section on the ground that it was a structure or work originally erected or constructed before the commencement of the Act, and as such exempted by section 210 from the operation of section 78 and the other sections of the Act.

The magistrate held that the hall being a public building used for shows, the erection of the blocks of seating on the 26th of May, 1896, was work done in connection with a public building for the purpose of seating the public to see the show and required the approval of the district surveyor, and the magistrate ordered the appellant to pay a penalty of twenty shillings and costs.

The question for the opinion of the court was whether, under the circumstances, notice was required to be given to the district surveyor by section 145 of the London Building Act, 1894.

The London Building Act, 1894, s. 78, provides that notwithstanding anything in this Act every public building, including the walls, roofs, floors, galleries, and staircases, and every structure and work constructed or done in connection with or for the purposes of the same, shall be constructed in such a manner as may be approved by the district surveyor. . . .

Section 145 (*a*)—Where a building or structure or work is about to be begun then two clear days before it is begun the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. . . .

Section 200 (11*b*) provides that any person who ought to serve a building notice and who fails to do so shall be liable to a penalty not exceeding forty shillings and to a daily penalty not exceeding the like amount.

Macmorran, Q.C., and *A. C. Glen*, for the appellant.

Avory, for the respondent.

The following cases were referred to: *Hall* v. *Smallpiece*, 59 L. J. M. C. 97; *London County Council* v. *Humphreys*, 43 W. R. 13, [1894] 2 Q. B. 755; *Lavy* v. *London County Council*, 43 W. R. 677, [1895] 2 Q. B. 577.

Cur. adv. vult.

Jan. 15.—The judgment of the COURT (WILLS and WRIGHT, JJ.) was read by

WILLS, J.—The information in this case charges that the appellant at the Royal Agricultural Hall did without notice to the district surveyor begin to execute a work respecting which the appellant ought to serve a building notice before commencing such work, contrary to the provisions of the London Building Act, 1894. By section 200, sub-section 1 (*b*), any person who being a person who ought to serve a building notice begins to execute a work respecting which he ought to serve a building notice before serving such notice shall be liable to a penalty. By section 145, where a building or structure or work is about to be begun, then two clear days before it is begun the builder or person causing the work to be done shall serve a building notice on the district surveyor. If a building notice was necessary in t

present case, the appellant was the person who ought to have given it, and he did not give it before the work was begun. The only question therefore is whether the erection or construction with which this case is concerned was or was not a "building structure or work" within the meaning of section 145 of the London Building Act, 1894.

The Agricultural Hall is a large building constructed for the purpose of shows and exhibitions of various kinds. It is surrounded on the inside by galleries or staircases which are permanent. Some of the exhibitions require that the galleries should be occupied by sittings for the spectators; others require that there should be no seats or seats only in portions of the gallery. The iron columns which permanently support the roof and galleries have sockets attached to them and the temporary and movable timbers to which the seats are for the time being screwed or bolted are dropped or let into these. It is obvious that if the expression "structure or work" is to receive what, apart from the subject matter to which it is applied, would be its natural meaning, no person within the jurisdiction of the London County Council could repair his roof or mend his windows, or put up a fixed cupboard in his bedroom or a fitted bookcase in his library, or a new kitchen range or introduce gas, water, or electric light into his house without giving notice to the district surveyor, and without being subject (section 138) to his supervision, nor without in the case of the most trivial matters paying him half of the fee to which he would be entitled on the original construction of the house or building to or on which any addition, alteration, or other work was made or done (Schedule III., Part I.). It seems impossible to suppose that interference so constant, vexatious, useless, and costly with the daily life of a great community can have been intended, and we are therefore driven to the conclusion that some limitation must be put upon the natural meaning of "structure or work." It is, therefore, necessary to construe "structure or work" as meaning in section 145 something of the same general nature and character as a building. No other limitation appears possible. This view receives confirmation from section 146, which shows the object of supervision by the district surveyor and his duties in respect thereof. "He is from time to time to survey any building or work hereby placed under his supervision, and cause all the provisions of this Act and of the bye-laws made thereunder to be duly observed." There are no bye-laws applicable to such erections as this temporary seating, and no power to make them (see section 164).

It has been argued that section 78 and Part VII. (sections 82 and 86) contain "provisions" applicable to such an erection. The Agricultural Hall was built and in use when the Act of 1855 (18 & 19 Vict. c. 122) was in force. Section 30 of that Act corresponds to section 78 of the Act of 1894, but it omits the words "and every structure or work constructed or done in connection with or for the purposes of the same." We think it plain, however, that the Act of 1894 is not retrospective; that the approval of the surveyor there made a condition precedent to the use of the building as a public building refers to an approval to be given at the outset once and for all; and that afterwards the only part of the section which could apply is the last clause, which says that no work shall be done to or on the building without approval. We do not think this work done to or on the building, and if it were it is not likely to affect it. As to Part VII. of the Act, the two material sections are sections 82 and 83. The reasons we have given for saying that in section 145 by "structure or work" is meant something in the nature of a building apply with greater force to section 82. In addition it is to be observed that, where the builder is desirous of erecting a "building or structure" which comes within that section, the plan he has to deliver with his application is described merely as a "plan of the proposed building," and it is the "building" that is then to be erected if the council are satisfied.

As to section 83, there may be reason for giving in some cases a more extended meaning to the term "structure," because in Schedule III., Part I., where the fees payable to the surveyor are defined, it is clear that it is assumed that he may be entitled to a fee, not only in respect of "any wooden structure," but of "any structure or erection put up on any public occasions." This extension of the fee to "erections put up on public occasions" must refer to section 83, which is the only one dealing specially with "structures of a temporary character," and it therefore gives a reason for saying that "erections put up upon public occasions" may (not must) come under the description of "structure" in section 83. Such extension of the word "structure" in section 83, however, has no application to the present case, where the construction in question has no reference to any public occasion. As, therefore, neither section 70 nor sections 82 and 83 apply to such an operation as that of replacing the seating in the Agricultural Hall, there is no provision of the Act and no bye-law the observance of which the district surveyor has, under section 146, to secure. The necessity in this Act of applying to the word "structure" the principle *noscitur a sociis* is well illustrated by section 164, which gives power to the London County Council to make bye-laws, for (amongst other things) the regulation of lamps, signs, or other "structures." In a building Act one certainly would not, but for the context, have supposed that a lamp would fall under the designation of a "structure." It is impossible to give any general definition of "structure" to be applied everywhere throughout the Act. If it had been possible the definition clause would have been the appropriate place, and Parliament the appropriate authority to give it. We must in each case consider the enactment which has to be applied, and see as we best can whether the nature of the provisions bearing upon the question justify the application sought to be made. In Part III., for instance, there seem to be very good reasons for giving a wide meaning to the word "structure." It is difficult to imagine anything affixed to the ground in any way which ought to be erected (without the permission of the Council) so as to project beyond the general line of building. The whole object of the legislation in this respect is to preserve uniformity, and that object can only be secured by putting everything which could interfere with it under the control of the Council. Some "structures and erections put up on any public occasion" are clearly intended to be subject to the jurisdiction of the council or the district surveyor (see 3rd Sched., Part I.). From the very nature of the occasions on which they come into existence many of them—probably most of them—must be in or in the neighbourhood of streets, and more or less in the nature of public nuisances. The 3rd schedule, as has been pointed out, enlarges the expression "structure" in the Act by tacking on, in the schedule, the words "erection put up on any public occasions." Whether any particular erection put up on such occasion requires notice and inspection must be determined when the occasion arises. The illustration given shows that the expression "structure" must be dealt with in each case according to the facts and the particular enactments sought to be applied. It is clear from Schedule

III., Part I., that "erections put up on any public occasions" must come somewhere under the word "structure" in the Act, else there would be nothing for them to operate upon. This is a very good reason for saying that in section 83 such erections may be legitimately considered to fall within the word "structure." It is no reason for a similar extension of the word in section 145, inasmuch as section 83 contains within itself every provision necessary for the full control of the works by the council and for the protection of the public. Again, in section 201, "building" and "building or structure" appear to be used as synonymous. It is impossible to conceive any reason for giving a different measure of exemption to railway companies and dock companies on the one hand and to canal companies and Conservators of the Thames on the other hand. The enactments to which we have thus called attention illustrate the impossibility of defining "structure" once for all in the Act, and we are not going to attempt more than to deal with the particular case now before us. As to that, we are satisfied that the replacing of the seats in question is not "the beginning of a structure" within section 145, and that this appeal ought to be allowed.

Appeal allowed.

Solicitors for the appellants, *Kingsford, Dorman, & Co.*

Solicitor for the respondent, *W. A. Blaxland.*

Q. B. Div.
(Wills and Wright, JJ.) Dec. 10.

LONDON COUNTY COUNCIL (*Appellants*) v. HOBBIS (*Respondent*). (*a.*)

Metropolis — County council — Dangerous structure — Notice to remove or repair — Recovery of expenses — Ministerial duty of county council — London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 103, 106.

The powers and duties conferred upon the London County Council by sections 103 *and* 106 *of the London Building Act,* 1894, *are ministerial, and may be delegated to, and are exercisable by, the duly authorized servants and representatives of the Council.*

This was a case stated by one of the metropolitan police magistrates.

The respondent, the owner of a structure known as 331, Ferry-road, Poplar, in the county of London, was summoned before the magistrate by the appellants for the recovery of certain expenses incurred by them in the matter of a dangerous structure—to wit, the said No. 331, Ferry-road, and in carrying into force the provisions of the London Building Act, 1894, with respect to the said structure.

Information was given by the district surveyor to the London County Council, the appellants, that the structure was in a dangerous state, whereupon he, the surveyor, was instructed by the Architect's Department of the appellants to certify as to its condition. The surveyor certified that the structure was in a dangerous state, and that it was necessary that the respondent should execute certain repairs; whereupon the superintending architect to the appellants served notice upon the respondent requiring him to take down or otherwise secure the said structure. Upon receipt of such notice the respondent executed the necessary works, but declined to pay the expenses incurred by the appellants in taking the steps aforesaid. The expenses were in accordance with sections 113 and 117, and Parts II. and IV. of the 3rd Schedule of the London Building Act, 1894. These steps were taken by the appellants' Architect's Department as a matter of ordinary routine. Except as aforesaid the dangerous state of the structure was not made known to the appellants as a body, and the matter of the said structure was not, except as aforesaid, dealt with by them or brought before them in any way whatever.

The appellants contended that the powers and duties conferred on them under sections 103 and 106 of the said Act were ministerial only, and had been duly delegated to, and were properly exercisable by, and under the supervision of, their superintending architect.

The magistrate held that the expenses, if recoverable at all, could only be recovered where sections 103, 105, and 106 of the said Act had been complied with; that those sections had not been complied with, inasmuch as it had not been made known to the appellants that the structure was in a dangerous state, and the appellants had not required a survey of the structure to be made under section 103, nor had they caused the notices to be served on the respondent under section 106; he further held that the appellants had no authority to delegate their powers to the superintending architect, and that therefore the routine followed in that official's department was not a compliance with the section in question.

The question for the opinion of the court was whether such decision was right in law.

Certain standing orders, which it is unnecessary to set out, made by the London County Council on the 23rd of November, 1894, relating to dangerous structures, were referred to as part of the stated case.

Avory appeared on behalf of the appellants.

The respondent in person.

WILLS, J.—I am of opinion that this case must be remitted to the learned magistrate to be dealt with upon the merits. The respondent is clearly entitled to that; but I think the view taken by the learned magistrate was erroneous, and that what has been done by the London County Council is strictly within the Act of Parliament.

Now, section 103 of the Act says: "Where it is made known to the Council that any structure is in a dangerous state." Now, it is made known to the Council if one of its officers who act in such a matter, and who is the proper person to receive a notice, receives one; and I think any such proceeding as that would be amply sufficient to fix the Council with any liability which falls upon them in consequence of removing such a nuisance. Then the section goes on to say that "the Council shall require a survey of such structure to be made by the district surveyor or by some other competent surveyor." They have no option whatever in the matter. They have no discretion to exercise. They have got a certain duty to perform, and a duty which cannot be done by a corporate body, but which requires to be done by an individual. I think that it is within every principle which is applied to matters of that kind that that may be done in pursuance of the general authority. The authority has been given to the superintending architect by the motion of the Metropolitan Board of Works. It is true that it is described as a temporary power, and it is also said "until further order"; but no further order has been made, and all rights and all liabilities which existed under the Acts relating to the Metropolitan Board of Works have been transferred to the London County Council by the opera-

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

tion of the statute. Therefore that is still operative. It seems to me that, under the very nature of things, powers or actions of this kind, which are compulsorily placed upon them, must be undertaken by the properly authorized servants and representatives without waiting for the general council. It may be that in this case, as the respondent alleges, that the power of the Act has been tyrannically put into force. Upon that I express no opinion at all, and it must not be supposed that I imagine for a moment that it is accurate; still it may be that it is so. But that is no reason for holding that the action of the London County Council was wrong in the exercise of the power by a properly constituted officer to whom the powers were given.

I think the learned magistrate came to a wrong conclusion, and that he must rehear the case.

Appeal allowed and case remitted.

Solicitor, *Blaxland.*

Q. B. Div. (Mathew, J.) } Dec. 3, 4, 7.

CROCKER AND OTHERS *v.* STURGE AND ANOTHER. (*a.*)

Insurance, Marine—Reinsurance—Description of voyage in policy—"To any port or ports, place or places, in any order"—"For thirty days after arrival at final port"—Meaning of.

The plaintiffs effected a policy of reinsurance on a vessel with the defendants. The risk clause was "at and from Newcastle, N.S.W., to any port or ports, place or places, in any order, on the west coast of South America, and for thirty days after arrival in final port, however employed." The vessel sailed with a cargo from Newcastle, N.S.W., to Valparaiso, and there discharged the whole of it. She remained at Valparaiso for thirty days, and whilst there loaded partly with ballast and partly with sugar, the latter being part of her cargo for the United Kingdom. She then sailed for a port on the west coast of South America in order to take on board the remainder of her cargo, but while proceeding there she was stranded and became a total loss.

Held, that the words "final port" in the risk clause were not confined to the port of discharge, but included the final port of loading for the homeward voyage, and that the plaintiffs were therefore entitled to recover.

Commercial action.

In this case both the plaintiffs and the defendants were underwriters at Lloyd's.

The action was brought to recover a total loss under a policy of reinsurance which had been effected by the plaintiffs with the defendants.

The reinsurance, dated the 30th of December, 1895, was for "£100 on hull. Warranted free of all average. To pay no salvage charges."

It was on the ship *Talavera*, "at and from Newcastle, N.S.W., to any port or ports, place or places, in any order on the west coast of South America, and for thirty days after arrival in final port however employed."

This policy was a reinsurance of a policy dated the 3rd of December, 1895, which was underwritten by the plaintiffs and which covered the said ship *Talavera* at and from Sydney to Newcastle, N.S.W., while there and thence to any port or ports, place or places, on the west coast of South America, and (or) the islands adjacent in any order once or oftener while there and thence to any port or ports of call, and (or) discharge in the United Kingdom, and (or) continent of Europe between Bordeaux and Hamburg, both included, and for thirty days in port after final arrival however employed."

On the 5th of January, 1896, *The Talavera* left Newcastle, N.S.W., with a cargo of coals, for Valparaiso, at which port she arrived on the 12th of February, 1896, and having discharged the whole of her cargo she remained there for more than thirty days. While at this port she loaded partly with ballast and partly with sugar, the latter being part of her cargo for the United Kingdom. She then sailed for Talcohuano, also on the west coast of South America, in order to take on board the remainder of her cargo. During her passage to this port she stranded and became a total loss.

It was admitted by the parties that vessels from Newcastle, N.S.W., to the west coast of South America sometimes discharged their cargo from Newcastle at more than one port on the said coast, and that vessels which loaded cargo on the west coast sometimes loaded at more than one port on such coast.

The plaintiffs, under the policy underwritten by them, paid the owner of *The Talavera* a total loss, and now sued the defendants under the policy of reinsurance on the ground that such policy covered *The Talavera* at the time when she became a total loss.

Joseph Walton, Q.C., and *Percy Morris*, for the plaintiffs.—The words ports or places in the policy mean ports or places of discharge or loading, and the words "final port" mean the final port before sailing for home. It was not the intention of the parties to limit the risk to the port of discharge. If it had been so, words to that effect would have been introduced. *The Talavera* was covered until she arrived at Talcohuano and for thirty days after. That port was her final port on the west coast of South America. There is no custom to the contrary.

Counsel cited *Bermon* v. *Woodbridge*, 2 Doug. 781; *The Aikshaw*, 9 Times L. R. 605.

Boyd, Q.C., for the defendants.—The voyage of *The Talavera* was divided into the cross voyage and the homeward voyage. It was the cross voyage only that was insured here. The ship was only covered by the insurance from Newcastle, N.S.W., to the last port at which she discharged cargo and for thirty days after. Therefore she was only covered until her arrival at Valparaiso, which was her "final port," and thirty days after. The risk expired before she left Valparaiso, because she remained there more than thirty days after arrival. At the time *The Talavera* was lost she was on her homeward voyage, and was not covered by the policy.

Walton, Q.C., replied.

Cur. adv. vult.

Dec. 7.—MATHEW, J.—In this case the rights of the parties depend upon the construction of a form of insurance usually adopted. The action is to recover a total loss on a policy of marine insurance on a ship called *The Talavera*. The defendants say they are not liable, on the ground that the ship was not covered by the policy at the date of the loss. [The learned judge here stated the facts of the case, and read the risk in the policy underwritten by the plaintiffs as stated above.] On behalf of the plaintiffs it has been argued that the words "ports or places" in the policy of reinsurance mean ports or places of discharge or loading. On the part of the defendants it was argued that those words only mean ports or places of discharge. *The Talavera* discharged the whole of her cargo at Valparaiso, and remained there for thirty

(a) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

days. Whilst there she loaded 600 tons of ballast and some 200 tons of sugar for Talcohuano, where she was to load the remainder of her cargo for the United Kingdom. While on her way to that port she stranded and became a total loss. The plaintiffs contend that this loss was clearly covered by the policy now sued upon, that the loss was within the terms of the policy, and that the clause describing the risk must be construed as if the ports or places referred to had been expressly named.

On the part of the defendants it was contended that the clause only covered the ship to the port of discharge and thirty days after, and that the policy was only intended to apply to one voyage to a port of discharge, and that the voyage came to an end at Valparaiso, and that the risk ceased thirty days after arrival at that port; and it was argued that the words "arrival in final port" were more applicable to the discharge than the loading of the vessel. This construction, however, would be practically against a great part of the clause in question. If it was only meant to cover the voyage to Valparaiso it seems idle to insert the words "any port or ports, place or places, in any order" and the words "however employed." This latter phrase seems clearly to provide for the employment of *The Talavera* in some other way than in the discharge of her cargo—as, for instance, while employed in sailing from port or ports of discharge to the port of loading. Witnesses were called to show that the clause had a customary meaning and was understood only to apply to ports of discharge; but they failed to prove such a custom, and they had to admit that, to their knowledge, the question had never been raised before. It was sought to show, but unsuccessfully, in the case of *The Aikshaw* that the words "ports or places" in the risk clause in question meant ports or places of loading; but it seems to me that the words must be construed according to their ordinary meaning, and, so understood, they are sufficient to cover the risk in question. There is no reason why a policy of insurance or reinsurance should not cover the risks of one whole voyage and the risks of part of another voyage. There may be very good reasons for adopting such a course where one part of the adventure is more perilous than another. Here the line between the risks covered and those remaining uninsured would seem to have been drawn upon the expiration of the thirty days at the final port of loading.

I therefore give judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Thomas Cooper & Co.*

Solicitors for the defendants, *W. A. Crump & Son.*

Court of Appeal.

From Chan. Div. (Lord Halsbury, C., and Lindley and A. L. Smith, L.JJ.) — Oct. 27, 29, 30; Nov. 2; Dec 12.

DE LA ROCHEFOUCAULD v. BOUSTEAD. (a.)

*Frauds, Statute of, s. 7—Absolute conveyance—Trust—Proof by parol evidence—Fraud—*Laches*—Delay.*

Certain estates in Ceylon to which the plaintiff was entitled subject to a mortgage were in 1873 *sold by the mortgagees to the defendant, and were conveyed to him by a conveyance absolute in form.*

Held (*reversing the decision of* Kekewich, J.), *that upon the facts the defendant took the property as a trustee for the plaintiff.*

Held, also, that, notwithstanding section 7 *of the Statute of Frauds, it is competent for a person claiming land conveyed to another and alleging fraudulent breach of trust, to prove by parol evidence that it was conveyed upon trust for the claimant.*

Bartlett *v.* Pickersgill, 1 *Eden* 515, *overruled.*

Held, further, that, there being an express trust, mere delay by the plaintiff in seeking to enforce her rights was no bar to her claim.

Erlanger *v.* New Sombrero Phosphate Co., 27 *W. R.* 65, 3 *App. Cas.* 1218, *and* Lindsay Petroleum Co. *v.* Hurd, 22 *W. R.* 492, *L. R.* 5 *P. C.* 221, *discussed.*

This was an appeal against the judgment of Kekewich, J., whereby his lordship dismissed the action with costs.

The action was commenced in 1894, and the plaintiffs thereby claimed a declaration that the defendant, who in 1873 had purchased certain estates in Ceylon, formerly belonging to the plaintiff, the Comtesse De la Rochefoucauld, at a sale of them by the mortgagees, had purchased them as a trustee for the plaintiffs (the Comtesse and her daughter), or one of them, and they also claimed an account and payment by the defendant of the balance due from him.

At the trial before Kekewich, J., his lordship held that the plaintiffs had failed to prove the alleged trusteeship on the part of the defendant, and that there was no evidence that he had acted in any confidential relation towards the plaintiff, the Comtesse.

The plaintiffs appealed.

The material facts are all set out in the judgment of the court.

Haldane, Q.C., and *T. L. Gilmour*, for the appellant.—The defendant is liable to account to the plaintiff as trustee for her. On the correspondence it is, we submit, clear that he took the property as an express trustee, and not as mortgagee, and there is a sufficient writing within the meaning of the 7th and 8th sections of the Statute of Frauds: Fry on Specific Performance, 3rd ed., p. 254. [LINDLEY, L.J., referred to *Bartlett* v. *Pickersgill*, 1 Eden, 515.] That case is not conclusive, and having regard to *Heard* v. *Pilley*, 17 W. R. 750, L. R. 4 Ch. App. 548, it must now be taken to be overruled. The Statute of Frauds will not now be allowed to protect what would be a fraud: *Lincoln* v. *Wright*, 7 W. R. 350, 4 De G. & J. 16. Further, in this case there has been part performance: *Haigh* v. *Kaye*, 20 W. R. 597, L. R. 7 Ch. App. 469; *Davis* v. *Whitehead*, 42 W. R. 456, [1894] 2 Ch. 133. *Leman* v. *Whitley*, 4 Russ. 423, which was a similar case to *Bartlett* v. *Pickersgill*, was treated as overruled by Stirling, J., in *Davis* v. *Whitehead*. [LINDLEY, L.J.—It is not consistent with *Booth* v. *Turle*, 21 W. R. 721, L. R. 16 Eq. 182.] Further, here was an express trust: *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467. The Statute of Frauds does not apply to Ceylon, notwithstanding *Leroux* v. *Brown*, 1 W. R. 22, 12 C. B. 801. Ceylon was no part of the British dominions when that statute was passed. [LINDLEY, L.J., referred to *Gardiner* v. *Fell*, 1 Jac. and W. 22.]

Renshaw, Q.C., and *G. Lawrence*, for the respondent.—The facts do not show any trust. The defendant was really a mortgagee in possession; and the plaintiff's rights are barred by section 7 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57). *Locking* v. *Parker*, 21 W. R. 113, L. R. 8 Ch. App. 30. [LINDLEY, L.J., referred to *Ward* v. *Carttar*, L. R. Eq. 25, 14 W. R. Ch. Dig. 115.] Even apart from the Statute of Limitations the delay, *laches*, and acquiescence which there has been here is enough to defeat the

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(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

claim. *Bartlett* v. *Pickersgill* has never been overruled, and is applied by Lord St. Leonards' Vendors and Purchasers, 14th ed., p. 703 (chap. 21, s. 1, 15); in *James* v. *Smith*, 39 W. R. 396, [1891] 1 Ch. 384, it was treated as not overruled. *Cranstown* v. *Johnston*, 3 Ves. 170; *Denton* v. *Donner*, 23 Beav. 285, 6 W. R. Ch. Dig. 80; *Banner* v. *Berridge*, 29 W. R. 844, 18 Ch. D. 254.

At the request of their lordships,

Haldane, Q.C., in reply, dealt with the defence on the ground of delay, referring to *In re Cross*, 30 W. R. 376, 20 Ch. D. 109.

In addition to the cases cited in the argument the following are referred to in the judgment: *Forster* v. *Hale*, 3 Ves. 696; *Smith* v. *Matthews*, 9 W. R. 644, 3 De G. F. & J. 139; *Davies* v. *Otty*, 13 W. R. 484, 35 Beav. 288; *Soar* v. *Ashwell*, 42 W. R. 165, [1893] 2 Q. B. 390; *In re Alison*, 27 W. R. 389, 11 Ch. D. 284; *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218; *Lindsay Petroleum Co.* v. *Hurd*, 22 W. R. 492, L. R. 5 P. C. 221; *Bright* v. *Legerton*, 9 W. R. 239, 2 De G. F. & J. 606.

Dec. 12.—The judgment of the court was delivered by

LINDLEY, L.J.—The question raised by this appeal is whether the plaintiff is entitled to an account from the defendant of the proceeds of sale of certain coffee estates in Ceylon. The estates in question are known as the Delmar estates. They formerly belonged to the plaintiff; they were mortgaged first to Barings and then to a Dutch company, and on the 27th of May, 1873, they were sold and conveyed to the defendant. In form the conveyance was to him absolutely, but the plaintiff insists that the estates were conveyed to the defendant as a trustee for the plaintiff, subject, however, to the repayment to the defendant of the amount which he paid for them, and of the expenses which he has incurred in managing the estates. The estates were sold by the defendant or his mortgagees many years ago without the knowledge of the plaintiff, and she says that the proceeds of sale were more than sufficient to repay to the defendant all his advances, and that a considerable surplus remained, which the defendant ought to have paid over to her. The defendant, in answer to this claim, says (1) the estates were conveyed to him, not as a trustee for the plaintiff, but as beneficial owner; (2) the trusts alleged by the plaintiff cannot be proved by any writing signed by the defendant, and the Statute of Frauds affords a defence to the action; (3) the plaintiff's claim, even if proved, is barred (*a*) by the defendant's bankruptcy, (*b*) by the Statute of Limitations, (*c*) by the plaintiff's *laches* and the equitable doctrines applicable to delay independently of the statute. Kekewich, J., decided against the plaintiff on the first ground—viz., that there was no trust in favour of the plaintiff. This view of the case rendered it unnecessary for him to consider the other defences. The plaintiff has appealed from this decision, and as we have been unable to take the same view as the learned judge of the effect of the evidence, it will be necessary for us to deal with all the other defences relied upon by the defendant.

The circumstances under which the Delmar estates were conveyed to the defendant are to be gathered from the verbal testimony of the plaintiff, the defendant, a Mr. Duff, and a mass of correspondence, both before and after the conveyance. The correspondence after the conveyance is relied upon by the plaintiff as being inconsistent with the defendant's contention that he acquired the estates for himself beneficially, free from any trust in favour of the plaintiff. In order to appreciate the above evidence it is necessary to state that in 1868 the plaintiff, who was then the wife of a Mr. Cavendish, was divorced from him, and that, under the decree of the Divorce Court, that gentleman acquired an interest in these Delmar estates, and that his claims on these estates, under that decree, were not released until a compromise with him was effected in 1874. In the meantime it was a great object of the plaintiff and her friends to prevent Mr. Cavendish from deriving any benefit from these estates. The plaintiff and her friends were afraid that he might, under the decree of the Divorce Court, get himself registered in Ceylon as entitled to a charge on those estates and perhaps even acquire them by paying off the mortgagees and foreclosing the plaintiff. In 1868 the estates were mortgaged to a Dutch company, which was in liquidation, and the liquidator desired to get in the amount due on the mortgage. The plaintiff was extremely anxious that her late husband should not get this mortgage transferred to himself or any friend of his. At the period to which we are now referring the disease which afterwards destroyed the coffee plantations in Ceylon had not broken out, and the Delmar estates were worth far more than the amount due to the Dutch company upon their mortgage. The colonial rate of interest was 6 per cent. A transferee of the Dutch mortgage would therefore acquire a good investment for his money. Moreover, it would be an object to anyone acquainted with the working of Ceylon coffee estates to have the management of them and to be the agent for the sale of their produce. Then considerations of friendship for the plaintiff induced a gentleman of the name of Duff to assist the plaintiff; and after some negotiations it was agreed that the Dutch mortgage should be transferred to Duff and to the defendant, who was brought into the matter by Duff or by Mr. Sabonadiere, the plaintiff's agent in Ceylon. The defendant has had experience in the management of coffee estates and in receiving and disposing of consignments of coffee from them, and had business transactions with Mr. Sabonadiere. The above arrangement was not, however, carried out, owing to some objection taken by Mr. Duff to the form of the draft transfer which had been prepared. It was then proposed that the Dutch mortgagees should sell the estates to Duff and the defendant for the amount due on their security, and on the 1st of July, 1871, an agreement to this effect was signed. Before the sale was completed Mr. Duff refused to carry it out. The defendant, however, hoped to become the plaintiff's representative in England and the consignee of the produce of her estates, and he did not wish to break faith with the Dutch company. The defendant was willing to carry out the above arrangement himself. Accordingly, after some further negotiation, the estates were sold and conveyed to him in May, 1873, by the Dutch company for the amount due to them on their security as had been agreed in July, 1871. The sum paid by the defendant to the Dutch company was £57,942. But he immediately remortgaged the estates to the Dutch company for £53,000, so that his actual payment out of pocket was under £5,000.

Pausing here, it is, in our opinion, clear beyond all doubt that the proposed sale to Duff and the defendant was not intended to be a sale to them for their own benefit. It was intended to be a sale to them for the benefit of the plaintiff, but subject, of course, to the repayment of Duff's advances. This is quite plain from Duff's evidence and from the correspondence. It is also clear that the plaintiff's name was kept off all formal documents in order to prevent her first husband from discovering that she had any interest in the estates, and to lead him to suppose that they

had passed into the hands of strangers. It is further quite clear that the conveyance to the defendant grew out of the arrangement which he and Duff were to have carried out, and was made for precisely the same purpose. There is not in the whole correspondence a line to show that the price which the defendant paid had any reference to the value of the estates nor to show or suggest that the conveyance to the defendant was intended to be to him for his own benefit. The history of the transaction is wholly inconsistent with any such intention. [His lordship then referred to the correspondence, and came to the conclusion that the plaintiff had proved that the estates in question were conveyed to the defendant on the 27th of May, 1873, upon trust for her, but subject to a charge in his favour in respect of all sums advanced by him in order to obtain the estates from the Dutch company in the first instance and of all sums advanced by him in order to work them as coffee lant ations after he had acquired them.]

This conclusion renders it necessary to consider whether the Statute of Frauds affords a defence to the plaintiff's claim. The section relied upon is 7, which has been judicially interpreted in *Forster* v. *Hale*, and *Smith* v. *Matthews*. According to these authorities, it is necessary to prove by some writing or writings signed by the defendant, not only that the conveyance to him was subject to some trust, but also what that trust was. But it is not necessary that the trust should have been declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial. It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute in order to keep the land himself. This doctrine was not established until some time after the statute was passed. In *Bartlett* v. *Pickersgill* the trust was proved, and the defendant, who denied it, was tried for perjury and convicted, and yet it was held that the statute prevented the court from affording relief to the plaintiff. But this cannot be regarded as law at the present day. The case was referred to in *James* v. *Smith*, and was treated as still law by Kekewich, J., but his attention does not appear to have been called to *Booth* v. *Turle* nor to *Davies* v. *Otty*, both of which are quite opposed to *Bartlett* v. *Pickersgill*. So is *Haigh* v. *Kaye*. The late Lord Justice Giffard, one of the best lawyers of modern times, speaking of *Bartlett* v. *Pickersgill*, said, "It seems inconsistent with all the authorities of this court which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud." See *Heard* v. *Pilley*. The case not only seems to be, but is, inconsistent with all modern decisions on the subject. See, in addition to those already mentioned, *Lincoln* v. *Wright*, where a conveyance absolute in form was held to be a mortgage only. See also *Davis* v. *Whitehead*, in which Stirling, J., examined the authorities and held that an assignment absolute in form was subject to a trust for the plaintiff. The defence, based on the Statute of Frauds, is met by the plaintiff in two ways. First, she says that the documents signed by the defendant prove the existence of the trust alleged; secondly, she says that if those documents do not prove what the trust is with sufficient fulness and precision the case is one of fraud which lets in other evidence, and that with the aid of other evidence the plaintiff's case is established. In our opinion the plaintiff is correct in this contention. [His lordship then referred to certain letters signed by the defendant, and continued:] We are by no means satisfied that they do not contain enough to satisfy the Statute of Frauds. Whether this is so or not, the other evidence is admissible in order to prevent the statute from being used in order to commit a fraud, and such other evidence proves the plaintiff's case completely.

Counsel for the plaintiff contended that the Statute of Frauds had no application to lands in Ceylon. But, having regard to *Leroux* v. *Brown* and to the language of section 7 of the Statute of Frauds, we are unable to see why the defendant should not be able to rely on that statute as a defence to any proceedings in this country having for their object the proof and enforcing of a trust, even of lands abroad. The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other sense than this; it regulates procedure here, not titles to land in other countries. If, therefore, the statute afforded the defendant a defence he would be entitled to the benefit of it. But for the reasons above given, the statute affords him no protection.

Having come to the conclusion that the plaintiff has proved her case by evidence admissible by our law, it is necessary to consider the other defences raised. The first is bankruptcy. The defendant became bankrupt in 1879, and he obtained his discharge in May, 1880. The Bankruptcy Act then in force was the Act of 1869, and by section 49 of that Act bankrupt trustees were not discharged from the claims of their *cestuis que trustent*. This defence, therefore, fails. The next defence is the Statute of Limitations. The trust which the plaintiff has established is clearly an express trust within the meaning of that expression as explained in *Soar* v. *Ashwell*. The trust is one which both plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises, although there may have been no intention to create a trust. The intention to create a trust existed from the first. The defendant is not able in this case to claim the benefit of section 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), and the statute which is applicable is the Judicature Act, 1873, s. 25, clause 2, which enacts as follows: "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." The Statutes of Limitations, therefore, afford no defence if the plaintiff's action is to be regarded as one brought by a *cestui que trust* against his trustee, seeking for an account of trust property. It was, however, urged by the defendant's counsel that this action was really one for an account by a mortgagor against a mortgagee in possession, and that so regarded one of the Statutes of Limitations was a bar to it. In support of this contention counsel cited *Locking* v. *Parker*, *In re Alison*. These cases undoubtedly show that a conveyance upon trust for sale to secure a sum advanced is regarded as a mortgage, and that although there may be a trust declared of the surplus in favour of the mortgagor the Statute of Limitations is a bar to an action brought by him for the surplus, if his title to the land is barred before a sale by the mortgagee. The ground of these decisions is that the trusts were such that the mort-

gagor could not enforce them and compel a sale, but could only redeem. Those cases, however, show that the mortgagor can as *cestui que trust* enforce the trust of the surplus after a sale if his title to the land is not barred before the sale takes place as it was in *Alison's case*. *Banner* v. *Berridge*, which was also cited to support the view we are considering, merely shows that a mortgagee selling under a power of sale is not an express trustee of the surplus for the mortgagor in the absence of words creating a trust for him. The mortgagee in that case was a mortgagee of a ship, and he sold as such under his statutory power. The real transactions in those cases were mortgages, and were very different from the real transaction in this case. The real transaction here was a purchase by the defendant for the plaintiff; she claims relief, not as mortgagor, but as the defendant's *cestui que trust*, although she admits his lien on the property for his advances; she claims an account of his dealings and transactions with her property, and in particular an account of the money which he has obtained from it. This being the real nature of her claim, the cases to which we have alluded are not applicable to it, and the Statutes of Limitations are no bar to the action.

We come now to the last ground of defence—viz., *laches* and lapse of time apart from the Statutes of Limitations. This is the most difficult part of the case. The time which has elapsed since the plaintiff knew that her claim to the estate was disputed is so considerable that, before giving the plaintiff the relief to which she would otherwise be entitled, it is necessary to consider what her conduct has been and whether anything has happened to render it unjust to the defendant to compel him to account now. On the 7th of January, 1880, Mr. Sabonadiere wrote a letter to the plaintiff and told her that the estates belonged to the defendant's creditors, on the 9th of August, 1880, the plaintiff, by her then solicitor, Mr. Lake, wrote to Mr. Cooper, the defendant's trustee in bankruptcy, claiming the estates as her own. On the 29th of October, 1880, Mr. Cooper wrote to Mr. Lake and disputed this claim, and asserted the rights of the defendant's creditors to the estates, stating that the defendant had bought them with his own money, and had mortgaged them and dealt with them as his own. It is to be inferred from another letter of Lake's, dated the 30th of October, 1880, that he communicated the position of affairs to the plaintiff, and explained to her the necessity of making up her mind whether she would or would not embark in a very serious and expensive litigation with the defendant's trustee in bankruptcy. It is also to be inferred from her subsequent letters that she preferred not to do so, but to wait and see whether the defendant would not be able to make some arrangement with his creditors which would enable him to regain control over the estate and then recognize her claims to them. She was unquestionably encouraged to do this by the defendant himself. The estates had not then been sold, but were still being carried on. We can find nothing since 1882 which was in any way calculated to induce the plaintiff to believe that her claims would ever be recognized. On the other hand, the defendant, as distinguished from his trustee in bankruptcy, never repudiated them. This suit was not instituted until the 24th of October, 1894, twelve years after the correspondence between the plaintiff and the defendant practically ceased. The principle applicable to cases in which equitable relief is sought after long delay is well expressed in Lord Blackburn's judgment in *Erlanger* v. *New Sombrero Phosphate Co.*; citing *Lindsay Petroleum Co.* v. *Hurd*, he says: "The doctrine of *laches* in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just is founded upon mere delay—that delay, of course not amounting to a bar by any Statute of Limitations—the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." Lord Blackburn goes on to say: "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think from the nature of the inquiry it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must, therefore, be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry." In questions of this kind it is not only time, but the conduct of the parties which has to be considered. Before 1882 the defendant had mortgaged the estates as if they were his own, but he concealed such mortgages from the plaintiff. Since 1882 the estates have been sold, and he has received the moneys arising from their sale, but he concealed these transactions from the plaintiff. The defendant also destroyed the books containing the accounts of these estates. He says he did this, not because the plaintiff abandoned her claims, but because he had no room for the books. Under these circumstances he can hardly invoke the loss of the books as a reason for refusing relief to the plaintiff. But, as already stated, since 1882 the defendant has done nothing to induce the plaintiff not to sue him nor to lead her to believe that any claim by her would be recognized. On the other hand, the plaintiff has done nothing actively to lead the defendant to suppose that she abandoned any claim she might have against him as her trustee. There is nothing to be said against her except that she has forborne to sue for twelve years. In 1884 she wrote a letter to Mr. Hollams asserting her rights, but she did no more. Under these circumstances, to hold that time is a bar to the plaintiff's claim would be to decide that although the Statute of Limitations is no bar to a suit by a *cestui que trust* against a trustee in a case of express trust, yet that lapse of time without more, is a bar. Such a conclusion cannot be correct, and it was decided to be inadmissible in *In re Cross*. Even where there is an express trust lapse of time, coupled with other circumstances which render it unjust to give the plaintiff relief against the defendant, will induce the court to refuse the relief, although no Statute of Limitations might bar his claim: see *Bright* v. *Legerton* and *In re Cross*. But in this case, which is one of express trust, there is nothing except time, and that without more, is not sufficient apart from some Statute of Limitations. This view of the case renders it unnecessary to examine the excuses given by the plaintiff for not instituting proceedings sooner.

The appeal must be allowed, and the judgment be reversed. It must be declared that the defendant purchased the Delmar estates as a trustee for the plaintiff, but subject to a charge for the amount paid to the Dutch company. An account must, then, be directed of the defendant's dealings and transactions with the Delmar estates. The account will be an account as between a trustee and his *cestui que trust*, not an account as between mortgagor and mortgagee, and there must be no account on the footing of wilful default. The defendant must be allowed all his advances and outlays, with colonial interest; but he ought only to be charged simple interest at 4 per cent. on balances in his hands, unless it appears that he has made more. Minutes had better be prepared and signed, and, if necessary, they can be mentioned to the court. The defendant must pay the costs of the action up to the hearing, and the costs of the appeal.

Solicitors, *G. H. Lea; Hollams, Son, Coward, & Hawksley.*

House of Lords.

From C. A. (England). } Dec. 10, 11.

CLUTTON v. ATTENBOROUGH. (a.)

Bill of exchange—Cheque—Payee a fictitious or non-existing person—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 2, 7, *sub-section* 3.

Cheques payable to the order of a fictitious or non-existing payee, signed by the drawer and handed by him to his clerk to be posted, must be considered as issued by the drawer, and should they be received by a bonâ fide *holder for value the drawer will be liable on them as payable to bearer. And this is so although the drawer was unaware that the payee was a fictitious or non-existing person, and was misled by the fraud of his clerk, who stole the cheques and having indorsed them in the name of the fictitious or non-existing payee handed them to the holders for value.*

Decision of the Court of Appeal, 44 *W. R.* 114, [1895] 2 *Q. B.* 707, *affirmed.*

This was an appeal by Messrs. Clutton from a decision of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) reported 44 W. R. 114, [1895] 2 Q. B. 707, where the facts are set out in detail.

Following the routine of Messrs. Clutton's office, a clerk named Piper laid before one of his principals a number of cheques filled up, payable to George Brett or order. The cheques were signed by one of the principals and handed back to the clerk Piper for the purpose of being used. The name George Brett, the payee on the cheques, was a fictitious name inserted by Piper, who after the cheques had been signed by the principals, fraudulently indorsed the cheques in the name of George Brett, and took them to Messrs. Attenborough, who gave value for them, and were unaware of any forgery or irregularity whatever.

The clerk Piper was known to Messrs. Attenborough as George Brett.

Messrs. Clutton's bankers paid the amount of the cheques in due course to Messrs. Attenborough's bankers; after the discovery of the fraud Messrs. Clutton brought this action against Messrs. Attenborough to recover the money which they had been paid on these cheques.

By section 7 (3) of the Bills of Exchange Act, 1882, it is enacted that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

The Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) affirmed the decision of Wills, J., who gave judgment for the defendants.

The plaintiffs appealed.

Tindal Atkinson, Q.C., and *W. A. Meek*, for appellants.—These cheques never ceased to be the property of Messrs. Clutton; they were never negotiated. The *Vagliano case*, 39 W. R. 657, [1891] A. C. 107, was a question between customer and banker. The only question is, Can defendants claim title as upon a cheque payable to bearer? There was no one in whom the property in the cheque vested, for it was not issued. See the definition in the Act, section 21, sub-section 1, as to delivery of such instrument, and section 21, sub-section 2 (*b*). In *Bank of England* v. *Vagliano* the acceptor had put the bills into circulation. The cheque was drawn to order, and so long as it has not got beyond the principals' control, the cheque is not issued. It is just as if it had been stolen out of my pocket: *Baxendale* v. *Bennett*, 26 W. R. 899, 3 Q. B. D. 525, Brett, L.J.'s judgment therein. [The Lord CHANCELLOR.—It did not exist as a bill when stolen.]

Ingham v. *Primrose*, 7 C. B. N. S. 82, 7 W. R. C. L. Dig. 12, and *Scholfield* v. *Earl of Londesborough*, *ante*, p. 124, [1896] A. C. 514, were also referred to.

Sir E. Clarke, Q.C., Joseph Walton, Q.C., and *Macaskie*, for the respondents, were not called upon.

Lord HALSBURY, C. — I confess I approach the consideration of this case with some surprise, because it appears to me that every part of it is so far covered by authority that I should have thought it would be impossible to argue it. The facts are now beyond doubt that the person who drew this cheque intended to draw a cheque, that he intended this cheque to be paid, and that he handed this cheque to his clerk. It is perfectly immaterial that he was induced to draw this cheque and to hand it to his clerk by fraud. What has that got to do with the validity of the cheque as against a *bonâ fide* holder for value when it gets into the hands of that *bonâ fide* holder for value? It seems to me that if this case was treated as if it were possible to raise that question, it would be a most serious blow against the currency of negotiable instruments—that is to say, if the history of every negotiable instrument, in itself perfectly genuine, in respect of the person who drew it and the person who issued it, has to be inquired into. There is one observation I must make upon the word "issued." If, contrary to the intention of the person who had signed the document, it got out of his possession, it being stolen out of his strong-box or what not, I may or may not have some opinion as to what would be the legal result of that; but that is not the question here, and I therefore absolutely decline to consider it. It would be beside the ground upon which this case ought to be decided, and I think it undesirable to raise new questions on a matter which, as it seems to me on the facts of this case, is so perfectly and manifestly plain. The drawer of these cheques hands them to one of his own clerks, puts them in circulation, and they get into the hands of a *bonâ fide* holder for value. Now, forsooth, we were treated to a long argument to show what was the intention of the drawer—to make that which is a bill payable to bearer a bill payable to order only. I have nothing to

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

do with the intention of the drawer beyond this, that I find the document is on the face of it made payable to a person who is "non-existing." Whatever might have been said in *Vagliano's case*, where there were questions raising a doubt upon the applicability of those words, or whatever might be said about the difference between the words "fictitious" and "non-existing," it has in this case never been suggested that on the face of these instruments the name of George Brett is anything other than the name of a non-existing person. Why am I, upon this very plain and manifest state of facts, to inquire into what would be the case if there was a person, as there was in *Vagliano's case*, who might plausibly be represented as the person intended by the drawer to be the person to whom the payment was to be made? In this case no such question arises at all; and treating, therefore, these cheques as cheques payable to bearer, the broad fact comes that the genuine drawer attached his own signature to cheques perfect in form, that he handed them to his own clerk for the purpose of their being paid away, but by an act of fraud on the part of a clerk they got into the hands of a *bonâ fide* holder for value; and we are treated to this somewhat protracted argument in order to decide the question whether under these circumstances the drawer of these genuine cheques is liable upon these cheques to a person who has received them in good faith and paid value for them.

I do not profess to differ in any one respect from the judgments which have been delivered by the Court of Appeal; and my opinion is, that it would be treating this case with a respect that it does not deserve if one were to go more elaborately into the question than to say that I entirely concur with what was said by the Court of Appeal, and that I hope we shall not again have an argument of this sort upon a matter which, if it really could be made a matter of question, would throw very considerable difficulty and doubt upon the currency of negotiable instruments. I therefore move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. I also think the case too clear for argument. I think Messrs. Attenborough, having taken these cheques in good faith for value and without any notice of any irregularity in their history, are entitled, now that they are called in question, to treat them as payable to bearer.

Lord SHAND.—I am also of opinion that this appeal should be disallowed.

The first question to be determined in this case is whether the cheques in question were or were not, in the language of the statute, to be "treated as payable to bearer." Upon that question I entertain no doubt. Apart from the *dicta* and authority of the *Vagliano case*, I should have had no difficulty on the statute. The statute expressly provides that where the payee is a fictitious or non-existent person, the bill (and under the statute a cheque is to be regarded as a bill) may be "treated as a bill payable to bearer." These cheques were in favour of a person of the name of Brett—he was fictitious, because that name had been provided by a person who wished to commit a fraud and to appropriate the money of his employer. He knew no person of that name, and the person who got the cheques knew no one of that name, and, in the language of the statute, I think these were therefore cheques in favour of a fictitious person and a non-existent person. But it appears to me further that the decision and grounds of judgment in *Vagliano's case* are directly applicable to the present. There is no limitation in the language of the statute of the effect of the insertion of the name of the fictitious or non-existent person as payee of a cheque to the case where this is done with the knowledge of the drawer, and nothing to warrant a judicial interpretation of the statute in this limited way.

Treating these documents, then, as cheques in favour of bearer, what is the other point that has been maintained? It has been said that the cheques were never issued. I do not stop to notice what the special meaning of the word "issued" in the statute is defined to be. The cheques in question were parted with by the employer to his clerks, and it was the employer's desire and intention that they should be sent out as cheques to be paid by the banker in ordinary course. By a system of fraud these cheques passed out of the hands of one clerk into the hands of another, and ultimately into the hands of the respondents in return for full value. It appears to me that cheques which have been signed and intended by the drawer to be issued, and which were parted with by him and so issued, although parted with and issued in consequence of fraud practised on the drawer, must in the hands of a *bonâ fide* holder for value be valid and effectual.

Counsel for the appellants argued that the case was the same as if the cheques had been stolen from a strong-box in which they had been locked away—as if they had been cheques which it might be the drawer kept in his own repositories, and which were either not intended to be issued at all, or, at all events, to be issued only in certain contingencies. That would, however, be an entirely different case from this. I agree with what the noble and learned lord on the woolsack has said, and with what was said by Kay, L.J., in the Court of Appeal—namely, that if bills under such circumstances were not to have currency and to be negotiable, it would be a very serious blow to the use of negotiable instruments in this country. On these grounds I am of opinion with your lordships that the arguments which have been maintained at the bar are untenable.

Lord DAVEY.—I also think that this case is too clear for serious argument, and I concur in the judgment which your lordships have proposed.

Appeal dismissed.

Solicitor for the appellants, *H. S. Clutton.*

Solicitors for the respondents, *Stanley, Attenborough, & Tyer.*

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Jan. 29.

In re SIMPSON. (*a.*)

Settled land—English land—Infant beneficiary having Colonial domicile — Sale—Appointment of Colonial trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* (1), (8); *ss.* 38, 59, 60.

Where an infant domiciled in a British colony was beneficially entitled to English land under a will which contained no power of sale, and it was for the benefit of the infant that the land should be sold, the court appointed persons resident in that colony trustees of the settlement effected by the will for the purposes of the Settled Land Act, 1882.

(*a.*) Reported by J. RITCHIE, Esq., Barrister-at-Law

Reginald Whitechurch, who died on the 29th of January, 1895, domiciled in New South Wales, was, at the time of his death, beneficially entitled in possession to one twenty-fifth share of certain freehold and leasehold property in England under the will of his aunt, Elizabeth Whitechurch, and to one-thirtieth share of certain other freehold and leasehold property also in England, under the will of his aunt, Margaret Whitechurch.

By his will dated the 25th of January, 1895, he devised and bequeathed to Marie Simpson, an infant, domiciled in New South Wales, any interest which he might be entitled to under the said wills for her sole and separate use, any moneys received during her minority to be expended towards her education and maintenance and on her attaining the age of twenty-one, or marrying with the consent of her trustee before that age, the *corpus* to be handed to her for her separate use, and he appointed E. H. Simpson executor and trustee of his will.

The will was proved by E. H. Simpson in Sydney, and a copy of the probate was sealed in the Probate Registry in England.

An agreement was entered into by E. H. Simpson for the sale of the testator's shares in the above-mentioned properties to certain of the co-owners of such properties. These shares being settled land within section 59 of the Settled Land Act, 1882, by reason of the infancy of the said Marie Simpson, it was necessary that trustees thereof, for the purposes of the Settled Land Acts, should be appointed.

An originating summons in the matter of the said shares and in the matter of the Settled Land Acts, 1882 to 1890, was accordingly taken out by the said Marie Simpson by her next friend to have the said E. H. Simpson and P. S. Selfe, of Sydney, appointed trustees under the above-mentioned settlement for the purposes of the said Acts.

North, J., in chambers, dismissed the summons on the ground that, in his opinion, the court ought not to sanction a proceeding by which the proceeds of sale of an infant's estate would pass into the hands of trustees out of the jurisdiction of the court, who might invest them in unauthorized securities.

Notice of appeal was given on behalf of the said Marie Simpson.

Vaughan Hawkins, in support of the application.—By section 38 of the Settled Land Act, 1882, the court has power to appoint trustees of a settlement for the purposes of the Act. The court has jurisdiction to appoint persons resident in a colony. The definition in section 2, sub-section (8), is wide enough to include such persons. The order should be that the persons approved are appointed trustees of the settlement effected by the will for the purpose of the Act: *In re Morgan*, 31 W. R. 948, 24 Ch. D. 114; *In re Wright's Trusts*, 24 Ch. D. 662, 32 W. R. Dig. 214.

LINDLEY, L.J.—We think that there is jurisdiction to make the order, and the only question, therefore, is whether we ought to make it. No doubt the court does not in general appoint persons out of its jurisdiction to be trustees, and if in this case the infant was domiciled in England we should not make the appointment. But she is domiciled in New South Wales, and all her friends and connections are there. Her estate consists of undivided shares in freehold and leasehold property in England. The co-owners of the property have agreed to purchase these shares on fair terms. The persons whom it is proposed to appoint trustees, and who, if appointed, will receive the proceeds of sale, are resident in the same colony as the infant. In these circumstances the business-like course seems to be to make the order. It is clearly for the benefit of the infant that it should be made.

The order should be that the persons proposed are appointed trustees of the settlement effected by the will for the purposes of the Act.

A. L. SMITH, L.J.—I agree.

RIGBY, L.J.—I agree.

Appeal allowed.

Solicitor, *George M. Light.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Jan. 29.

JONES v. GERMAN. (a.)

Justices—Jurisdiction—Search warrant—Information—Reasonable suspicion of felony—Sufficiency of information.

The information on which a search warrant for goods is applied for need not allege the actual commission of a larceny. It is sufficient if the information alleges, either directly or by fair intendment, that the informant has reasonable grounds for suspecting that a larceny has been committed.

The judgment of Lord Russell of Killowen, C.J. (ante, *p.* 112, [1896] 2 *Q. B.* 418), *affirmed.*

Appeal from the judgment of Lord Russell of Killowen, C.J., reported *ante*, p. 112, [1896] 2 Q. B. 418.

The action was brought to recover damages for false imprisonment and trespass to goods.

The plaintiff was employed as butler and bailiff to Thomas Wood, of Brasted, Kent, and the defendant was a justice of the peace for Kent.

Wood swore an information before the defendant that "he hath just and reasonable cause to suspect, and doth suspect, that William Jones (the plaintiff), of Brasted, has in his possession certain property belonging to the said Thomas Wood, and upon his oath doth depose and say that the said William Jones has been in his employ for five years and is now under notice to quit, and that he has requested the said William Jones to allow him to search several boxes which the said William Jones has had packed ready to be taken away, but which he refuses to be looked through."

The defendant thereupon granted a warrant authorizing a constable to enter the premises occupied by the plaintiff, and there search for the goods, and if the same or any part be found upon such search to bring the goods so found, and also the body of the plaintiff, before him (the defendant) or some other justice of the county to be disposed of and dealt with according to law.

In pursuance of the warrant a search was made in the presence of the plaintiff and Wood, and Wood identified and claimed as his property certain articles which were found packed in the plaintiff's boxes, and the plaintiff was thereupon taken into custody upon a charge of stealing them.

Subsequently the plaintiff was charged before the defendant with stealing the said goods, and was committed for trial at the quarter sessions, and the grand jury returned a true bill. An agreement was arrived at under which Wood offered no evidence against the plaintiff, and certain of the articles were given up to Wood, the plaintiff undertaking to take

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(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

no proceedings for false imprisonment or malicious prosecution against Wood. A verdict of not guilty was returned.

The plaintiff then brought this action against the magistrate, alleging that the search warrant was issued without jurisdiction, because the information did not charge the commission of any criminal offence, and did not specify the goods for which search was desired.

The jury assessed the damages at £15 if the defendant was liable only in respect of the search, and at £75 if he was liable for the arrest and imprisonment until the committal for trial.

The Lord Chief Justice held that it was sufficient if the information alleged reasonable grounds for suspecting that the goods were being feloniously dealt with by the plaintiff, and that this information could reasonably be so interpreted; and that the warrant need not specify the goods. He accordingly gave judgment for the defendant.

The plaintiff appealed.

J. Lawson Walton, Q.C., and *A. E. Gill*, for the plaintiff.—The defendant had no jurisdiction to issue this search warrant. The information upon which a search warrant is founded must allege that a felony has been committed. At any rate it must allege that the informant has reasonable grounds for suspecting, and does suspect, a felony to have been committed. Here the information does not allege either of those things. There is nothing in it which is not consistent with an honest possession of the goods by the plaintiff. The old authorities lay down that there must be an allegation that a felony has been committed: 2 Hale's Pleas of the Crown, 150; 4 Co. Inst. C. 31, p. 176; *Entick* v. *Carrington*, 19 Howell's State Trials, 1029, at p. 1067. Those authorities were followed in *M'Donald* v. *Bulwer*, 13 Ir. C. L. R. 549; and the forms in the text-books agree therewith. In *Elsee* v. *Smith*, 1 Dow. & Ry. 97, it was held that an information is sufficient if it states that the goods are in possession of the accused and that the informant reasonably suspects that they have been stolen. That case only modifies to that extent the rule laid down by the older authorities. Here the information does not allege any suspicion of a felony, nor does it allege a felony.

They also referred to *Lindsay* v. *Leigh*, 11 Q. B. 455; *Lawrenson* v. *Hill*, 10 Ir. C. L. R. 177; *Hope* v. *Evered*, 34 W. R. 742; 17 Q. B. 338; Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 16; 24 & 25 Vict. c. 96, s. 103.

Carson, Q.C. (*Hohler* with him), for the defendant.—If there are facts stated in the information from which the magistrate can reasonably treat it as conveying a charge of suspicion of felony, that is sufficient: *Elsee* v. *Smith*; *Lawrenson* v. *Hill*, 10 Ir. C. L. R. at p. 194; and merely committing an error of judgment will not make the magistrate liable: *Mills* v. *Collett*, 6 Bing. 85, at p. 92; *Cave* v. *Mountain*, 1 Man. & G. 257. This information complies with that test.

J. Lawson Walton, Q.C., replied.

Cur. adv. vult.

Lord ESHER, M.R.—I agree with the judgment of the Lord Chief Justice. In my opinion the defendant was acting within his jurisdiction as a magistrate when he granted the search warrant. It is immaterial whether he made an error in the exercise of that jurisdiction. There was enough upon the face of this information to give him jurisdiction to issue a search warrant. The appeal must, therefore, be dismissed.

LOPES, L.J.—This search warrant was issued under the general inherent jurisdiction of the defendant as a justice of the peace. It was argued that the defendant had no jurisdiction upon the information laid before him to issue the search warrant, because the information did not allege that any larceny had been committed, and did not specify the goods to be searched for. In my opinion, if, by any reasonable intendment, it can be collected from the information that the informant had reasonable grounds for suspecting and did suspect that the goods had been stolen, that is sufficient. The authority for that proposition in *Elsee* v. *Smith*. That case shows that a positive averment that a felony has been committed is not necessary, but that an averment that the informant reasonably suspects the goods to have been stolen is sufficient. The question, therefore, is, Can this information be fairly construed as alleging that the informant reasonably suspected the goods to have been stolen. The test, adopted by the Lord Chief Justice, may be applied. Supposing the same language were the subject of an action for libel, and there was an innuendo that the defendant meant thereby that he had reason to suspect the goods to have been stolen, in my opinion the jury might properly find that the words were capable of that meaning. I think that the fair intendment of this information is that the informant had reasonable grounds for suspecting and did suspect that a felony had been committed. In my opinion, therefore, the judgment is right, and the appeal must be dismissed.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *C. Everett.*

Solicitors for the defendant, *Routh, Stacey, & Castle*, for *Knocker, Knocker, & Holcroft*, Sevenoaks.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 26, 27.

LONDON COUNTY COUNCIL (*Appellants*) v. GROVE, SURVEYOR OF TAXES (*Respondent*). (*a.*)

Inland revenue—Income tax—County council—Interest received by county council on loans to other public bodies—Deductions—16 & 17 Vict. c. 34, Schedule D.

The London County Council, under powers given them by various statutes, borrowed large sums of money and created stock on which they paid interest to the stockholders, income tax being deducted by the Bank of England on behalf of the Commissioners of Income Tax before such payment. The London County Council also, under powers given them by various statutes, advanced sums of money by way of loan to certain public bodies from whom they received interest in full without deduction of income tax. The London County Council were held liable by the surveyor of taxes to pay income tax on such last aforesaid interest, and he assessed them under Schedule D. On appeal to the Commissioners, and subsequently to the Divisional Court, but not when before the surveyor, the London County Council contended that if they were so liable they were entitled to certain deductions in respect of income tax paid by them in other transactions.

Held, that the London County Council were properly assessed, and that they were liable to pay income tax on the sums received by them in full without deduction of income tax by way of interest on loans made by them.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

This was the only question before the surveyor, and therefore the only question the court had jurisdiction to deal with, and any other transactions by the London County Council could not be taken into consideration.

Decision of the Divisional Court, 44 *W. R.* 599, *affirmed.*

This was an appeal by the London County Council from the decision of the Divisional Court (Pollock, B., and Bruce, J.)—see 44 W. R. 599—on a special case stated by the Commissioners of Inland Revenue for the District of St. Martin-in-the-Fields, in the County of London, upon the determination of an appeal to them under the Income Tax Acts, which appeal related to a claim for the payment of income tax upon the sum of £352,021 6s. 10d., the interest received in 1892-93, in full without deduction of income tax, by the London County Council upon loans advanced by them to the School Board for London and other local bodies.

The appellants contended that no duty was payable in respect of such sum, but only on such part of it as was profit (if any); and that if duty was payable on such sum or any part thereof then they were entitled to make deductions in respect of other transactions in which they had borrowed money on which they paid interest, from which interest income tax was deducted on behalf of the Commissioners, and in respect of transactions relating to certain lands the rents of which the appellants, as owners, received.

The Divisional Court held that the appellants were properly assessed under Schedule D of the Income Tax Act (16 & 17 Vict. c. 34) in respect of the aforesaid sum, such sum being part of their funds and part of the *corpus* of their property; and further that the appellants could not be treated as a trading concern so as to bring the money they borrowed, on the one side, and the money they lent, on the other side, into an account.

From this decision the London County Council now appealed.

The full facts as set out in the special case will be found in the report of the case in the Divisional Court (44 W. R. 599).

Sir E. Clarke, Q.C., Bosanquet, Q.C., and *English Harrison,* for the appellants.

Sir R. Webster, A.G., and *Danckwerts,* for the respondent.

The arguments of counsel sufficiently appear in the stated case and in the following judgments:

Lord ESHER, M.R.—In this case a surveyor of taxes applied to the county council for payment of the income tax in respect of interest which they had received from certain parties to whom they had lent money. That interest, which they received in the course of the year, amounted to £352,021. The surveyor of taxes demanded income tax in respect of that, and that is all he asked for. The county council took objection to the assessment on the ground that no part of the sum of sum of £352,021 was or is assessable or chargeable under the Income Tax Acts, and that no duty was or is payable by the London County Council in respect thereof. That was the case before the surveyor. Nothing was then said about any other transactions, nor was this claim made in respect of any other transactions. The claim and the assessment were in respect of the receipt by the county council of that interest, and their answer was that that interest was not assessable at all. Upon that the surveyor insisted on his right to assess them, and then they appealed against that decision of the surveyor to the Commissioners—that is, against the decision of his that they were assessable and should be charged in respect of that interest which they had received in the year amounting to £352,000, and thereupon they went before the Commissioners. Now the only question before the Commissioners upon that appeal was whether that amount was assessable. The Commissioners have held that it was assessable, and when the appeal went to the Divisional Court that was the question really before the Divisional Court. The main question, I may say, was, Was the interest so received assessable?

Now, before the surveyor, they did not mention any question of deductions, they could not have done so before him upon the simple question which they were disputing. There could be no deduction from that amount of interest which was to be assessed under the circumstances which were before him. No deduction had been made at all; the county council had received the whole, had not paid or dealt with any deduction, they had received the whole and therefore it was held by him that they were assessable to the whole amount.

When the case came before the Commissioners what the county council did was this: They still maintained that upon those facts which were before the surveyor (the only facts which were before the surveyor) they were not bound to pay anything. But they endeavoured to bring in another view, which is this. They said: Supposing we are assessable on that interest and that in respect of that transaction there is no deduction which can be claimed, we now, before you, the Commissioners, bring in a history of other transactions which we had, not with these people who paid us interest, but other wholly independent transactions with wholly different people and with two sets of different people. We were owners of certain property, and we let that property to tenants who were to pay us, in respect of their occupation, ground-rent; we bring in that transaction and we say: Upon that transaction, by reason of certain sections in the Income Tax Acts, we paid income tax for those tenants, and we are entitled to deduct it. That is in regard to the tenants. Then they said: We had transactions wholly independent of the people from whom we claimed interest and to whom we had lent money, which was this—We borrowed money from certain people, as we were entitled to do by our Act of Parliament, to the extent of £28,000,000, and according to our agreement with them we were bound to pay them interest amounting to £966,000.

Now, that is a wholly separate transaction with different people; with different people from the tenants, with different people from those to whom we had lent money—we lent it to the stockholders—and we say that the surveyor of taxes, when he made his claim against us, ought to have entered upon those two transactions, he ought to have inquired into them, and if we had endeavoured to bring them before him, he would have been bound to entertain them, and if he found, that as far as the Government was concerned, we might have claimed some reduction of the income tax or property tax, in respect of those separate transactions, he ought to have taken these claims which we had against the Government for reduction upon those transactions into consideration and have applied them to this transaction and made a deduction in respect of this transaction.

The answer given to that on behalf of the Crown is this: You have no right to put upon the surveyor such an inquiry as that; and if you had put it before him he was not bound to entertain it; he had a simple case before him. He had asked you for the income tax on the interest that you had received. That is all he had to do. If you could have shown that, according to any of the statutes, there was this deduction to be made, well and good, then you would have been entitled to deduction in respect of that

assessment which he had made, but you had no right to ask the surveyor of taxes to go out of that transaction, and to go into transactions wholly independent of it; to ask whether there was a claim for reduction in those transactions as against the Crown, and then to apply it to this, because to do that is only to say that as between you and the Crown there is a set-off, and there is nothing in any one of the Acts which allows you to say that you can put forward against a claim for assessment, which is a valid claim, a set-off as against the Crown in respect of other transactions. The judgment of the Divisional Court is that, at the most, if you do make out your other cases, they only amount to a set-off, and there is no such thing as a set-off in such a case as this. Your claims in respect of the other transactions cannot be set off at all. This transaction in which the Crown claims this interest is a simple transaction, a transaction not mixed up with any other, and therefore, even if you could make out a case upon the others, you cannot bring that in here.

Now, that is the judgment of the Divisional Court, and we have to say whether we agree with or differ from that decision, and the grounds on which it was given.

Then the Crown go further, by way of caution, and say that, with regard to those other cases, the county council have no claim for reduction, even if, as between themselves and their own tenants, they had made out, or were entitled to make out, in this case that they had paid the whole, when they ought not. I should have thought they were entitled to a reduction in respect of those rents received by them; but, it is said, they have not made that out. With regard to the other case—that is, to any claim which they had to deduct anything in respect of the money which they were paying to the stockholders for money borrowed from the stockholders, it is not within any one part of these Income Tax Acts. The 10th rule or section may apply to the case of the rents—it cannot apply to this case of the stockholders—they do not come within any words of it, and, as far as I am concerned, I could not get myself to bring this case of the payment to the stockholders within any part of the 10th rule. Then it was said: But you can bring it within the 24th rule. That, it seems to me, depends entirely upon whether the conditions of the 24th rule were complied with. I do not wish to decide either of those points at present; but to say that I have not a very strong opinion about them would be wrong. I have a very strong opinion that they are not within the 10th rule nor within the 24th rule. The 24th rule was not complied with. The conditions precedent to allowing a deduction under the 24th rule were not complied with. But supposing they were, then there might be, with regard to any assessment of income tax, or of any deduction in respect of the money paid by them to the persons from whom they borrowed moneys, an allowance on that transaction. If there were any allowance to be made in respect of the tenants of the property and a payment of rent by them, that would be a transaction between them. Whenever a surveyor comes to deal with the county council in respect of those matters, he may have to deal with those deductions; but the surveyor here, in my opinion, had nothing to do with those separate and independent transactions, and ought not to be called upon to entertain them. The Commissioners pressed, no doubt, as we have been pressed by powerful and vigorous counsel, seemed to have entertained questions which they need not have entertained.

The Divisional Court, when the case came before them, seem to me to have rejected these arguments as not being relevant to the only question, which was before them, which was whether the decision of the surveyor in this case was right, and whether the adoption by the Commissioners of his decision was also right. That left the only question to be the one which the county council brought forward at first—namely, that they were not liable for income tax in respect of the interest which they have received.

I am of opinion, therefore, that the decision of the Divisional Court was right, and that this appeal must be dismissed.

LOPES, L.J.—I think that in this case there is really only one question raised, and that is this, whether the county council are liable to pay income tax in respect of interest that they have received from persons to whom they have lent money, which has not already been subjected to income tax. I am clearly of opinion that they are liable. I think the case is covered by the words of the Act of Parliament, and by authority. Now that is all that I propose to decide in this case. It has been said and argued with great force that, even assuming the county council are so liable as I have stated, they are entitled as against the Crown to make certain deductions. Now, I am bound to say that that is a matter to my mind of very considerable difficulty. I have felt that there is very great force in the way in which it has been put by Sir Edward Clarke. If I were compelled to express my opinion with regard to that matter, I should desire to take time to consider the question. It is a matter of great difficulty, and a matter about which I wish it to be clearly understood that I express no opinion at the present moment one way or the other. I merely decide this case on the ground that there is only one question raised—namely, the question to which I have alluded, that is, whether or not the county council are liable to pay income tax on the interest received by them from the persons to whom they have lent money which has not already been subject to income tax.

I understand Sir Edward Clarke to put the other point in this way, that if no deduction is to be allowed then they are not called upon to pay income tax out of the money which has already been subjected to income tax. That, I again say, is a question about which I express no opinion, and which in all probability will have to be decided in the future.

RIGBY, L.J.—In this case the question arises whether the London County Council is chargeable in respect of a sum of £352,000 odd, the amount of moneys which they received from various bodies to whom under their powers they had lent money, by way of interest in the year ending the 31st of March, 1893. In the ordinary way the bodies who were paying that interest ought to have deducted the income tax. Then the county council would have received it less income tax, and the only reason why that was not done apparently was that the county council suggested to them that this was an exceptional case, and that income tax was not payable in respect of those sums, and therefore would not allow them to deduct it, saying that they had no power to absolutely compel them to pay the extra money. That was the position they took. They said, you are not liable to pay us the whole of the moneys; but the whole of the moneys were paid apparently for some time. This was the course of dealing that had taken place, and the Crown had not objected; but the point was clearly raised in respect of that year ending the 31st of March, 1893, and then the surveyor of taxes, whose duty it was to deal with it, decided that inasmuch as the borrowers of the money from the county council had not deducted the income tax, the whole of it having passed into the hands of the county council they must pay it; and as far as appears to me that

was the only matter he had jurisdiction over. What has the surveyor of taxes to do with a demand which anybody may have, or may think he has against the Crown for repayment of money overpaid? It has not been suggested that he has any jurisdiction. The only decision was that they must pay duty on the £352,000, and against that decision the county council appealed to the Commissioners, stating as their ground that no tax was payable on the sum or any part of it.

Now apparently before the Commissioners they brought in, as the Master of the Rolls has said, two other questions which do appear to me to be quite foreign to that question as to whether £352,000 in their hands was taxable. First of all as to the lands. Now about them undoubtedly they paid tax, but as I understand the facts they had not raised any demand against the Crown; they did not raise any question at all about being entitled to any deduction in respect of those lands. Of course apparently—I say "apparently" because I do not wish to decide any point which is not now before us—apparently the case as regards the lands was the same in principle as that with regard to the money—I mean as regards deduction. What took place was this (and I consider it somewhat unfortunate): The county council, choosing to rely upon the position which they throughout took, that they were not liable in respect to the £352,000, permitted the deduction which by law must be made from the sums paid to the stockholders for income tax to go to the Crown account, and the Crown have received the whole of it. It was suggested that our law is in that peculiar position, that if you employ the Bank of England that must take place. Until I have that matter thoroughly investigated and argued I decline to assume that it must be so. I have no doubt that the Bank of England is, as a rule, bound by Act of Parliament to deduct from all dividends that it pays, the amount of income tax; but to say that if they have a client who has already paid the income tax they are nevertheless bound to ignore that fact whilst deducting the income tax from the person to whom they pay, and pay it over to the Crown, is to my mind so remarkable a statement that until that is clearly proved I should be sorry to assent to it.

However, we have not to do with that. The county council permitted that to be done without protest, without any claim being made as against the Crown, and it was attempted before the Commissioners to agree that there was a set-off. I suppose it would not be put in that way, but that there was some equitable sort of claim against the Crown to have a return of moneys they had received because the county council had taken a wrong view of their position; they thought they were entirely exempt, and having been beaten, or feeling themselves liable or likely to be beaten upon that point, they wanted to raise that claim. It has not been shown to me that the Commissioners had any jurisdiction whatever to deal with the question. They did find that the county council were not entitled to any return of that duty, and of course that was right. I cannot see any foundation whatever for suggesting that that duty, or any part of that duty, was returnable. The fact that the Commissioners allowed matters to come into the case which were irrelevant to the appeal before them, and which are irrelevant to the appeal now before us, cannot give us jurisdiction. We have had a very able argument on both sides with reference to that point, and I regret very much that it does not appear to be within the scope of our duty here. We might have determined it now, perhaps—we shall probably never have it better argued—but it is not before us. I agree in the view taken by the Master of the Rolls, and it was so treated by the Divisional Court. Of course Pollock, B.'s, judgment is a great deal criticized on the assumption that he had decided what he never attempted to decide. He said, and he said with truth, that if a man has got an income of a thousand a year, and has charged it, say, to the extent of £300, so that really his beneficial enjoyment is only £700 a year; nevertheless, that is no answer whatever, and is not relevant to the question whether he is to be charged on a thousand. That is perfectly true, and it is only by twisting that into what certainly it does not in itself mean—that is, into saying that he never under any circumstances can get a deduction from anybody else, that you can make that which is correct in point of law, and correct as regards the real facts in issue in this case, wrong. I understand the Divisional Court to mean, "We can only ask whether the tax ought to be payable in the first instance, we decide that we have nothing to do with the rest of the case at all." I take the same view of it, and, of course, coincide with the view that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

From Railway & Canal Com. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 9.

DIDCOT, NEWBURY, AND SOUTHAMPTON RAILWAY CO. *v.* GREAT WESTERN RAILWAY CO. AND LONDON AND SOUTH-WESTERN RAILWAY CO. (*a.*)

Railway—Through booking—Reasonable facility—Consideration of public interest—Railway and Canal Traffic Acts, 1854 (17 & 18 *Vict. c.* 31), *s.* 2, *and* 1888 (51 & 52 *Vict. c.* 25), *s.* 25.

Upon an application for through booking over continuous lines of railway belonging to different companies the Commissioners must take into consideration the requirements specified in section 25, *sub-section* 5, *of the Railway and Canal Traffic Act,* 1888—*namely, whether the granting thereof is a reasonable facility in the interest of the public, and whether the route is a reasonable one.*

Appeal from an order of the Railway and Canal Commission.

The Didcot, Newbury, and Southampton Railway Co. applied (so far as material) for an order for through rates for goods and through booking for passengers *viâ* their railway between Southampton on the London and South-Western Co.'s line and Paddington on the Great Western Co.'s line.

The Great Western Railway Co. did not oppose the application.

Sir Frederick Peel came to the conclusion, on the facts, that the application should be granted, Lord Cobham dissenting so far as regards the through rates for goods.

Collins, J., in delivering his judgment, after saying that he agreed with the judgment of Sir Frederick Peel, added: "I regard the decisions in this court since its commencement as binding on this court, and sitting here it seems to me that in view of those decisions there is practically no alternative but to hold, as Sir Frederick Peel has held, that the rates must be granted. . . . It is, further, clear law that through booking as distinguished from through rates is for all practical purposes a matter of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

right. . . . It is pointed out by Mr. Commissioner Miller in the case of *Great Western Railway Co. v. Severn and Wye Railway Co.*, 5 Ry. Traff. Cas. 170, that through booking between certain points being practically a matter of right as a reasonable facility, it is only when you come to deal with the question of rate, and thereby force a company to take something less than it is by law entitled to demand, that the considerations which are introduced under section 25 of the Act of 1888—namely, the advantage to the public and the reasonableness of the route, come into question. . . . This practically, in my judgment, brings the case down to something very little more than an application for through booking, and a very slight *primâ facie* case of advantage to the public, I think, would suffice on the authorities, as they exist in this court, to entitle the applicants to the orders which they ask for."

The London and South-Western Railway Co. appealed.

Cripps, Q.C., and *E. Moon*, for the appellants.—Two of the commissioners having differed, Collins, J., decided the case upon a point of law. He held that through booking is a matter of right, and that the interest of the public and the reasonableness of the route are only to be taken in consideration under section 25, sub-section 5, of the Railway and Canal Traffic Act, 1888, when a through rate is applied for. In so holding he merely followed the decision of Mr. Commissioner Miller in *Great Western Railway Co. v. Severn and Wye Railway Co.* That decision is wrong. A through booking necessarily involves a through rate, and an order for a through booking involves a through rate. In both cases the considerations specified in section 25, sub-section 5, of the Act of 1888 must be taken into account.

They also referred to *South-Eastern Railway Co.* v. *Railway Commissioners*, 6 Q. B. D. 586, 29 W. R. Dig. 109.

Littler, Q.C., and *W. M. Acworth* (*Balfour Browne, Q.C.*, with them), for the Didcot, Newbury, and Southampton Railway Co.—A through booking is a reasonable facility within section 2 of the Railway and Canal Traffic Act, 1854: *Sussex County Council* v. *London, Brighton, and South Coast Railway Co.*, 8 Ry. Traff. Cas. 17; and the commissioners can order it, but it is not contended that they can do so without any consideration of the interest of the public. On the facts Collins, J., agreed with Sir Frederick Peel,* and no appeal lies from their decision on the facts.

They also referred to *Barret* v. *Great Northern and Midland Railway Companies*, 1 C. B. N. S. 423, 5 W. R. C. L. Dig. 229.

Cripps, Q.C., replied.

Lord ESHER, M.R.—In this case the application is substantially that the London and South-Western Railway Co. (the Great Western Railway Co. not objecting) be ordered to give through booking for passengers and goods between Southampton and Paddington *viâ* the applicants' line, and through rates for goods. The Railway Commissioners inquired into the whole matter, and Sir Frederick Peel came to the conclusion that it would be for the advantage of the public that there should be through booking and through rates between those stations, and he had jurisdiction to do that under the Railway and Canal Traffic Acts, 1854, s. 2, and 1888, s. 25. Collins, J., went through the same process as Sir Frederick Peel and came to the same conclusion on the questions of fact. Lord Cobham differed upon the facts. There was, therefore, a majority one way, and we cannot interfere. Collins, J., however, finding that the two commissioners differed upon the facts, thought that it would be better (so he has told me), besides agreeing with Sir Frederick Peel upon the facts, if he could support Sir Frederick Peel's decision in another way than by merely agreeing with him on the facts. He thought that he, in his capacity as legal member of the court, by deciding a question of law, could make the difference between his colleagues less than it otherwise would be, or make it vanish altogether.

Now, the question of law which he decided, and intended to decide, was, that in considering the question of through booking he was not bound by the consideration of public interest, or the other considerations and limitations mentioned in section 25 of the Act of 1888. He thinks that it is right, for the purpose of comity, for the legal member of the court to follow the decision in point of law of a former legal member of the court until it is overruled. Therefore he followed the decision of Mr. Commissioner Miller as he understood him, and as I also understand him, that the court could consider and determine the question of through booking without the considerations and limitations which it would be bound to give to a question of a through rate; and the learned judge said that as a matter of law he must allow the through booking, and that it required a very slight *primâ facie* case of advantage to the public to entitle the applicants to a through rate. Understanding Mr. Commissioner Miller's judgment to be what I have stated, and considering the judgment of Collins, J., to be, as he says it was, intended to follow the decision of Mr. Commissioner Miller, I think that in this court we ought to say what we think of that proposition of law—namely, that the court can grant through booking without any of the considerations or limitations which are necessary as to the grant of a through rate. In my opinion that proposition is wrong, and therefore the point of law decided by Collins, J., is wrong. An applicant can apply to the commissioners for a through rate. They may grant a through rate, but before they can do so they must go into the consideration of the public interest. If they grant a through rate it seems to me to follow, as a matter of necessity, that they must allow a through booking. If a through rate is granted either for goods or for passengers from Southampton to Paddington at a less amount than the aggregate of the local rates, the moment that is done the applicant will ask to have his goods or himself booked. It follows of necessity that if a through rate is granted, a through booking must be granted also. The converse seems to me to be equally true, that if an applicant asks for a through booking, and the court grants it, it follows that they grant a through rate. If the Railway Commissioners think that a through booking is for the advantage of the public, and they don't wish to interfere with the aggregate of the local rates, they will, by granting the through booking, be granting a through rate in ordinary language—that is, a rate payable for the through journey. That is a new rate; it is one instead of several rates. If they lessen the aggregate of the local rates they equally grant a through rate. If they grant a rate less than the aggregate of the local rates, it may be that in railway language that is the only rate that is called a through rate. But if they grant a through booking and leave the rate at the aggregate of the local rates, it is still, in my opinion, a through rate. I think that, subject to the consideration of the conditions and the limitations mentioned in the Act of 1888, they can either grant

* The court stated that Collins, J., had informed them that he concurred with Sir Frederick Peel on the facts, but that he also gave judgment upon the point of law.

that by saying that they grant a through booking or a through rate. If they grant either the one or the other they must of necessity grant both.

Collins, J., as I understand, wished us to express an opinion upon this point, and I have expressed my opinion. I have some hope that we shall be found differing only in words and that we shall agree as to substance. As, however, Collins, J., agreed with Sir Frederick Peel upon the questions of fact, that is sufficient to carry the decision below, and we have no jurisdiction to interfere with it.

LOPES, L.J.—It was unnecessary for Collins, J., to have dealt with the law at all, because it is now clear that he agreed with Sir Frederick Peel upon the facts. But, having done so, it seems that he desires that this court should state its opinion upon the law. Now, in my opinion, through booking is a reasonable facility, and it cannot be granted as a matter of right unless evidence is given which brings it within the purview of the statutes which allow reasonable facilities to be given. I think that Mr. Commissioner Miller did hold that the granting of through booking was a matter of right, but I am not quite certain that Collins, J., adopted that view. I rather gather that he meant to decide that provided a certain amount of evidence is given in favour of a through booking, and that evidence is not met or rebutted on the other side, that would be sufficient to justify the court in coming to the conclusion that it would be a reasonable facility, and that it ought to be granted. I cannot myself think that a through booking may not be granted without a through rate. I can imagine cases of this kind. If there are three railways, a passenger might find it extremely inconvenient when he gets to the end of the first railway to find that he has to take another ticket, and again at the end of the second railway. If the railway companies did not act harmoniously to prevent that state of things, it would be right and proper that an application should be made to the commissioners for a through booking. I believe that was one of the main objects for which the Railway Commissioners' Court was established. I am of opinion, therefore, that there may be through booking without a through rate. It may be, as the Master of the Rolls has said, that it is only a distinction in words. I admit that, if there is through booking, the aggregate of the local rates would be the amount to be paid. But I do not understand that to be what is generally called a through rate. I cannot understand any traders or other persons going to the Commissioners' Court and asking for a rate of that kind. If they had obtained through booking, it follows, as a matter of course, that the rate which they have to pay will be the aggregate of the local rates. The object of the application for a through rate, as I understand it, is to obtain something less than the aggregate of the local rates. It may be that that is a distinction in terms rather than in substance, but that is the view I have always heard applied to "through rate." However, that is a proposition which does not refer to the present case. I only wish distinctly to say this, that I think a through booking may be granted by itself without a through rate, and I think a through booking is a reasonable facility, as laid down by Wills, J., in *Sussex County Council* v. *London, Brighton, and South Coast Railway Co.*

RIGBY, L.J.—Agreeing as I do with the Master of the Rolls in the judgment which he has delivered, I shall add very few words. Upon the question as to the point of law laid down by Collins, J., I am unable to see how there can be a through booking without a through rate, or how a through rate can effectually be granted unless it includes a through booking. I am quite ready to agree that railway managers and others, when they are talking about through rates, very generally mean reduced rates. But that there is a legal meaning of that word as being only applicable to a reduced rate I have not heard anything to induce me to believe. When a person takes his ticket or pays the price demanded for the carriage of goods from one place to another, assuming the carriage to be over different railways, he pays one sum. He probably knows nothing about the way in which that sum may have to be divided. That may be a matter of arrangement between the railway companies, or by an order of the Railway Commissioners. He only knows that he is entitled for that one payment to have himself or his goods, as the case may be, carried over the whole distance. He has paid for through carriage, and anyone would consider it a through rate, whether it was the sum of the local rates, or whether it was a smaller sum. I think it follows from that that it is quite impossible that there should be a through booking or a through rate granted, except upon the considerations that would authorize the granting of a through rate. It appears to me that the same considerations ought to be given to whether a through booking should be granted as would be given to the question of a through rate being granted.

Appeal dismissed.

Solicitors for the applicants, *Lake & Lake.*

Solicitors for the London and South-Western Railway Co., *Bircham & Co.*

Solicitor for the Great Western Railway Co., *R. R. Nelson.*

High Court of Justice.

Chan. Div. North, J. } Jan. 21, 22, 23, 26.

In re STEVENS.
COOKE *v.* STEVENS. (*a.*)

Executor—Acting before probate—Delay in proving will—Wilful default.

A testator died in 1882, *and his will was proved* (*by one only of three executors named in the will*) *in* 1889. *A policy on the testator's life could not be got in until probate was obtained, and meanwhile interest at the rate of* 5 *per cent. was paid upon a debt of the testator.*

Held, that this delay in proving the will and getting in the money due upon the policy did not amount to wilful default.

Two persons named as executors in the will wrote a letter in conjunction with the executor who eventually proved asking the assurance office to pay the policy money to a creditor of the testator.

Held, that all three had acted as executors.

Action.

Gardner Christopher Stevens made his will on the 12th of February, 1880, and appointed Charles Frederick Stevens, Matthew Tallitt Emerson, and John Sewell executors thereof. The testator died on the 23rd of December, 1882, and the will was proved by C. F. Stevens alone on the 15th of October, 1889. The testator was entitled to a policy for £676 in the Scottish Widows' Assurance Office, which became payable upon the 21st of March, 1883. This sum was

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

paid upon the 18th of November, 1889, with £45 1s. 4d., being interest at the rate of one per cent. from the 21st of March, 1883, to the 21st of November, 1889. Meanwhile five per cent. was paid upon a debt due by the testator.

This was an action for administration of the estate of the testator, and it was sought to have the defendants Stevens and Emerson declared liable to account on the footing of wilful default. There was a dispute as to whether Emerson, who was a solicitor, had acted as executor. The acts relied upon as showing that he acted as an executor were:

(1.) Coleman, who claimed to be a creditor of the testator when the will was in Emerson's possession, as he said as solicitor for Stevens, obtained a subpœna in the usual form requiring Stevens and Emerson to lodge the will with the registrar.

(2.) Pyecroft, a simple contract creditor of the testator in September, 1886, four years after the testator's death, issued a writ against Stevens and Emerson as executors *de son tort*. The writ was taken to Emerson and an undertaking to appear asked for. The parties came to some arrangement and the creditor accepted a bill.

(3.) In January, 1883, Mann issued a writ for administration of the testator's estate, making all the executors named in the will defendants. An appearance was entered on behalf of all the defendants, but the action was not proceeded with.

(4.) On the 28th of July, 1883, all the executors named in the will wrote to the Scottish Widows' Assurance Office requesting that the money due upon the policy might be paid to Messrs. Gurney, who were creditors of the testator. The entry in Emerson's bill of costs with regard to this was, "Writing letter for your signature as arranged."

Everitt, Q.C., and *Butcher*, for the plaintiff, one of the residuary legatees.—We ask for an account against the defendants upon the footing of wilful default. There was a breach of trust in not getting in the policy-money sooner—the death was in 1882 and the money was not got in till 1889. Meanwhile the estate had to pay interest at 5 per cent. It is clear that Emerson acted as executor. In Mann's case all the executors entered an appearance, and pleading in the character of an executor is an admission that a man is an executor (Williams on Executors, p. 210), and entering an appearance as an executor must have the same effect.

Swinfen Eady, Q.C., and *C. James*.—No case of wilful default is made out. No money has been lost that might have been recovered. As regards the policy, it is said that there is a loss of interest between the date at which the policy was payable and the date at which it was actually paid. As 1 per cent. interest was paid, the plaintiff only claims the difference between that and the 5 per cent. paid upon the testator's debts. But this interest never became part of the testator's estate. It cannot be said that not proving the will earlier was wilful default. [They cited: *Lowry* v. *Fulton*, 9 Sim. 104; *Orr* v. *Newton*, 2 Cox. 274; *Vickers* v. *Bell*, 12 W. R. 589, 4 De G. J. & S. 274.] Emerson, as a matter of law, is only liable for what he received: *Watkins* v. *Brent*, 1 My. & Cr. 97. The simple omission of an executor to clothe himself with the legal title to get in a debt is not wilful default. The money obtained from the insurance office might have been applied in paying a debt that did not bear interest, and if that had been done the estate would have suffered no loss.

They also referred to *Stacey* v. *Elph*, 1 My. & K. 195.

Everitt, Q.C., replied.

NORTH, J., after stating the facts, said: The insurance company might safely have paid the executors, as any executor, even before probate is taken out, can give a valid receipt (Williams on Executors, p. 249). It is equally clear that the executors could not compel payment before they proved the will. The bill of costs clearly shows that in this matter they all acted as executors and nothing else. The cases referred to are all cases in which there was a principal for whom an agent might act. This case might be similar if Stevens had then proved the will, in that case it might be well that Emerson would have acted as his agent. But here there was no principal; how could any of the three who signed the letter be said to act as agent for the others? In my opinion it is clear what was done was to give the executors' authority to the insurance company to pay over the money to Messrs. Gurney. It is a clear case of acting as executors. I need not go into the other instances of Emerson's acting as executor, though the same considerations apply. I must direct an account against Emerson, similar to that directed in *James* v. *Frearson*, 1 Y. & C. C. C. 370. An inquiry is asked on the footing of wilful default. This would be a very severe order, and up to the present wilful default has not been shown, which is necessary to obtain such an order. The passage quoted by Lord Hatherley in *Partington* v. *Reynolds*, 6 W. R. 388, 4 Drew. 253, p. 256 —"the plaintiff must allege and prove that there is some part of the deceased's personal estate which ought to have been, and might have been, received by the defendant, and which he has omitted to receive by his own wilful neglect or default"—describes the law. A case must be shown; it is not enough that wilful default may possibly be arrived at as a result of an inquiry. It was first said that rents had been received and not accounted for, but this was not proved. It was said that a debt due from a creditor was not got in, but it was not proved that there was a loss to the estate by reason of the executors' action. Then it was said an alleged surplus of £180, arising from proceeds of sale, might have been applied in paying a debt bearing interest at the rate of 5 per cent. But paying a wrong creditor is not wilful default. It is said that there was wilful default in not getting in the money on the policy earlier, but no loss to the estate resulted, as the whole sum has been received. But it is said there was a breach of trust, as if the money had been got in it might have been applied in paying a debt or have produced interest. That does not seem to me to amount to wilful default. Not proving the will certainly is not wilful default, and the damages said to result from the delay are too remote. I must direct an account against both defendants. I dismiss the action so far as it asks for an account on the footing of wilful default, with costs. Both defendants resisted an administration decree, so they must pay the costs of their resistance, and the costs must be set off.

Solicitors, *S. S. Seal*, for *Steavenson*, Darlington; *White & Co.*, for *Emerson*, Norwich.

Chan. Div. North, J. } Dec. 8.

GOLD REEFS OF WESTERN AUSTRALIA v. DAWSON. (*a*.)

Practice—Costs—Solicitor—Plaintiff made party without authority—Motion to strike out name—Action

(*a*.) Reported by R. SILLEM, Esq., Barrister-at-Law.

discontinued—Judicature Act, 1875 (36 & 37 *Vict. c.* 77), *s.* 21—*R. S. C., ord.* 26, *r.* 1; *ord.* 78, *r.* 2.

When a plaintiff is made a party to an action without his authority there is jurisdiction to order the solicitors so using the plaintiff's name to pay the plaintiff's costs, although before a motion for that purpose and to strike out the plaintiff's name from the writ can be made, the action has been discontinued.

Motion.

This was a motion by a company that the name of the company might be struck out of the writ in the action, on the ground that the solicitors had no authority to make the company a party to the proceedings, and that the solicitors by whom the writ had been issued might be ordered to pay the company's costs as between solicitor and client, both of the action and of this motion.

The action had been commenced in the name of the company, two directors, and two shareholders to restrain further proceedings in a voluntary winding up. An application for an injunction to this effect had been made, and had been dismissed, and the plaintiffs ordered to pay the costs. On this coming to the notice of the company this motion was launched, and two days after this motion had been served the solicitors who acted for the plaintiffs gave to the defendants a formal notice that they discontinued the action. The solicitors now took the objection that as the action was gone, the court had no jurisdiction to make the order.

Swinfen Eady, Q.C., and *Duke*, for the motion.—Under the old practice of the Court of Chancery the court would have jurisdiction. *Hood* v. *Phillips*, 6 Beav. 176; *Wade* v. *Stanley*, 1 J. & W. 674; *Nurse* v. *Durnford*, 28 W. R. 145, 13 Ch. D. 764; *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, are to the same effect. *Bolton* v. *Bolton*, 24 W. R. 663, 3 Ch. D. 276; *In re Savage*, 29 W. R. 348, 15 Ch. D. 557, were also cited.

Kenyon Parker, for the solicitors.—The old practice of the Court of Chancery has no application. The matter turns on the true construction of ord. 26, r. 1: *Newby* v. *Harrison*, 9 W. R. 849, 3 De G. F. & J. 287; *Farquharson* v. *Pitcher*, 4 Russ. 510; *Conybeare* v. *Lewis*, 28 W. R. 330, 13 Ch. D. 469.

NORTH, J.—In my opinion the discontinuance of an action cannot have any larger effect than the dismissal with costs of a bill under the old practice. It was well settled that after the dismissal of a bill with costs, a person whose name had been used as a plaintiff without authority could get an order to strike out his name, and that the solicitors should indemnify him against costs. This has not been altered in express terms by ord. 26, r. 1. It would be surprising if such an application as this could be evaded by the solicitors putting an end to the action in this way. There is nothing in the rules altering the old practice in this respect., (Reads section 21 of the Judicature Act, 1875, and R. S. C., ord. 78, r. 2.) I cannot find any provision in the Acts or rules as to what is to be done when a solicitor uses a plaintiff's name without his authority, I think, therefore, that the old practice still prevails.

Solicitors, *Gover & Chiles; Wyatt Digby & Co.*

Chan. Div. } Jan. 12.
Kekewich, J. }

BOWEN *v.* PHILLIPS. (*a.*)

Executor—Injunction restraining bankrupt executor from acting—Application by co-executor—No receiver.

Upon the application of one executor for an injunction to restrain his bankrupt and defaulting co-executor from acting, the court has jurisdiction to grant the injunction without having recourse at the same time to the appointment of a receiver of the testator's estate.

Motion by the plaintiff, William Bowen, one of the executors of the will of Daniel Roberts (deceased) to restrain his co-executor, Daniel Phillips, the defendant, from receiving, dealing with, or managing the testator's estate.

The testator died in August, 1891, having by his will bequeathed a life interest in his estate to his wife, who was still alive.

The plaintiff and defendant had acted as executors of the will down to the present time, and had paid the yearly income of the estate to the widow. The testator had not appointed trustees of his will.

From the evidence it appeared that the defendant had misappropriated moneys belonging to the estate, and had been adjudicated bankrupt in July, 1896.

Greig, for the motion.—I do not ask for a receiver in this case; there is no need of one, for the plaintiff will continue to administer the estate as executor. I submit that your lordship has power to grant the injunction although the appointment of a receiver is not asked for. I refer to Williams on Executors, 9th ed., vol. 1, p. 187-8, and to the cases of *Utterson* v. *Mair*, 2 Ves. jun. 95; and *Gladdon* v. *Stoneman*, 1 Madd. 143, there cited.

The defendant did not appear.

KEKEWICH, J.—I am of opinion that I have the necessary jurisdiction, and I will grant the injunction until trial or further order.

Solicitors, *Schultz & Son*, for *Lewis Thomas*, Neath.

Chan. Div. } Dec. 10.
Kekewich, J. }

In re AIREY.
AIREY *v.* STAPLETON. (*a.*)

Deed—Presumption of law—Deed more than thirty years old—Marriage settlement purporting to exercise power of appointment—Execution by attorney of appointor—Mere production of deed insufficient evidence—Invalid exercise.

On the mere production of a deed more than thirty years old purporting to exercise a power of appointment and executed by the attorney of the appointor, the presumption of law that a deed more than thirty years old and produced from an unsuspected repository proves itself does not, in the absence of other evidence, warrant the court in coming to the conclusion that the attorney was properly constituted and authorized to execute the deed, and, consequently, the power of appointment will not be deemed to have been validly exercised.

Adjourned summons.

On the hearing of this summons a question arose as to whether or not a power of appointment purporting to have been exercised by a marriage settl

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

ment executed by the attorney of the appointor had in fact been validly exercised.

The facts were as follows: George Dennis Walsh and his wife, Amelia Sarsfield Walsh, were parties to the settlement, dated the 19th of December, 1851, and made upon the marriage of their daughter Amelia Walsh with John Moore Cole Airey, and by the settlement Mrs. Walsh purported to exercise in favour of her daughter a power of appointment of which she was the donee. At the date of the settlement Mr. and Mrs. Walsh were resident abroad. The deed was executed by their attorney, and the attestation clause duly testified to such execution by him. The remaining parties to the deed executed it in person.

There was no reference in the body of the settlement to the appointment of the attorney. The power of attorney was not produced, and no evidence was tendered to show that the attorney was properly constituted or authorized to execute the deed.

In the events which had happened, if the appointment was good, Mrs. Airey's statutory next of kin were entitled to the fund in question, but if not, her husband's executors were entitled to it.

Renshaw, Q.C., and *Stokes*, for the trustee of the marriage settlement.

Spence, for one of the next of kin.—The settlement is more than forty years old, and therefore it proves itself, and must be taken to have been properly executed by the attorney under the power of attorney. The fact that a deed proves itself must establish the deed and all things necessary to its validity.

P. O. Lawrence, Q.C., and *George Henderson; Beaumont*; and *Musgrave*, for other next of kin, adopted the same argument.

Warrington, Q.C., and *Howard Wright*, for the executors of the husband.

KEKEWICH, J.—It has been argued that, as the rule of law is in favour of deeds which have been executed more than thirty years, I ought to consider that this deed was a proper execution by Mrs. Walsh of her power of appointment. The rule is clearly stated in Broom's Legal Maxims (6th ed., p. 898), under the heading "*Omnia praesumuntur rite et solemniter esse acta*," in the following manner: "Upon the same principle proceeds the rule that deeds, wills, and other attested documents which are more than thirty years old, and are produced from an unsuspected repository, prove themselves." Now, in the present case I have before me a deed which purports to have been executed by the parties thereto (except Mr. and Mrs. Walsh) in person; I must accordingly conclude that those parties did in fact properly execute the deed at that time—*i.e.*, on the date of the deed. This settlement also purports to have been executed by the attorney of Mr. and Mrs. Walsh, as appears in the attestation clause. I do not, however, find any rule of presumption which countenances me in coming to the conclusion that the attorney of these parties was properly constituted *ad hoc*, and, bearing in mind the rule against delegation of discretionary powers, I do not think that in the circumstances I should be justified in concluding that the attorney was authorized to execute this deed. I am therefore of opinion that the power of appointment was not validly exercised.

Solicitors, *Crawley, Arnold, & Co.; Field, Roscoe, & Co.; George Coote; Wild, Berger, & Moore; Freshfields & Williams.*

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 21.

MANDERS v. MANDERS. (*a*.)

Justices—Married woman——Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Order of justices under section* 5—*Mode of appeal—Section* 11.

The only mode of appeal from the decision of a court of summary jurisdiction on an application made for an order under the Summary Jurisdiction (Married Women) Act, 1895, *is, under section* 11 *of that Act, to the Probate, Divorce, and Admiralty Division. A court of summary jurisdiction has no power in such a case to state a case for the opinion of the Queen's Bench Divisional Court.*

This was an appeal by way of a case stated to the Queen's Bench Division by the justices for the borough of Louth under the Summary Jurisdiction Act, 1879.

At a court of summary jurisdiction sitting in the said borough on the 5th of November, 1896, an application of Jane Manders, wife of Matthew Manders, for an order under the Summary Jurisdiction (Married Women) Act, 1895, was heard and determined.

The justices made an order that the said Jane Manders be no longer bound to cohabit with the said Matthew Manders, and providing for a weekly payment for maintenance and costs. The justices at the request of the husband stated a case for the opinion of the Queen's Bench Division.

The facts of the case are immaterial to the present decision.

Section 11 of the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), provides as follows: "Save as hereinbefore provided, an appeal shall lie from any order by a court of summary jurisdiction under this Act to the Probate, Divorce, and Admiralty Division of the High Court of Justice . . ."

M. Shearman, for the respondent, raised a preliminary objection. No appeal lies in this case to a Divisional Court of the Queen's Bench. An appeal will only lie to the Probate, Divorce, and Admiralty Division. This is expressly provided in section 11.

T. Hollis Walker, for the appellant.—This case was stated under the Summary Jurisdiction Act, 1879, section 33 of which gives "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction" the right to have a special case stated. The right there given is not taken away by the Act of 1895, but only a further mode of appeal provided for. The two concurrent remedies are not inconsistent: *Hetherington* v. *Hetherington*, 36 W. R. 12, 51 J. P. 294. See also the case of *Power* v. *Wigmore*, L. R. 7 C. P. 386, where Willes, J., at p. 391, says: "The fact of parties having a right of appeal under section 106 of the Building Act (18 & 19 Vict. c. 122) and the fact of the magistrate having jurisdiction to allow an appeal, if he thinks proper, under 20 & 21 Vict. c. 43, are by no means inconsistent; the two powers may well co-exist."

WRIGHT, J.—I think it is extremely difficult to say what the proper construction of the Summary Jurisdiction (Married Women) Act, 1895, as regards an appeal is, but I think the common sense point of view is that the Legislature intended that the only mode of appeal should be to the Probate, Divorce, and Admiralty

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Division, as the judges of that division have the greater experience in matrimonial cases. However, this Act creates a new jurisdiction, and where that is the case there is no appeal from the tribunal on which such new jurisdiction is conferred unless the Act expressly so states, or unless such right of appeal is given by some subsequent Act. The Act we are dealing with expressly gives, by section 11, a right of appeal to the Probate, Divorce, and Admiralty Division, and I should say that the reasonable construction is that no right of appeal to any other court was intended to be given. It is contended, however, that the mere mention of and reference in several sections to the Summary Jurisdiction Acts imports and implies in this Act the right given in the Summary Jurisdiction Acts to have a case stated for the opinion of this division of the High Court. I cannot think that is so. If that were so it would give a right of appeal to quarter sessions. I do not think that would be right, except in the case of a conviction for assault.

The references to the Summary Jurisdiction Acts are carefully limited as in sections 1, 4, 7, and 8, the last of which enacts that all applications under the Act shall be made in accordance with the Summary Jurisdiction Acts, which, if there were no further provision, might imply that there is power to state a case for the opinion of this division. Section 10 contains a very peculiar enactment—namely, that the court may refuse to make an order in cases which would be more conveniently dealt with by the High Court, and that in such case no appeal shall lie from the decision of the Court of Summary Jurisdiction. Section 11, however, contains the specific provision that "save as hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a court of summary jurisdiction under this Act, to the Probate, Divorce, and Admiralty Division of the High Court of Justice."

I am of opinion that the right construction of that section is that there is no other right of appeal. However, it is quite possible that there may be two co-existing modes of appeal from this court of summary jurisdiction, and therefore we shall give leave to appeal.

BRUCE, J.—I am of the same opinion. I think the reasonable construction of section 11 is that only one mode of appeal was intended, and that to the Probate, Divorce, and Admiralty Division.

Appeal dismissed, with leave to appeal.

Solicitor for the appellant, *E. G. Elwes*, for *Haddon & Owen*, Louth.

Solicitor for the respondent, *E. H. Wyles*, for *John Barker*, Grimsby.

Q. B. Div. (Wright and Bruce, JJ.) Jan. 18.

MOUNTIFIELD *v.* WARD. (*a.*)

Licensing law—Sale during prohibited hours—Bonâ fide *traveller — Consumption off the premises — Licensing Act*, 1874 (37 & 38 *Vict.* c. 49), *ss.* 9, 10.

The provisions of section 10 *of the Licensing Act*, 1874, *as to the sale of intoxicating liquor to a* bonâ fide *traveller during prohibited hours do not exempt a licensed victualler from being convicted under section* 9 *for selling intoxicating liquor during prohibited hours if the sale was for consumption off the premises; and it is no defence in such a case that the defendant truly believed that the person supplied with liquor was a* bonâ fide *traveller.*

Special case stated by justices for Middlesex.

An information was preferred against the respondent charging him that he did, on the 19th of July, 1896, sell beer at the Duke's Head public-house during the time at which premises for the sale of intoxicating liquors are directed to be closed, contrary to section 9 of the Licensing Act, 1874.

The respondent was, on Sunday, the 19th of July, 1896, the landlord of the Duke's Head, holding under a protection order. The house was licensed for the sale of intoxicating liquors for consumption on or off the premises. On the day in question, shortly before 11 a.m., two men came to the house, carrying two empty bottles. They spoke to the respondent, who was standing in the doorway, and were admitted into the house. They were, during prohibited hours, served with a pint of beer each, which they drank, and the bottles were filled with beer. The men paid for the beer and carried away the bottles to a public park in the neighbourhood, and, in company with other men there assembled, consumed the beer.

The justices found as a fact that the respondent truly believed that the men were *bonâ fide* travellers, and that he took all reasonable precautions to ascertain whether or not they were such travellers. The justices also found as a fact that the beer in the bottles was sold for the purpose of being consumed off the premises.

The justices dismissed the information.

The question for the opinion of the court was whether they were right in so doing.

The Licensing Act, 1874, s. 9, enacts that: "Any person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors, although purchased before the hours of closing, to be consumed in such premises, shall . . . be liable to a penalty . . ."

Section 10 (1): "Nothing in this Act or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to *bonâ fide* travellers . . ."

(3) "If in the course of any proceedings which may be taken against any licensed person for infringing the provisions of this Act or the principal Act relating to closing, such person (in this section referred to as the defendant) fails to prove that the person to whom the intoxicating liquor was sold (in this section referred to as the purchaser) is a *bonâ fide* traveller, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller, and further, that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant . . ."

Danckwerts, for the appellant.—The provisions of section 10 of the Licensing Act, 1874, by which liquor may be sold to *bonâ fide* travellers during prohibited hours only apply where the *bonâ* traveller consumes the drink on the premises. The words "such liquor" in the first paragraph of section 10 refer to the previous words "intoxicating liquor to be consumed on the premises." It will be contended that the respondent was rightly acquitted because he truly believed that the purchasers were *bonâ fide* travellers; but in this case there was unlawful selling quite apart from the question

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the respondent's belief in the *bona fides* of the men served. If the respondent is protected by the third paragraph of section 10, the result will be that if there is a sale to a person who is a *bonâ fide* traveller for consumption off the premises, then the defendant can be convicted, whereas if, in the same circumstances, the purchaser is not in fact a *bonâ fide* traveller, but the defendant truly believes him to be so, then the defendant would escape conviction. It cannot have been intended that a publican who sells to a person who is not a *bonâ fide* traveller shall be in a better position than when he sells to a person who is a *bonâ fide* traveller.

George Elliott, for the respondent.—The decision of the justices was right. There is nothing in section 10 to show that the exemption in favour of a sale to *bonâ fide* travellers is to be limited in the manner suggested. The words "such liquor" mean intoxicating liquor, and the words "to be consumed on the premises" are not intended to be directory as to where the liquor must be consumed, but are merely descriptive of the licensed premises to which the proviso is confined. *Dames* v. *Bond*, 55 J. P. 503, is in the respondent's favour. In that case a man had been performing at a concert at a publican's house. After closing time, and before leaving, he purchased a bottle of whiskey for consumption during the journey home. The court held that no offence had been committed. [WRIGHT, J.—The point was not taken there that even a *bonâ fide* traveller cannot purchase liquor for consumption off the premises.] The point must have been present to the minds of the judges. A. L. Smith, L.J., said: "I think Colwill was a traveller all the time until he returned home, and therefore there was no evidence of any offence in the appellant selling the liquor to Colwill." As to the second point, the words "in the course of any proceedings" in the third paragraph of section 10 cover this case, and therefore the respondent is protected by the finding of the justices that the respondent truly believed the men to be *bonâ fide* travellers.

Danckwerts, in reply.—The proviso in section 10 as to honest belief on the part of the defendant was introduced into the Act of 1874 because of the decision in *Roberts* v. *Humphreys*, 21 W. R. 885, L. R. 8 Q. B. 483, that the onus of showing that the person supplied with drink was a *bonâ fide* traveller lay on the defendant. The honest belief of the defendant is no defence in the circumstances of this case.

WRIGHT, J.—On the main question of the construction of section 10—that is to say, whether it extends to the sale of liquor to be consumed off the premises—I am clearly of opinion that the appellant's contention must prevail. If it were permissible to sell liquor to *bonâ fide* travellers for consumption off the premises, it would be impossible for anyone to see that the liquor was consumed by *bonâ fide* travellers only. I think that the words "such liquor" refer to the previous words, "liquor to be consumed on the premises." It was argued that they referred only to "intoxicating liquor." I do not think so; and it is important to observe that the words "such liquor" do not occur in any other place in the Act. I think, therefore, that the respondent ought to have been convicted, unless he is protected by the third paragraph of section 10. That paragraph, no doubt, does at first sight look as if it was intended to protect a defendant under all circumstances; but notwithstanding the generality of the language used, I do not think that that can have been the intention. In my opinion that part of the section does not apply to a case such as this, where the defendant cannot show that the sale to the traveller was (apart from the question whether the customer was a *bonâ fide* traveller) a sale permissible under the Act.

I think that the respondent ought to have been convicted, and the case must be remitted to the justices.

BRUCE, J.—I am of the same opinion. It was never intended that a *bonâ fide* traveller should resort to licensed premises during prohibited hours for the purpose of laying in a store of liquor to be consumed at some future time. There is some difficulty in construing the words of section 10, but I think those words must receive a limited construction. Any other construction would result in giving greater privileges in the case of persons who were not *bonâ fide* travellers than where they were such travellers. That can never have been the intention of the Legislature.

Appeal allowed. Case remitted to justices to convict.

Solicitors for the appellant, *Wontner & Sons.*

Solicitor for the respondent, *A. M. Forbes.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), and Q. B. Div. — Jan. 22; Feb. 22.

LAMOND v. RICHARD AND THE GORDON HOTELS (LIMITED). (a.)

Innkeeper—Duty to provide accommodation—Traveller—Right to remain in inn.

A common innkeeper is under no legal obligation to receive into his inn a person who is not a traveller, or to permit to remain in his inn, after reasonable notice to quit, a person who, though he came to the inn as a traveller, has ceased to be a traveller.

Appeal of the plaintiff from the Brighton County Court.

The action was brought against the manager and proprietors of the Hôtel Métropole, at Brighton, to recover damages for the illegal expulsion of the plaintiff from the hotel. The plaintiff, who was a young lady of position and good character, went to the hotel in November, 1895, and remained there continuously until the 31st of August, 1896, on which day the defendants refused to re-admit her on her return from a walk. It was admitted by the defendants that there was sufficient accommodation for the plaintiff in the hotel on the day in question, and that she had always paid her bill during her stay.

The county court judge found as a fact that there was nothing in the conduct of the plaintiff to justify the defendants in refusing to supply her with accommodation in the hotel, but he held that she had long ceased to be a traveller or wayfarer, and that the defendants were under no legal obligation to permit her to remain in the hotel after reasonable notice to quit, which he found as a fact had been given. The judge gave judgment for the defendants.

The plaintiff appealed.

Carson, Q.C. (*P. Rose-Innes* with him).—The

(a.) Reported by F. O. ROBINSON and W. F. BARRY, Esqs., Barristers-at-Law.

county court judge was wrong in holding that the common law obligation of an innkeeper to afford accommodation only exists in the case of persons who are "travellers or wayfarers." When once a person has been received into an inn as a guest, he is entitled to remain as long as he likes, provided he behaves properly. If the defendants' contention is right, then at some period the innkeeper must lose his common law privileges, such as lien, which are correlative to the obligation to provide accommodation for guests. But, in *Allen* v. *Smith*, 10 W. R. 646, 12 C. B. N. S. 638, it was held that an innkeeper had a lien upon the goods of a guest who was not a traveller. In *Gordon* v. *Silber*, 39 W. R. 111, 25 Q. B. D. 491, Lopes, L.J., said: "By the common law of England every person who keeps a common inn is under an obligation to receive and afford proper entertainment to everyone who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him." In Bacon's Abridgement, Tit. Inns and Innkeepers, c. 5, it is stated that "if A. comes with goods to an inn in London and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns*, according to the writ in the register." That clearly shows that the innkeeper is still liable for stolen goods, although the guest has ceased to be *transeuns*. There is no case in which an innkeeper has asserted a right to turn out a guest without excuse, or in which the position of guest has become that of boarder without a special contract.

He also referred to *Turrill* v. *Crawley*, 13 Q. B. 197; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11, 39 W. R. Dig. 94. [WRIGHT, J., referred to *Reg.* v. *Rymer*, 25 W. R. 415, 2 Q. B. D. 136.]

Asquith, Q.C. (*S. H. Day* with him).—This is an entirely novel claim, for which there is no foundation in any decided case or in any *dictum* in the cases. The policy of the common law was that a traveller, making his way from one place to another and finding an innkeeper holding out an offer of refreshment and accommodation, was entitled to keep the innkeeper to his offer; but the authorities show, beyond all doubt, that the innkeeper was only bound to provide accommodation for persons who were actually travellers. In Bacon's Abridgement, Tit. Inns and Innkeepers, c. 1, the duty of an innkeeper is said to extend chiefly "to the entertaining and harbouring of travellers." In *Rex* v. *Luellin*, 12 Mod. 445, an indictment against an innkeeper for refusing to receive a sick person was quashed for not saying he was a traveller. Again, in *Holder* v. *Soulby*, 8 C. B. N. S. 254, at p. 264, Erle, C.J., quoting *Calye's case*, 8 Co. Rep. 32, 1 Sm. L. C., 10th ed., p. 115, says that the liability for the safe keeping of the property of a guest is restricted entirely to the case of an innkeeper keeping a common inn, and the wayfaring traveller using the inn as a wayfarer.

WRIGHT, J.—This case is quite free from doubt. The report of the case of *Rex* v. *Luellin*, which was a decision by Lord Holt, is in these words: "The defendant was master of the Bell Inn, in Bristol. He was indicted for not receiving one taken ill with the small-pox, and it was quashed for not saying he was a traveller." That case was cited in *Reg.* v. *Rymer*, which was a case of an indictment against an innkeeper for refusing to supply refreshment. Kelly, C.B., there said: "The second question is whether the prosecutor is a traveller. I need hardly cite authorities to show that it is essential to such a prosecution that the prosecutor should be a traveller. If any be wanted the case of *Rex* v. *Luellin*, in which an indictment was held bad for want of an allegation to that effect, is an express authority upon the point." In the same case Denman, J., said: "The principles laid down in *Burgess* v. *Clements*, 4 M. & S. 306, show that the object of the law upon the subject of an innkeeper's liability is merely to secure that travellers shall not, while upon their journeys, be deprived of necessary food and lodging." That is obviously the principle upon which the law depends; but the obligation on the innkeeper to receive and keep the guest only continues so long as the guest is a traveller. The alternative position is that the innkeeper is under liability to keep the guest in his house for life. No doubt, so long as the guest does remain in the inn, although he may cease to be a traveller, nevertheless the incident of the innkeeper's lien still exists. But the duty to take a person into an inn only exists in case of persons who are travellers.

BRUCE, J.—I am of the same opinion. The authorities clearly show that the obligation only attaches when the person demanding to be received into an inn is a traveller. In Bullen and Leake's Precedents of Pleading (3rd ed.) the form of a count in an action against an innkeeper for refusing to lodge the plaintiff is as follows: "That the defendant was an innkeeper and kept a common inn for the accommodation of travellers, and the plaintiff then being a traveller . . . yet the defendant did not nor would receive and lodge the plaintiff as a guest in the said inn, &c." Reliance was placed in the argument for the plaintiff, on a *dictum* of Lopes, L.J., in *Gordon* v. *Silber*. That *dictum*, however, was not necessary to the case then under consideration, and I do not think that Lopes, L.J., intended to lay down that the law is in accordance with the view as contended for by the plaintiff.

The plaintiff appealed.

Carson Q.C., and *P. Rose-Innes*, for the plaintiff.

Asquith, Q.C., and *S. H. Day*, for the defendants.

Lord ESHER, M.R.—In this case the plaintiff, a young lady, arrived at the defendant's hotel at Brighton, and it is clear that she went there for the purpose of making a considerable stay, and not merely in the course of travelling. She was received into the hotel and provided with accommodation, and stayed there about ten months. The hotel proprietors then gave her notice to quit, but she refused to leave, saying that she would stay there until the hotel was burnt down—that is, as long as she chose. The defendants then, taking the opportunity of her going out for a walk, refused to receive her back again and gave her her luggage. She then brought this action. The action was tried before a county court judge without a jury, and he came to the conclusion that the hotel was an hotel which carried on its business according to the custom of England—that is, that it held itself out as willing to receive any traveller who came. He also came to the conclusion that the plaintiff was received into the hotel as a traveller, but that she had stayed so long at the hotel that she had ceased to be a traveller, and that the defendants were entitled to give her reasonable notice to quit. Now, the findings of the county court judge, in so far as they are findings upon questions of fact, cannot be reviewed upon appeal. His first finding is that the defendants' hotel held itself out to the public as one which would take in any traveller. That seems to me to be a question of fact to be decided upon a consideration of the nature of the hotel, and the intention with which it carries on its business. The county court judge has found in this case that this hotel is such as I have described, but it does not follow from that finding that other great hotels, like those we see in London, are hotels which hold themselves out as

ready and willing to receive any traveller, and I cannot help thinking that it will be open to the courts in any future case to hold that such great hotels do not so hold themselves out; but in this case we must take it that this hotel did so hold itself out.

Then comes the next question, Did the plaintiff go there as a traveller? That, I also think, must be a question of fact in each case. We must take it that she did go there as a traveller. The point was not taken at the trial that she made a contract with the defendants as to her stay there, but the action was tried upon the footing that she arrived at the hotel as a traveller, the hotel holding itself out as willing to receive travellers. Then comes this question, is it true as a matter of law that a person who goes to an hotel as a traveller remains there a traveller for ever? If that were the law, it would be contrary to the truth. A person who goes to an hotel for the purpose of staying there and not intending to continue his travels would not be called in ordinary language a traveller. I will be no party to making the law say that which is contrary to the fact. Here, again, it seems to me to be a question of fact whether a person has ceased to be a traveller. Mere length of stay is not conclusive. A person may go to an inn upon a journey, and may become ill, and his remaining there during his illness, however long, will not prevent him being a traveller, as he intends all the time to continue his travels. But length of stay is one of the circumstances to be taken into consideration. If a person stays at an hotel for a time wholly inconsistent with his being a traveller, the judge may act upon that. In the present case the plaintiff said that she was going to stay until the hotel was burnt down. She meant by that that she intended to stay as long as she chose. Therefore it seems to me that there was evidence upon which the county court judge could properly find that the plaintiff had ceased to be a traveller. If that is, as I think it is, a a question of fact, no appeal lies. But I desire to say that, in my opinion, the evidence proved clearly that the plaintiff had ceased to be a traveller. She had no intention of continuing her travels. Therefore the custom of England did not apply, and the relationship founded upon that custom had ceased.

It was contended, as an objection to this view, that if that were so, the rights of the defendants as to lien had also come to an end. For my part I should say that the rights of the innkeeper as against the plaintiff had also ceased quite as much as the rights of the plaintiff against the innkeeper.

Then, as regards the suggested implied contract—namely, that the defendants had contracted to keep the plaintiff as long as she chose to stay, while she, on her part, was under no obligation to stay an hour longer than she chose—such an absurd contract cannot be implied. It never could have been in the contemplation of the parties at the time when the plaintiff went to the hotel.

For these reasons the judgment must be affirmed.

LOPES, L.J.—The law of England has conferred exceptional privileges and exceptional liabilities upon innkeepers, but only in relation to persons who are in the transitory position of travellers. In the old writ, which is set out in *Calye's case*, the words are "*ad hospitandos homines, per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes*"; and in Bullen and Leake's Pleadings there is always an averment that the plaintiff came to the inn as a traveller. The plaintiff here resided at the hotel for ten months. She had no idea of leaving it, and she intended to remain there as long as she pleased. A reasonable notice to leave was given to her, and one day, after the expiration of the notice, when she left the hotel for a short time she was refused re-admittance. In these circumstances the county court judge came to the conclusion that this hotel was a common inn, that there was room for the plaintiff in the hotel, and that she had not in any way misconducted herself. That raises the question whether the plaintiff was a traveller at that time, or whether she had ceased to be a traveller. That, I think, is a question of fact, and the finding of the county court judge upon it is conclusive. But I do not desire to decide the case upon that technical ground, but upon the larger ground that the judge was quite right in coming to the conclusion that after having resided for ten months in the hotel she ceased to be a traveller, and that the defendants were entitled to give her reasonable notice to quit.

CHITTY, L.J.—The claim of the plaintiff is founded entirely upon the liability imposed upon innkeepers by the common law of England and not upon any implied contract. The county court judge has found that the hotel was a common inn. The defendants have not appealed from that finding, and we are not called upon to say whether it is right or wrong. The judge then considered the question whether the plaintiff had, after a stay of ten months at the hotel, ceased to be a traveller or wayfarer, in which character she had originally arrived at the hotel, and become a boarder, and he came to the conclusion that she had. If that is a question of fact, there is no more to be said about it. The appellant's counsel tried to treat it as a question of law, and the proposition they advanced came to this, that a person who comes to an inn as a traveller and stays there remains there always as a traveller. There is plenty of authority upon the relation of innkeeper and guest, but not one authority can be cited for such a proposition. It seems to me to be a question of fact when a person ceases to be a traveller and becomes a boarder. Upon the facts in this case I think that the judge was justified in coming to the conclusion that the plaintiff had ceased to be a traveller and had become a boarder. The length of time she stayed at the hotel was a fact for the judge to consider in deciding the question. The argument put forward was that the plaintiff could remain at the hotel as long as she pleased, provided she paid her bill and conducted herself properly, and could leave at any moment she pleased, the landlord on his part being bound to keep her as long as she chose to stay. Such a contention cannot be supported. With reference to the suggested implied contract, I can only say that the action was not founded upon an implied contract, and that, even if it were, to imply such a contract would be monstrous.

Appeal dismissed.

Solicitor for the plaintiff, *N. C. Campbell.*

Solicitors for the defendants, *Stanley, Woodhouse, & Hedderwick.*

From Q. B. Div. (Lord Esher, M.R., and Lopes, L.J.) — Jan. 11.

PALLISER v. DALE AND OTHERS. (a.)

Friendly society—Dispute—Expulsion of member—Jurisdiction of court—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60), *s.* 22—*Friendly Societies Act*, 1895 (58 & 59 *Vict. c.* 26), *s.* 10, *sub-section* 1.

Section 10, *sub-section* 1, *of the Friendly Societies*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Act, 1895—*which enacts that section* 22 *of the Friendly Societies Act*, 1875, *providing for the settlement of disputes between a member and the society in the manner directed by the rules of the society, shall apply to every dispute between any person aggrieved, who has for not more than six months ceased to be a member of a society, and the society—does not alter the nature of the dispute, but merely extends the time for settling disputes which come within section* 22 *of the Act of* 1875. *The dispute must still be one between the society and a member as a member.*

Therefore a dispute whether the society is entitled to treat a person as no longer a member of the society is not a dispute to be settled according to the rules of the society, and the court has jurisdiction to entertain such dispute.

Appeal from an order of Lawrance, J., at chambers refusing an injunction until the trial of the action to restrain the defendants, the trustees of the Northallerton Providential Sick Society, a society registered under the Friendly Societies Acts, from excluding the plaintiff from the meetings and benefits of the society, and from refusing to accept his subscriptions.

The plaintiff was a member of the society, and on the 1st of May, 1896, at a meeting of the management committee he was fined, under rule 25 of the rules of the society, £1 1s. for having, as alleged, said that he had not received the funeral donation due from the society on the death of his wife. The plaintiff denied that he had made any such statement, and refused to pay the fine.

On the 17th of August the secretary of the society sent the plaintiff a notice that the fine of £1 1s. was due last meeting night, the 1st of August, and that if not paid he would subject himself to suspension from all benefits and privileges of the society, as per rules 5 and 26.*

The plaintiff not having paid the fine the society refused to accept his contributions.

Upon the 3rd of November the plaintiff brought an action for an injunction, and applied for an *interim* injunction as above. Lawrance, J., refused to grant it, on the ground that under section 10 of the Friendly Societies Act, 1895, the dispute had to be decided in the manner directed by the rules of the society, and that therefore he had no jurisdiction in the matter.

Section 22 of the Friendly Societies Act, 1875: "Every dispute between a member or person claiming through a member, or under the rules of a registered society, and the society or an officer thereof . . . shall be decided in manner directed by the rules of the society . . ."

Section 10, sub-section 1, of the Friendly Societies Act, 1895: "Section 22 of the principal Act, which relates to the settlement of disputes, shall apply to every dispute between any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such person aggrieved, and the society or an officer thereof, and accordingly in that section after the words 'registered society,' where they first occur, shall be added the words 'or any person aggrieved who has for not more than six months ceased to be a member of a registered society, or any person claiming through such person aggrieved."

These sections have been repealed and re-enacted in section 68 of the Friendly Societies Act, 1896.

Scott Fox, for the plaintiff.—The learned judge had jurisdiction to entertain this application. In *Prentice* v. *London*, L. R. 10 C. P. 679, 24 W. R. Dig. 8, it was held that section 22 of the Friendly Societies Act, 1875, does not apply to a dispute as to whether a party is a member of the society or not. To bring the case within the section the dispute must be one arising between the society and a member as a member: *Morrison* v. *Glover*, 4 Ex. 430. In *Willis* v. *Wells*, 41 W. R. 64, [1892] 2 Q. B. 225, it was held that the section does not apply to a dispute as to whether a person who has been expelled from the society is entitled to be reinstated. The present case exactly comes within those decisions. The learned judge thought that section 10 of the Friendly Societies Act, 1895, had altered the law and brought such a dispute within section 22 of the earlier Act. That section, however, does not alter the nature of the dispute to be referred; it merely enlarges the time for settling disputes which come within the earlier Act. Therefore the judge had jurisdiction to entertain this application. Upon the merits it was clear that the society had no power under rule 25 to impose a fine for what the plaintiff was alleged to have done here, and no power to expel him for non-payment of that fine. The present application will decide the action, as all the facts are before the court.

Manisty, for the defendants.—Section 10 of the Act of 1895 was passed to meet the decisions in *Prentice* v. *London* and *Willis* v. *Wells*, and to compel a dispute between a person who has been expelled from the society and the society as to whether he is entitled to be a member to be referred to arbitration within six months after he has ceased to be a member. The limit of time is inserted because the reference is generally to the whole body of the society, and it is desirable to have the dispute determined by those who were members when the dispute arose. The plaintiff comes within the description of persons mentioned in section 22 of the Act of 1875, as amended by section 10 of the Act of 1895. The "dispute" also comes within that section, because it is a dispute whether the plaintiff has committed an "offence" against the society within rule 25, and that is a dispute which must be settled according to the rules of the society. The statement of the plaintiff was injurious to the credit and reputation of the society, and it is for the society, and not the courts, to decide whether that is an offence within the rule. The jurisdiction of the courts was therefore ousted. It is not denied that all the facts are now before the court.

Lord ESHER, M.R.—The plaintiff, who had been a member of the society for a great many years, was fined by the committee, who purported to act under rule 25, one guinea for having, as they alleged, made certain untrue statements about the society. The plaintiff denied that he had ever made any such statements, and refused to pay the fine. They then, in effect, expelled him from the society. The plaintiff

* By rule 5 of the society's rules "any member allowing his contributions, levies, or fines to exceed twelve weeks shall have a notice sent to him by the secretary stating how much he is in arrears, and, if he does not bring himself into compliance on the following meeting of the society, he shall cease to have any claim upon the society." By rule 25 "any member of this society breaking a rule thereof, or committing any offence to which no specific fine is attached, shall be fined not less than 2s. 6d. and not exceeding the sum of £1 1s., as the majority of the management committee may think fit." By rule 27, "if any dispute shall arise between a member or person claiming through a member or under the rules of the society and the society or any officer thereof, it shall be referred to a summoned meeting of the society," to which every member of the society should be summoned.

thereupon brought this action and applied for an injunction to restrain the society from excluding him from the benefits of the society and from refusing to accept his subscriptions. The learned judge at chambers held that the dispute was one which must be settled according to the rules of the society, and refused the injunction on that ground.

Before the Friendly Societies Act, 1895, it was held that a dispute between a person and the society as to whether he was or was not a member of the society, as in *Prentice* v. *London*, or whether the society had a right to expel him, as in *Willis* v. *Wells*, was not such a dispute as had to be settled according to the rules of the society under section 22 of the Friendly Societies Act, 1875. I agree with those decisions, and with the reasons given for them. A dispute whether a person is still a member of the society or not is not a dispute between a member and the society, and therefore it cannot be settled according to the rules of the society. Those decisions come to this, that if the society assumes to expel a member, it cannot afterwards say that he is a member and bound by the rules. They are estopped from saying that. Has that law been altered by the Friendly Societies Act, 1895? It is contended that section 10 has altered the law. The "dispute" there mentioned must be one between a member and the society, and not one between the society and anybody else. The section is dealing with a dispute which comes within section 22 of the earlier Act, and merely extends the time for deciding that dispute to six months from the time when the person ceased to be a member. The words of the earlier section are not altered; certain words are merely added to it by the later section. Section 10 does not alter the class of disputes to be settled according to the rules of the society. Therefore the dispute must still be one which, under the earlier Act, must be settled as directed by the rules of the society. Upon that ground the plaintiff cannot be shut out from his right to have the dispute adjudicated upon by the court. The learned judge had jurisdiction, therefore, to entertain this application.

That being so, we must now consider, as the learned judge ought to have done, what the dispute was. The dispute was whether the committee had a right to expel him. Now, even if they had a right to fine him, it does not follow that they had the right to expel him. Rule 25 is vouched to show that they had a right to fine him. The word "offence" in that rule must mean an offence against the society. It must be a breach of some rule of the society. What offence has the plaintiff committed here? To my mind none at all. Therefore the society had no jurisdiction to impose a fine upon him according to the true construction of the rule. But, assuming that a fine could have been imposed, its non-payment did not give the society a right to expel him at their own will. By expelling him the plaintiff acquired a right to raise the question in the courts whether the society had a right to expel him.

Therefore, upon the whole case, I come to the conclusion that Lawrance, J., had jurisdiction to entertain this application, and he could only properly come to the conclusion that the society had no right to expel the plaintiff, and must now receive his subscriptions.

The injunction, therefore, must issue.

LOPES, L.J.—I am of the same opinion. I think that the learned judge had jurisdiction to grant this injunction. The object of section 22 of the Friendly Societies Act, 1875, is to provide for the settlement of internal disputes between the society or its officers and the members. If the controversy is whether a party is a member of the society or not, that is not a matter of internal arrangement. There is plenty of authority in support of that proposition. In *Prentice* v. *London* it was held that as the trustees of the society denied the right of the plaintiff to be a member of the society they were estopped from saying that the dispute was between them and him as a member. In 1892 the question again came before the court in *Willis* v. *Wells*, where it was held that section 22 of the Act of 1875 did not include a dispute as to whether a person who has been expelled from the society was entitled to be considered as a member or not. Those cases show that the court has jurisdiction in cases like this. It is said that section 10 of the Friendly Societies Act, 1895, has altered that, and that, where a member is expelled, the period of membership is extended for six months so as to bring the dispute within section 22 of the Act of 1875. I cannot adopt that view. I do not think that the Legislature intended to make that a "dispute" within section 22 which was not a dispute before the Act of 1895. In my opinion the sections do not include the case of the expulsion of a member, and do not interfere with the law laid down as to estoppel. If the argument above stated were correct, the only effect would be that the present action has been brought too soon, and that the plaintiff ought to have waited some little time longer before bringing it. In my opinion section 10 of the Act of 1895 has not affected the previous decisions. So much for the question of jurisdiction.

Upon the merits, in my opinion, the learned judge ought to have granted the injunction. Looking at rule 25 I cannot think that any offence at all has been committed. All that can be alleged against the plaintiff is that he told a lie. That cannot come within the rule. I do not think that the committee had any power to fine him for that, and even if they had that power, they had no power under the rules to expel him for non-payment of that fine. The injunction must therefore be granted.

Appeal allowed.

Solicitors for the plaintiff, *Williamson, Hill, & Co.*, for *Fowle & Horsfall*, Northallerton.

Solicitors for the defendant, *Field, Roscoe, & Co.*

From Prob. Div. and Adm. Div. (Lord Russell of Killowen, C.J., and Lindley and A. L. Smith, L.JJ.) — Dec. 1, 2.

ATKINSON v. MORRIS. (*a.*)

Probate—Will—Revocation—Evidence—Admissibility—Statements of testatrix after date of will.

Under the Wills Act the same formalities are necessary to prove the revocation of a will as to prove the execution of a will.

If a will has been executed in duplicate conformably with the statute, and the possession of the duplicate has been traced to the testator, and after his death it is proved that one of them has been destroyed by the testator or is missing, the destruction of the one part will operate as the destruction of the will itself; but the statement of a testator, made after the execution of his will, that he has executed it in duplicate and has destroyed one of the duplicates is not admissible evidence.

Decision of Barnes, J., *affirmed.*

Sugden v. Lord St. Leonards, 24 *W. R.* 860, 1 *P. D.* 154; Doe d. Shallcross v. Palmer, 16 *Q. B.* 747; *and*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

In the Goods of Ripley, 6 *W. R.* 460, 1 *Sw. & Tr.* 68, *applied and followed.*

Appeal by the defendant J. C. Morris to set aside the verdict of the jury at the trial of the action and the judgment of Barnes, J., pronouncing in favour of the will of the testatrix, Mrs. Ann Keble Atkinson, dated the 8th of August, 1878.

By her will the testatrix gave her residuary estate to a nephew of her deceased husband, Chas. Thomas Atkinson, and appointed him and his mother, Mrs. Emma Atkinson, executor and executrix of it. They were the plaintiffs in the action, and propounded the will. The defendants, the next-of-kin of the testatrix, alleged that the will had been revoked, and tendered evidence to the effect that the testatrix had told a friend, Mrs. Lockyer, that she had executed her will in duplicate and had destroyed one copy with the intention of revoking the will. The learned judge at the trial ruled that the evidence was inadmissible. The will, which was admitted to probate, showed that the testatrix had run her pen through her own signature and partly through that of one of the attesting witnesses and had added this note: "Null and void. A. K. A. Through injustice on the part of Mrs. Emma Atkinson and family from time to time."

The defendants appealed on the ground that the learned judge had misdirected the jury and had improperly rejected evidence which was tendered to him.

Bayford, Q.C., and *Barnard*, for the appellants, cited *Barry* v. *Butlin*, 1 Curt. 637, and *Tyrrell* v. *Painton*, 42 W. R. 343, [1894] P. 151, on the question of misdirection. On the rejection of evidence they cited *Doe d. Shallcross* v. *Palmer*, 16 Q. B. 747; *Staines* v. *Stewart*, 2 Sw. & Tr. 320, 10 W. R. P. Dig. 11; *Quick* v. *Quick*, 12 W. R. 1119, 3 Sw. & Tr. 442; *Sugden* v. *Lord St. Leonards*, 24 W. R. 860, 1 P. D. 154; *In the Goods of Ripley*, 6 W. R. 460, 1 Sw. & Tr. 68; *Keen* v. *Keen*, L. R. 3 P. & D. 105, 22 W. R. Dig. 280; *Johnson* v. *Lyford*, 16 W. R. 1130, L. R. 1 P. & D. 546; *Gould* v. *Lakes*, 29 W. R. 155, 6 P. D. 1; *Killican* v. *Parker*, 1 Lee 662; *The Aylesford Peerage*, 11 App. Cas. 1, 34 W. R. Dig. 74; *Sly* v. *Sly and Dredge*, 25 W. R. 463, 2 P. D. 91; *Colvin* v. *Fraser*, 2 Hag. Ec. 266; and Williams on Executors.

Inderwick, Q.C., and *L. D. Powles*, for the respondents, said that the present point had never actually been decided.

They cited *Woodward* v. *Goulstone*, 35 W. R. 337, 11 App. Cas. 469; *Stobart* v. *Dryden*, 1 M. & W. 615.

Bayford, Q.C., replied.

Lord RUSSELL OF KILLOWEN, C.J.—Nothing can be clearer than the indication which the testatrix gave of her intention to end her testamentary disposition. And certainly the court will be most anxious, so far as it can consistently with the law, to give effect to her clearly-expressed intention.

The question is whether we can do so in point of law. The first point on the appeal is that of misdirection. [On that point his lordship said that, although he would have preferred rather more emphatic language and more explanation in the summing up, he could not come to the conclusion that there had been any misdirection, and continued:]

I repeat again that no one can doubt that she intended to revoke her will, and the court ought to be astute to give effect to that wish, if it can do so consistently with the established principles of law. The Statute of Wills has said two things. It has laid down formalities to be observed in order to make an effective, formal, operative will, and if these are not complied with, the law steps in, and however clear the intention of the testator may be, if it is not expressed according to the statute, the law says it is void, and the estate must be distributed as in the case of an intestacy, and his intention disregarded. The statute also prescribes the same formalities for the revocation of a will. If it is done by writing, it must be with the same formalities as are required for the execution of a will—*i.e.*, it must be attested by two witnesses. It is clear in this case that, although it is clearly expressed and in writing, it is not expressed in conformity with the statute, and therefore that this intention of the testatrix, which would have been perfectly good if it had been properly signed and attested, cannot be relied upon as evidence of revocation. But it is said that revocation may be worked in other ways. Under the statute it may be effected by actual physical destruction of the document forming the will with the intention of revoking it, and it has been decided, and indeed it is common ground in this case, that if a will has been executed in duplicate conformably with the statute, and the possession of the duplicates has been traced to the testator, and after his death it is found that one of them has been destroyed by the testator, or is missing, the destruction of one part will operate as the destruction of the will itself. And pausing there—because on that the appellants contend that this will was in effect executed in duplicate, that both duplicates were in the possession of the testatrix, that one of them is missing, and therefore presumably destroyed, and that the other is here with an indication on the face of it of the intention of the testatrix to revoke it—were the defendants in a position to support that contention by legally admissible evidence? On the evidence as it stood at the trial, independently of that which the judge below rejected, it is impossible to say there was any case to go to the jury to show that the will was executed in duplicate. It was not suggested that as matters then stood the jury could come to any other conclusion than that they did arrive at.

But it is said that the defendants were prevented from proving their case on that point, because the learned judge ruled that the evidence they proposed to offer was not admissible. That evidence was this: There was living in the house of the testatrix one Edith Lockyer, and her evidence, which counsel proposed to adduce was, briefly, that the testatrix had told her that she had executed her will in duplicate, that she had spoken of the artfulness of the Atkinsons, and especially of C. T. Atkinson, in looking after themselves, and that they thought they had done a clever thing in getting hold of one of the duplicates; that she had got it back and destroyed the will; that later on Lockyer found the document now propounded in a drawer, and the testatrix then said, "That must be C. T. Atkinson's copy, because I have destroyed the will." In other words, it is sought to prove by the statements of the testatrix that she had executed the will in duplicate, which, if established, would entitle the defendants to contend that one part being destroyed and the *animus revocandi* being clear, the will was destroyed. Therefore the point is whether the statement of the testatrix made after the execution of her will, that she had executed it in duplicate, is evidence which ought to be admitted at law. I have come to the conclusion that it cannot.

It must be observed that the rules of evidence in this country are much less wide and liberal than those in other countries, and they shut out large branches of evidence which are of great force. We have to deal with settled rules, and we cannot disturb them. The evidence offered by the defendants is hearsay

evidence, the evidence of a statement *ex post facto* of the testatrix herself. As a general rule hearsay evidence cannot be admitted, but there are some well-marked exceptions, such as declarations made against interest, statements made or recorded in the course of business by the person whose duty it is to make such statements and declarations in pedigree cases, and now we have a series of cases relating to statements mainly received upon the ground that they are evidence to make clear the intention of a testator, statements made before the execution of a will as to what the will was intended to contain. I always thought they were clearly-defined rules. The case of *Sugden* v. *Lord St. Leonards* goes further, and extends the exceptions to the admissibility to statements made by a testator after the execution of the will as to the nature of its contents. I will only say in relation to that case that we are bound by the decision on that point, but it is to be observed that that extension, the limit of which was clearly fixed, has not received the approval of distinguished lawyers in the House of Lords in *Woodward* v. *Goulstone*, though it has not yet been overruled. But it is not necessary for us to consider that, because taking it at the full extent it falls short of what the defendants must establish here. There is no case which goes the length of saying that the statement of a testator that he has made a will is taken to be evidence of the regular execution of the will according to the Wills Act. I regard as authorities by which we are bound, and with which I agree, the cases of *Doe d. Palmer* and *In the Goods of Ripley*. Both of those cases were referred to in *Sugden* v. *Lord St. Leonards* with approbation. They do establish the rule that statements by a testator are not admissible to prove the execution by him of a will, and there is no authority in favour of admitting them. If they are not admissible for that purpose, is there any distinction between admitting them to prove execution, and admitting them to prove revocation of a will? I see none. The statute enjoins the same formalities in each case.

I am sorry we cannot give effect to the clear intention of the testatrix. We cannot interfere, and I regret it, and I also regret that the learned judge should have given costs against the defendants. The appeal must be dismissed without costs.

LINDLEY, L.J.—I am of the same opinion. On the question of misdirection I do not think it necessary to say anything. The summing-up might have been expressed differently, but there was no misdirection. The case really turns upon the admissibility or inadmissibility of the evidence tendered by the defendants. Their case was this. They wanted to prove that this will was executed in duplicate and that the testatrix had destroyed one of the duplicate parts of the will with the intention of revoking it. That, if proved, would have been an answer to this case; but what evidence is there in support of it? Nothing except evidence of statements made by the testatrix to the effect that she had made a duplicate will and destroyed it. I cannot see that a declaration made by her that she had made a duplicate will can be distinguished in principle from a declaration that she had made one will. It was argued that two duplicates made one will and that the declaration might be admitted. But a duplicate must be signed in accordance with the Act, and it is not merely a piece of paper. It would be the execution by the testatrix of a valid testamentary document. To hold the evidence admissible on that ground would be very unsatisfactory and subtle. It is simply a question whether the declaration of the testatrix that she has made a will can be received in evidence. We have on that point *In the Goods of Ripley*, excluding such evidence, and that was distinctly approved by the judges in *Sugden* v. *Lord St. Leonards*, in which the court held that statements made by the testator subsequently to the execution of a will might be admitted to prove its contents. Can we bring the declaration, which has been rejected in the present case, within any of the recognized exceptions to the rule which rejects hearsay evidence? We cannot do it; the exceptions are well known and are enumerated by Jessel, M.R., in *Sugden* v. *Lord St. Leonards*. Reliance was placed on the principle upon which the exceptions are based as it was expounded by Jessel, M.R., in *Sugden* v. *Lord St. Leonards*; but the principle as so expounded would let in a great deal more evidence than is ever admitted. That was pointed out by Mellish, L.J., in that case, and by Lord Herschell in *Woodward* v. *Goulstone*. We are asked to say that although declarations of this kind cannot be used to prove execution of a will, they can be used to show that it was executed in duplicate and revoked. I cannot hold that this is evidence which ought to be admitted. If the rules of evidence are too narrow that is a matter we cannot alter. It is obvious that the testatrix intended to revoke her will and did everything she could except that which the law has said she must do to revoke it.

A. L. SMITH, L.J.—I agree. I own that I have struggled to prevent having to hold that this will is the real will and intention of the testatrix when she died. I have no doubt that it is not. It certainly is, therefore, necessary to look astutely to see if we cannot get out of so holding. The true reason why her intention cannot be carried out is not caused by any failure in the administration of the law by the court, but by the regulations introduced by the Legislature in the 20th section of the Wills Act, which lays down hard and fast rules as to the way in which wills are to be revoked. The testatrix did not know of this, and she did what she thought was effectual to revoke her will. She struck out her own signature in ink, and the signature of one of the witnesses, and she gave her reasons for cancelling her will. So as regards her intention there can be no possible doubt that she intended to cancel it. But she did not carry out the rules of the statute, therefore she has not revoked her will according to law. I am not going into the question whether she knew and approved of the contents of the will in the first place. I agree that there was no misdirection on that point.

On the chief question argued before the court I find myself bound by authority. The will was not revoked in accordance with the Wills Act; but if it could have been shown that she had executed a duplicate when she made her will, and that that duplicate had been destroyed that circumstance would have operated as a revocation of the will. The difficulty is this, that the defendants in setting up the duplicate could not prove that the will was executed in duplicate except by the evidence of Edith Lockyer, who could have said that after the will had been executed the testatrix had told her that it had been executed in duplicate, and that one part had been destroyed by her with the intention of revoking it. It was objected that that is not admissible evidence because you cannot prove the fact of the execution of a will in accordance with the Act by hearsay evidence. I am clearly of opinion that that objection is well-founded. I am not going into the question whether the court must hold since the decision in *Sugden* v. *Lord St. Leonards* that a statement made by a testator after the execution of his will is admissible to prove what were the contents of the will, but there is a series of authorities beginning with *Doe. d. Shallcross* v. *Palmer* in which it was laid down that such state-

ments are inadmissible to prove the fact of execution, followed by *In the Goods of Ripley*, and these were approved in *Sugden* v. *Lord St. Leonards* by Cockburn, C.J. In the face of that sequence of authority it is not possible to say that the fact of the execution of a will can be proved by hearsay evidence. It would not be evidence at all, therefore there has been no rejection of evidence in this case.

Appeal dismissed.

Solicitors, *C. T. Wilkinson*, for *Timbrell & Wilkinson*, Stratford, E.; *A. Hunt*, for *Brown & Rooke*, West Ham

High Court of Justice.

Chan. Div. North, J. — Dec. 5.

SIMMONS v. BLANDY. (a.)

Mortgage—Foreclosure—Receiver—Form of order.

The form of order in a foreclosure action where a receiver has been appointed should charge the mortgagees with all the rents and profits in the hands of the receiver at the date of the chief clerk's certificate, and also "with such a sum, if any, as they submit to be charged with," in respect of rents and profits coming to the receiver's hands between the dates of the certificate and foreclosure absolute.

Motion for judgment in default of appearance in a foreclosure action.

By indentures dated the 1st of March, 1893, and the 19th of May, 1896, certain leasehold premises and a baker's business were mortgaged to the plaintiffs.

The writ was issued on the 14th of October, 1896, and on the 16th of November, 1896, an order was made appointing a receiver.

Tanner, for the plaintiffs, asked for judgment in the form given Seton, p. 2142.

NORTH, J., said he did not see why the plaintiffs should only be charged with "such a sum, if any, as they submit to be charged with" in respect of rent and profits in the receiver's hand at the date of the chief clerk's certificate. He thought they should be charged with the whole of such rents and profits as a matter of course. If the order were made in the form asked, the plaintiffs might not submit to be charged anything in respect of such rents and profits, and if no further rents and profits came to the receiver's hands after the date of the certificate, they would get the whole of the rents and profits, as well as their interest, up to the date fixed for foreclosure absolute. The plaintiffs must in any event allow the deduction of "such sum as shall be in the receiver's hands at the date of the chief clerk's certificate," and they must also allow the deduction of "such a sum, if any, as the plaintiffs shall submit to be charged with in respect of rents and profits to come into the receiver's hands prior to the order for foreclosure absolute." The registrar would settle the form of order.

Solicitor, *Alfred Allistone*.

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. (Stirling, J.) — Nov. 14, 17; Dec. 12.

CHANDLER v. BRADLEY. (a.)

Settled Land—Tenant for life—Payment to tenant for life to secure concurrence in lease—Fine—Best rent—Fraud or power—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 4, 6, 7, 45, 53, 54—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *ss.* 3, 4, 6—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 7.

Where a payment was made to a tenant for life to induce him to grant a lease, and no notice of either the payment or the lease was given to the trustees of the settlement,

Held, that the payment was in the nature of a bribe and not of a fine, and that the liability of the lessee was not limited to indemnifying the remaindermen to the amount of the sum so paid to the tenant for life, but that the lease itself was void.

This was an action by the trustees of the will of Elizabeth Chandler for a declaration that a lease of part of the trust property granted to the defendant by James Chandler, the husband of the testatrix, who was tenant for life under the will, was void against the plaintiffs, and to recover possession of the demised property. By her will dated the 11th of August, 1864, the testatrix, under a power of appointment, appointed and devised to her husband James Chandler during his life certain freehold property at Epsom. After his death this property was given to trustees upon trusts for sale and division among the children of the testatrix. The testatrix died in 1866 and her husband survived till 1895. Previously to 1892 he mortgaged his life interest under the will to the Mutual Life Assurance Society, who entered into possession as mortgagees. Part of the freehold property at Epsom consisted of a dwelling-house known as "The Retreat," with a paddock and garden. This adjoined other property (not devised by the testatrix's will) where the defendant carried on business as a brewer. The house became vacant about Midsummer, 1891, and was left in a bad state of repair. It was placed in the hands of some house agents at Epsom, and in 1892 the defendant wrote to the house agent proposing either to become the purchaser or to take it for seven years certain provided it was put in thorough repair. This led to negotiations between the defendant and Mr. Manley, the actuary of the insurance company. On the 18th of March, 1892, Mr. Manley wrote to the defendant: "I understood from Mr. Wrightman that he had explained to you that as we shall have to give up possession on the death of Mr. James Chandler, sen., we are not in a position to treat for the sale of the property, nor do we feel justified in spending any large sum of money in putting it in repair, but that we could grant a lease for seven years at a very moderate rental to anyone who would undertake to put it in repair."

After some further correspondence Mr. Manley again wrote to the defendant on the 23rd of March, 1892: "I have consulted with our solicitor to-day and find that our position is a very peculiar one. Individually we are unable to grant a lease for a longer time than the life of Mr. James Chandler, sen., but that if Mr. Chandler will join we can jointly grant you a lease. Could you approach Mr. Chandler with the view of getting him to join?"

On the 24th of March, 1892, the defendant wrote to Mr. Manley: "Mr. James Chandler is in London at 211, High Holborn, but I can see Mr. Frank Chandler. I expect the only way to induce Mr.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law

Chandler to join with you in granting a lease would be by means of a consideration, as I know that would be welcome. Would you be prepared to do this if I come to terms with him?"

On the same day Mr. Manley replied: "I thank you for the address of Mr. James Chandler, sen., and I will endeavour to induce him to grant a lease. I cannot offer him a consideration, as that might possibly vitiate the lease."

Ultimately Mr. Chandler consented to join in granting a lease, and the mode in which his consent was obtained was thus stated by the defendant in his evidence in chief: "I spoke to Mr. Frank Chandler to ask his father if he would sign the lease. He came a morning or two after and said his father was quite willing to sign the lease; but he thought I ought to give him something for himself. . . . I asked Frank Chandler what his father wanted. He said his father thought he ought to have twenty guineas. I said rather than go without the lease I will give him twenty guineas."

A lease was afterwards prepared by the solicitors for the insurance company and sent to the defendant, who read it through and returned it. The lease was then engrossed and sent to the defendant, who gave it to Mr. Frank Chandler, to procure his father's execution of it. Mr. F. Chandler brought it to the defendant executed; and he thereupon gave him a cheque for £21, payable to bearer. The cheque was handed to James Chandler, who cashed it, and applied the money to his own use. The lease was dated the 27th of April, 1892, and purported to be granted by the insurance company at the request of James Chandler, and by James Chandler "under and by virtue of the Settled Land Act, 1882, and as tenant for life under the will of Elizabeth Chandler," for a term of seven years from the 24th of June, 1892, in consideration of the rent thereby reserved, and the covenants on the part of the lessee therein contained. The rent reserved was £25, and one of the covenants on the part of the lessee was within six calendar months from the 24th of June, 1892, to lay out and expend the sum of £100 in executing, to the satisfaction of the surveyor of the insurance company, repairs and improvements to the demised premises, including certain repairs and improvements specified in a schedule to the lease. In pursuance of this covenant repairs and improvements were in fact executed to an amount of over £200. The defendant and Mr. Manley swore that the letting was on the best terms that could be obtained; and there was no evidence given that a higher rent could have been obtained from any person other than the defendant.

In 1883 two persons were appointed trustees of the will of the testatrix for the purposes of the Settled Land Act. One only of these was still living: he was called as a witness, and stated that he never heard of the payment of twenty guineas to the tenant for life. It was admitted that some at least of the children of the testatrix did not hear of it.

The question was whether, under these circumstances, the lease was good.

Grosvenor Woods, Q.C., and *Dighton N. Pollock*, for the plaintiffs.—It is not suggested that a tenant for life as such has any power to grant a lease except by virtue of the Settled Land Acts. Here the trustees were not communicated with. It may be said that this case falls within section 7 of the Act of 1890; but looking at the definition of a fine in section 2, sub-section 10 (2) of the Act of 1882, and section 3 of the Act of 1890, we have here a fine within the meaning of the Acts, and therefore section 7 of the Act of 1890 cannot apply. If the payment is to be regarded as a fine it should have been paid to the trustees. A tenant for life cannot grant, and a lessee cannot take, a lease where there is a fine without the concurrence of the trustees of the settlement: Settled Land Act, 1882, ss. 2 (7) (9) and (10), 6, 7 (2), 21, 22, 38, 39, 40, 41, 42, 45, 53, 54; Settled Land Act, 1884, ss. 3 and 4; *Duke of Marlborough* v. *Sartoris*, 35 W. R. 55, 32 Ch. D. 616. There is a distinction between a contract for a lease and the grant of a lease. A contract does not require notice to be given to the trustees, but a grant does, *Hatten* v. *Russell*, 36 W. R. 317, 38 Ch. D. 334; *Mogridge* v. *Clapp*, 40 W. R. 663, [1892] 3 Ch. 382; *Hughes* v. *Fanagan*, 30 L. R. Ir. 111, 40 W. R. Dig. 228. It is a condition precedent that if there is a lease with a fine or a sale, notice must be given to the trustees. The powers of the tenant for life must be consistent with the protection of the *corpus* of the estate: *Dowager Duchess of Sutherland* v. *Duke of Sutherland*, 42 W. R. 12, [1893] 3 Ch. 169. If the tenant for life has got anything for himself under a lease it cannot be supported as against the remainderman as a lease at the best possible rent: Sugden on Powers, 8th ed., 785; *Dyas* v. *Cruise*, 2 Jo. & Lat. 460, at p. 482.

Graham Hastings, Q.C., and *Micklem*, for the defendant.—The Settled Land Acts do not preclude a fine being taken. There is no authority for saying that if a fine is not paid to the trustees or into court the lease is bad. If the lessee has paid the fine to the wrong person it may have to be paid over again to the remainderman: *Mogridge* v. *Clapp*. The evidence shows that the remaindermen were not damnified in the least degree, so that if it were not a fine the lease ought to stand, the defendant having acted *bonâ fide* and the best possible rent obtained. [STIRLING, J.—Chandler being in the position of a trustee under the settlement, can a lease executed in consideration of a payment to a trustee be good as against the *cestui que trust?*] Yes, if the remaindermen do not incur a loss. *Duke of Marlborough* v. *Sartoris* and *Hatten* v. *Russell* were both actions for specific performance, and the defence raised was that the plaintiffs had not complied with the provisions of the Act. To set aside a transaction which is completed is very different from a case where the vendor asks the court to enforce the transaction. *Mogridge* v. *Clapp* is in favour of the defendant. *Hughes* v. *Fanagan* is also treated by Hood and Challis (4th ed., p. 265) as an action for specific performance, and the observations of the Master of the Rolls in the beginning of his judgment in that case bear this out. We acted in good faith, and are therefore within section 45 (3) of the Settled Land Act, 1882; then the lease is good. [*Grosvenor Woods, Q.C.*, referred to Sugden on Powers, 8th ed., p. 782.] That passage only bears on the question whether the best rent was obtained. In this case that is admitted. If we were parties to a breach of trust we can only be made to indemnify the remaindermen.

Grosvenor Woods, Q.C., in reply.—This is a lease granted under a power, and it is necessary to prove that the lease was executed in *bonâ fide* exercise of the power. Here everything points to the contrary. I submit that the lease is void as a fraud on the power.

He cited *Tildesley* v. *Harper*, 26 W. R. 263, 7 Ch. D. 403.

Cur. adv. vult.

Dec. 12.—STIRLING, J., after stating the facts, continued: First, what was the nature of this payment of twenty guineas? I think it was a payment to an impecunious man, intended for his personal benefit, and made with a view to inducing him to execute the lease.

Secondly, does the law permit such a payment? By section 53 of the Settled Land Act, 1882, a tenant for life, in exercising any power under the Act, is to have regard to the interest of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. In this transaction, therefore, James Chandler was in the position of a trustee for the other beneficiaries under the will, and subject to all the liabilities of a trustee. No rule is clearer than that a trustee may not derive a personal benefit from his position as trustee; and it was therefore improper on his part to accept, and on the part of the defendant to make, any such payment.

The defendant stated in his evidence that he did not know the provisions of the Settled Land Act, and had no legal advisers, and that the payment was not meant as a bribe. He knew that the lease was to be granted under that Act, for it appeared on the face of the draft lease submitted to him. He therefore had constructive notice of the fiduciary position of James Chandler. But more than that, the same draft told him that James Chandler was tenant for life, and he knew that the reason why the insurance company could not grant a lease for seven years was that their interest came to an end with the life of James Chandler.

The object of procuring James Chandler to join was to prevent the lease coming to an end with his life; and these circumstances ought, as it seems to me, to have brought home to the mind of the defendant, if he reflected on the matter at all, that James Chandler, in granting the lease, was dealing with property which was not his own, and that to the other owners of that property he must of necessity stand in a fiduciary position. But the matter does not rest even there. Mr. Manley's letter of the 24th of March, 1892, informed him that a payment to Chandler might vitiate the lease. When he was asked as to this, he said that he thought the risk arising from such a payment only affected the insurance company. I confess that I distrust that explanation, coming as it does from a defendant who, in answer to interrogatories sworn in January, 1896, said this: "The said cheque was not given as an inducement for the said James Chandler to grant the lease, or as part of the consideration therefor, but was a present made by me to the said James Chandler, who was then without means"—a statement entirely inconsistent with the defendant's evidence at the trial, and admitted by himself to be incorrect. Further, he made no inquiry (as any prudent man would have done) either of Mr. Manley or the solicitor of the insurance company as to what the nature of the risk was; and if he did not know the impropriety of the payment, then, in my opinion, he deliberately shut his eyes, and took his chance of what the consequences might be. I think, therefore, that this case must be dealt with on the footing of his having made an improper payment to James Chandler to induce him to grant the lease. If, then, the case is to be regarded as governed by the ordinary law applicable to dealings with trustees and other persons in a fiduciary position, I apprehend that the transaction could not stand as against the persons now beneficially entitled, and the court, in giving them relief, could not enter into the question whether or not they were damnified by what had been done.

It is said, however, that under the provisions of the Settled Land Acts the liability of the defendant is limited to that of paying to the trustees who have been appointed for the purposes of that Act the £21 which was paid to James Chandler.

The argument is put in this way: section 7, sub-section 2 of the Act of 1882 authorizes the granting of leases in consideration of a fine, which by section 4 of the Act of 1884, is to be deemed capital money arising under the Act, and consequently, by section 22 of the Act of 1882, is to be paid either into court or to the trustees of the settlement. It is said that this sum of £21 ought to be regarded as a fine, and that on this footing the lease must be regarded as valid. It is admitted that the fine was not paid either into court or to the trustees; but it is said that the defendant did not know of the existence of the trustees, and is entitled to rely on the protection conferred by section 45, sub-section 3, and section 54 of the Settled Land Act, 1882.

Reliance was also placed on the decision of the Court of Appeal in *Mogridge* v. *Clapp*, where a lease granted by a tenant for life who purported to demise as absolute owner was upheld, the lease being one which could have been granted under the Settled Land Act, 1882, and the lessee having acted in good faith.

[His lordship then read from the judgments of Lindley, L.J., from: "Even if the plaintiff had known that there were no trustees, it would not follow that his title would be bad . . . powers under the Settled Land Act"; and of Kay, L.J., from: "It might be said that he was not dealing in good faith with the tenant for life. . . . However, it is not necessary to give a decided opinion on this point, because I do not think that the lessee in this case had either knowledge or notice such as to make his acceptance of the lease a dealing not in good faith with the lessor."]

Now, if the £21 had been really agreed upon between the defendant and James Chandler as the proper amount of a fine for the granting of the lease, and some *bonâ fide* mistake had been made as to the proper mode of paying it, it may be that these sections of the statute and the observations of the Lords Justices would apply. I take a different view of the facts. The £21 was never intended, either by the defendant or Chandler, to be a fine constituting capital money under the Acts; it was from first to last intended by both to be a payment for the benefit of James Chandler personally, and of no one else. Further, I am unable to come to the conclusion that the defendant acted in good faith—as it is put by Kay, L.J., that he acted in the belief that everything was being regularly and properly done. On the contrary, I think he knew that he was engaged in a transaction attended with risk, and took the chance of the result. In my judgment, therefore, the clauses of the Settled Land Act, 1882, to which I referred, do not protect the defendant. This being so, section 7, sub-section (2), of the Settled Land Act, 1882, provides that every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. I have already said that the £21 paid to James Chandler is not to be regarded as a fine within the meaning of the Settled Land Act. It follows that the best rent has not been obtained, for I think that the same test is to be applied as in the case of a lease under a power; and, as is laid down in the case of the *Queensbury Leases*, cited in Sugden on Powers, 8th ed., p. 785, "there is but one criterion which our courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not—that is, whether the man who makes the lease has got as much for others as for himself; if he has got more for himself than for others, that is decisive evidence against him."

In my judgment, therefore, the lease is not such as

is authorized by the Settled Land Acts, and is void against the plaintiffs.

Solicitors for the plaintiffs, *A. R. & H. Steele.*

Solicitors for the defendants, *Layton, Sons, & Lenson.*

Chan. Div. } Nov. 17, 18, 19.
Kekewich, J. }

PETTY *v.* TAYLOR. (*a.*)

Copyright—Registration—Validity—Literary Copyright Act, 1842 (5 *&* 6 *Vict. c.* 45), *ss.* 13, 24—*Fine Arts Copyright Act,* 1862 (25 *&* 26 *Vict. c.* 68), *ss.* 1-4.

The managing director of a limited company, having prepared the letterpress of a trade catalogue, ordered two drawings to illustrate it to be made by a firm of lithographers. The drawings were made and were paid for and used by the company. The managing director was registered as proprietor of the copyright in the drawings under the Fine Arts Copyright Act, 1862, *s.* 4, *and of the copyright in the catalogue under the Literary Copyright Act,* 1842, *s.* 13. *There was no entry of any agreement in writing vesting the copyrights in him. The managing director and the company having brought an action as co-plaintiffs to restrain an alleged infringement of the copyrights,*

Held, that the managing director had acted throughout only as the nominee of the company; that he was not a trustee for the company, and was not, therefore, in fact, proprietor of the copyrights under either of the Copyright Acts; and that the registrations were bad.

Held, further, that, assuming the managing director to be entitled to be registered as proprietor of the letterpress of the catalogue, the drawings illustrating it would not be protected by such registration.

Held, therefore, that although the company, who were in fact the proprietors of the copyrights, were joined as co-plaintiffs, the action was not sustainable, because the company were not registered as the proprietors.

In 1895 Wesley Petty, who was the managing director of a printing and publishing company called Petty & Sons (Limited), having prepared a certain trade catalogue advertising clothing entitled "The Art and Virtue of Dressing Well," gave an order to a firm of printers and lithographers called Taylor & Winterbottom to produce two drawings of gentlemen attired in Chesterfield coats in order to illustrate the catalogue.

This order was executed by Taylor & Winterbottom, who, having employed an artist to design the drawings, engraved them.

The drawings were paid for and used by Petty & Sons (Limited) in their business.

The "Art and Virtue of Dressing Well" was registered in July, 1893, under the Literary Copyright Act, 1842 (5 & 6 Vict. c. 45), and the two drawings of gentlemen in Chesterfield coats illustrating the catalogue were registered on the 31st of October, 1895, under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), all in the name of Wesley Petty as proprietor of the copyright, but there was no entry of any agreement in writing vesting the copyright in him.

This was an action commenced on the 5th of November, 1895, by Wesley Petty and Petty & Sons (Limited), as co-plaintiffs, against Taylor & Winterbottom and William Blackburn & Co., clothiers, to restrain an alleged infringement of the copyrights and for penalties and damages.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law

The plaintiffs in their statement of claim alleged that Petty & Sons (Limited) were beneficially interested in the copyrights and entitled to the property in the works, and that Wesley Petty was registered as proprietor of the copyrights for and on behalf of Petty & Sons (Limited).

The defendants in the defence alleged that Wesley Petty was not in fact the proprietor of the copyrights, either on behalf of the plaintiff company or otherwise, and that the registration was therefore invalid and the action not sustainable.

The Literary Copyright Act, 1842, s. 13, provides that: "It shall be lawful for the proprietor of copyright in any book . . . to make entry in the registry book of the Stationers' Co. of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof and the name and place of abode of the proprietor of the copyright of such book . . . and it shall be lawful for every such registered proprietor to assign his interest . . . therein by making entry in the said book of registry of such assignment and of the name and place of abode of the assignee . . ," and section 24 provides that no proprietor of copyright shall sue for any infringement before making entry in the book of registry.

The Fine Arts Copyright Act, 1862, s. 4, provides that: "There shall be kept at the hall of the Stationers' Co. . . . a book or books . . . wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof and of the name and place of abode of the author of the work in which there shall be such copyright . . . and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

Warrington, Q.C., and *Israel Davis*, for the plaintiffs.—We are entitled to be protected under both the Copyright Acts. The Fine Arts Copyright Act, by s. 1, defines the proprietor of copyright in any drawing to be: (1) The author; (2) any person for whom the drawing is made for good or valuable consideration; (3) any vendor or assignee, provided that there is an agreement in writing disposing of the copyright before the time of any such disposition. The drawings were made for Wesley Petty for valuable consideration, and in such a case no assignment in writing is necessary, he is therefore the proprietor of the copyright in them, and is properly registered as such, and is trustee for Petty & Sons (Limited): *London Printing and Publishing Alliance* v. *Cox*, [1891] 3 Ch. 291; 40 W. R. Dig. 61; *Nottage* v. *Jackson*, 32 W. R. 106, 11 Q. B. D. 627; *Wooderson* v. *Raphael Tuck*, 4 Times L. R. 57; *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531; 44 W. R. Dig. 45.

Renshaw, Q.C., Tindal Atkinson, Q.C., and *Errington*, for the defendants William Blackburn & Co.—It is not right to claim copyright under two different Acts in the same work. The drawings were made for Petty & Sons (Limited), not for Wesley Petty, he only acted as nominee for his company. There is no assignment to him. He is not, therefore, the proprietor of the copyright, and is improperly registered as such. He cannot, therefore, sue, and the co-plaintiffs, Petty & Sons (Limited), who are the pro-

prietors, not having been registered, also cannot sue.

Dibdin, for the defendants Taylor & Co.

Warrington, Q.C., in reply.—Wesley Petty is the author of the letterpress in the catalogue, "The Art and Virtue of Dressing Well," and is properly registered as such under the Literary Copyright Act, 1842. We contend that this registration should be held to cover the drawings contained in the catalogue: *Grace* v. *Newman*, 23 W. R. 517, 19 Eq. 623.

KEKEWICH, J., after considering the evidence in the case, continued as follows: On the question of law I have already said I have only to decide one point. I should not have limited myself to that one point but for this, that it seems to me that sooner or later I must decide that point: I cannot avoid deciding it; if I decide all the others, and all the questions of fact into the bargain, I must decide this one point; and if I decide it, as I propose to do, against the plaintiffs, there is not the slightest reason why I should decide any other, because it is fatal. Therefore it seems to me I am better discharging my duty by deciding that one point only. That point is this. Both as regards the Literary Copyright Act and the Fine Art Copyright Act—that is to say, the statutes 5 & 6 Vict. c. 45, and 25 & 26 Vict. c. 68, Mr. Wesley Petty is registered as the proprietor of the copyright. Each statute provides that the proprietor of the copyright shall be registered, and that there shall be noted on the register the name and place of abode of the proprietor. In each case Mr. Wesley Petty is entered as the proprietor of the copyright. If as a matter of fact he was not the proprietor, then as there is no one else registered, there is no entry of the proprietor, and therefore there is no valid registration. I have not heard any argument on the point mentioned by Mr. Davis, that the plaintiffs have a case independent of registration. I assume they are dependent on registration, and the registration failing the case fails also. The action is brought by Mr. Wesley Petty, and Petty & Sons (Limited) as co-plaintiffs, and it is in my opinion the fact that Petty & Sons (Limited) are the proprietors, but they are not registered.

Now it seems to me decided, and it is perfectly clear, if I may venture to say so with respect to a judgment of a learned Lord Justice even without decision, that you cannot make a combination of two persons, neither of whom is entitled to sue, and so make a person who is entitled to sue. In the case of the *London Printing and Publishing Alliance* v. *Cox* Fry, L.J., puts it in this way: "I have no doubt whatever that a trustee in whom a copyright is vested may be registered as the owner, and may sue in that character, but it is impossible for one person to be the owner and another person to be on the register, and for those two persons successfully to sue." If the view which I come to is right, that Petty & Sons (Limited) are the proprietors, and Wesley Petty is not the proprietor, then you have exactly the case which the Lord Justice put. You cannot have the owner coming with another person on the register, and those two persons combining to make a good plaintiff. That is the view of the Lord Justice, and is mine also. So I get rid at once of any possible *status* given to a bad plaintiff by the conjunction with another. If either is a good plaintiff, the conjunction with a bad plaintiff would in these modern days not matter. The question is, Is Mr. Wesley Petty the proprietor? To my mind the question is precisely the same on both Acts. Mr. Warrington has endeavoured to separate them, and to say that they require different considerations, and it may be so, but it seems to me that the arguments which are applicable in one case are equally applicable in the other.

I will take the second Act first, and for this reason—that there is a point in which I entirely agree with Mr. Warrington's submission on that, which I think was not sufficiently attended to by the defendants, I mean that they did not attribute that importance to it that I do. I agree with the argument that under the first section of 25 & 26 Vict. c. 68 (Fine Arts Copyright Act) there are three different possible states of circumstances. Either the person who is the author, to speak shortly, may be the owner of the copyright; or the vendee or assignee from him may be the proprietor; or the proprietor of the copyright may be a person for and on whose behalf the work of art has been made or executed. If, therefore, I thought in this case that the proper conclusion from the facts was that this work of art was made or executed for or on behalf of Wesley Petty, I should consider that he was properly registered as the proprietor, notwithstanding that there is no agreement in writing entered on the register. The agreement in writing would be wanted if it was intended to reserve the copyright to the author as against a vendee or assignee. It would be wanted also if it was intended to vest that copyright in the vendee or assignee. It is not wanted, as I understand the meaning of the first section, where the copyright is vested in a person on whose behalf the work of art is made or executed. I thought, as that point was raised, it deserved attention, but I need say no more about it.

It is the fourth section on which the real point turns, and that provides that there shall be noted on the register the name and place of abode of the person in whom such copyright shall be vested. Now, who is the registered proprietor of the copyright? It is Mr. Wesley Petty. I am dealing now only, for the moment, with the drawing of the two figures. Wesley Petty is the managing director of Petty & Sons (Limited). It is quite immaterial to me that before the incorporation of the company he carried on business by himself, though I observe, of course, that it is that old practice before the incorporation which has led to the present dilemma. That is immaterial. He was throughout all these transactions the managing director and manager, the active man and representative of Petty & Co. (Limited). He is minded to have produced for publication in the proper way in the course of business two figures. His firm print; they, as a rule, do not do anything more than print. They therefore employed the firm of Taylor & Co. to produce the figures which they wanted, the two figures which have been referred to so often —two gentlemen in different attitudes, clothed in Chesterfield coats. Taylor & Co. employed an artist to design the drawings. The exact relation of the artist to Taylor & Co. is, perhaps, not very clear, but he seems to be one whom Taylor & Co. from time to time employ, and I gather that Petty & Sons (Limited) not only knew Taylor & Co., but knew the artist. But he was merely a servant of Taylor & Co., who was employed by Wesley Petty, the managing director of Petty & Sons (Limited). It seems to me in common sense and according to the ordinary principles of law, you get established there without any difficulty or dispute, that Petty & Sons (Limited) acted through their agent in instructing Taylor & Co. Taylor & Co. executed the order through their agent, the artist, but that there was no employment by Wesley Petty in his individual, personal character, and that the artist (I should have said, though I am not deciding that point) was only the agent of Taylor & Co. If the thing was done for Wesley Petty in his own personal character, he never purported to give directions, or to pay a bill, or in

any way throughout to do anything of any kind connected with this business, except in his character of representative of the incorporated company, Petty & Sons (Limited).

Then, it is said, he is trustee for the company. It is more easy sometimes to say that a man is a trustee than to explain how he is a trustee, or why, and this is an instance. In one sense he is trustee for the company. I have no doubt that if he can properly be held to be the proprietor of this copyright, he is a trustee of his proprietorship for the company. He cannot set up his own titles against his principals, and in that sense he is a trustee; but he is not a trustee in the sense that any legal ownership ever became vested in him. Copyright is a thing known to the law as capable of assignment, capable of acquisition by proper ways, different, of course, from those connected with real estate, but still a property to be acquired in a particular way; and there is nothing here to show that Wesley Petty ever acquired anything at all. He acted simply as the agent of others — namely, the incorporated company.

There is a passage in Lindley, L.J.'s, judgment in that case of *London Printing and Publishing Alliance* v. *Cox*, which I think worthy of notice on this point, though perhaps it does not necessarily decide it. He was considering there the relative position of Mr. Keep and the proprietors of *Myra's Journal*, and he was considering how far there had been an assignment by one to the other. He assumed there that Mr. Keep had the property vested in him when he wrote a certain letter of the 19th of April; and then he says: "It is contended that this letter amounted to an assignment of the copyright by Mr. Keep to *Myra's Journal*. If it did, then the proprietors of *Myra's Journal* were from the 19th of April the proprietors of the copyright; but the proprietors of *Myra's Journal* are not registered, and they cannot therefore maintain the action. If, on the other hand, that letter did not amount to an assignment of the copyright, then the copyright would remain with Mr. Keep as a trustee for the proprietors of *Myra's Journal*, and Mr. Keep being registered the action may be sustained so far as that point of form is concerned." Lindley, L.J., is there dealing with a case where there was undoubtedly a proprietor. Mr. Keep was originally the proprietor of the copyright. Had he or had he not assigned? If he had, what then? The proprietorship had passed. If he had not assigned it remained in him. But having started with one proprietor if you want to discover another you must find an assignment. There is no pretence for saying there is an assignment here. Wesley Petty did not acquire the copyright for himself, he acquired it merely as an agent. The result is, in my opinion, Wesley Petty has been wrongly entered as proprietor of this copyright, and on that ground the registration of the art copyright fails.

Now, then, I turn, and will only do it shortly, to the statute 5 & 6 Vict. c. 45 (Literary Copyright Act). To my mind the point is precisely the same; but Mr. Warrington made one point in reply which must be noticed, as purporting to distinguish it. In that statute the 13th section is the one in question, and there we get the very words—there is to be entered the name and place of abode of the owner of the copyright. In that case I think Mr. Wesley Petty occupied precisely the same position, he acted merely as an agent of Petty & Sons (Limited). Acting as their agent, as in the other case, he is the nominee of the company, but not the trustee. He is not the trustee, because he has nothing vested in him as trustee, no property. I fail to see myself anything that was ever acquired by him. But Mr. Warrington says there is this distinction: As regards the literary work, take this "Art and Virtue of Dressing Well." Mr. Wesley Petty prepared the letterpress, and the letterpress is a substantial part of the book; therefore he could register the book as having been the author of that, and properly registering that in his name that covers the figures which form part of the book. Now, I will assume in the plaintiffs' favour that Mr. Wesley Petty was the author of that book. I take it that there were some other books, but that is enough for my purpose, because that is one of the books that is registered, and I think the same applies to the others. At any rate, I will take the "Art and Virtue of Dressing Well." Mr. Petty was the author of the letterpress, and in that way the author of the book. Then he put into it these drawings, which, as I have already mentioned, were not his drawings, not produced by him, the copyright of which, if there is any copyright at all, is not vested in him. One sees the practical force of the difficulty raised by Mr. Renshaw that you cannot claim copyright in one and the same work under two different statutes and two different registrations, a point which may deserve much further consideration. I only refer to it in this connection. I only now seek to deal with Mr. Warrington's point, in support of which he cites *Grace* v. *Newman*. I am now reading from the headnote, but I have taken care to see that this conforms to the Vice-Chancellor's judgment there: "The plaintiff, a cemetery stonemason, employed and remunerated a person to collect monumental designs, and published a book containing sketches of such designs with scarcely any letterpress. Held, that the plaintiff had copyright in the book and was entitled to an injunction to restrain the publication of designs copied from it." If my view is right, Mr. Wesley Petty never employed or remunerated anyone. He did so in his character of agent, but not otherwise; and assuming him therefore to have been the author of the letterpress, the rest of the book, that is to say the figures, were not done for him, they were done for somebody else; and it seems to me monstrous to suppose, and I am sure *Grace* v. *Newman* does not support the hypothesis that a man in protecting his copyright in letterpress, supposing him to be entitled to it, can thereby protect an alleged copyright in works of art which are introduced into the letterpress, they being the works of other persons, the copyright of which is vested in those other persons, or at any rate in strangers to the literary author. I put to Mr. Warrington the not at all uncommon case of two persons jointly publishing a book, one supplying the letterpress and the other the illustrations. Of course they may make an agreement between themselves, as they probably will take care to do, but I cannot see my way to say that the man who is the author of the letterpress thereby becomes the author of the book including the illustrations so as to protect those illustrations. I cannot myself see why the position should not be equally reversed, and why the author of the pictures, the illustrations, should not protect them, and through them the letterpress of which he never wrote a word. That seems to reduce it to an absurdity; and I do not find anything in the Act or in the cases cited to aid me in supposing that any such conclusion is possible. I hold, as well under one Act as the other, that the name and place of abode of the proprietor of the copyright is not stated on the register, because the person there named is Wesley Petty, whereas it ought to have been Petty & Sons (Limited); and I hold that Wesley Petty cannot be registered as a trustee for Petty & Sons (Limited) so as to vest in him a title to sue on their behalf, because there is nothing of which he can be

trustee, nothing being vested in him originally. The distinction between trustee and nominee is one which I have already noticed in giving judgment. I have only to say here, it seems to me a trustee may be registered and can sue with or without the concurrence of his *cestui que trust*; a nominee, it seems to me, cannot be properly registered, and if registered cannot sue, notwithstanding that the person by whom he has been nominated, on whose behalf he purports to have a copyright, is a co-plaintiff. The result is that the plaintiffs' case fails, and there must be judgment for the defendants with costs.

Solicitors, *Herbert Bentwich; Vincent & Vincent*, for *Bowling & Sons*, Leeds; *Pitman & Sons*, for *Herbert Denison*, Leeds.

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 29.

GUARDIANS OF THE POOR OF THE ST. OLAVE'S UNION (*Appellants*) *v.* GUARDIANS OF THE POOR OF THE CANTERBURY UNION (*Respondents*). (*a.*)

Poor law—Settlement—Derivative settlement—Residence — Computation of time — Period of residence as a patient in a hospital—Residence under sixteen apart from parent — Irremovability — Poor Removal Act, 1846 (9 *&* 10 *Vict. c.* 66), *s.* 1—*Divided Parishes and Poor Law Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 61), *s.* 34.

A. had his home and residence in a parish from the 23rd of July, 1892, *until his death on the 15th of April*, 1896, *but from the 1st of May to the 29th of July*, 1895, *he was a patient in a hospital and convalescent home outside the parish.*

Held, that, by virtue of section 1 *of the Poor Removal Act*, 1846, *the time during which A. was in the hospital must be excluded from the computation of his period of residence in the parish, and that he had not acquired a settlement in the parish under section* 34 *of the Divided Parishes, &c., Act*, 1876.

Quære, *whether a child under the age of sixteen who has lived in a parish apart from his only surviving parent for a period sufficient to confer upon him a settlement in that parish if he had been emancipated becomes irremovable upon the death of his father.*

Case stated by the Recorder of Canterbury. The facts were as follows:

On the 1st of April, 1896, Edward James Farr, aged nine years, became chargeable to the respondent union.

On the 24th of April, 1896, an application was made to two of the justices of the city of Canterbury for an order for the removal of the pauper from the respondent union to the appellant union, and an order was that day made on such application adjudging the pauper to be legally settled in the parish of Rotherhithe in the appellant union. From this order the appellants appealed.

The pauper was the lawful son of Arthur Farr and Ellen Farr, and was born on the 1st of April, 1887, at New Cross, in the Greenwich union.

Ellen Farr died on the 22nd of June, 1888, and shortly after her death, Arthur Farr, the father, being of opinion that his children would be better cared for in the country in the charge of female relations who were desirous of having them, sent the pauper, who was then about one year old, to live with an aunt at Ashford, in the county of Kent, out of the appellant union.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The pauper lived at Ashford with his aunt until 1889, when he was taken charge of by another aunt, Mrs. Barker, and lived with her in the parish of St. Mary, Bredin, in the respondent union until he was sent to the respondents' workhouse.

Arthur Farr never intended that the absence of the pauper should be permanent, nor did he ever abandon or relinquish his right as father to the custody and control of the child, nor did either of the aunts take the permanent charge of the pauper.

During the whole of the time the pauper lived in the respondent union with his aunt, Mrs. Barker, Arthur Farr never contributed anything towards his maintenance, clothing, or education. The Barkers were in comfortable circumstances, and never desired that he should so contribute. Arthur Farr only saw his son once during this period, when the child was brought to London for the day on a visit.

On the 23rd of July, 1892, Arthur Farr remarried, and on the same day went to live in the parish of St. Mary, Rotherhithe, in the appellant union, not having previously resided there. From that time until his death he continued to have his residence and home in the appellant union.

On the 1st of May, 1895, Arthur Farr was admitted into the Brompton Hospital for Consumption, situate outside the appellant union, where he remained until the end of June. He then went to a convalescent home in connection with the said hospital at Sandgate (also outside the appellant union), where he remained until the 29th of July, 1895, when he returned to his home in the appellant union and remained there until his death on the 15th of April, 1896.

Arthur Farr went to the hospital intending to return to his home in the appellant union as soon as he was well enough to do so. During his temporary absence his wife remained in his house where his said home was kept together by means of an allowance which his employer made to him.

In March, 1896, Mrs. Barker wrote to Arthur Farr requesting him to take the pauper back.

Arthur Farr was then too ill to reply. His wife wrote for him stating that he was desirous of having his boy back, but was unable to do so owing to his illness. On receipt of this reply Mr. Barker sent Edward James Farr to the respondents' workhouse on the 1st of April, 1896.

The appellants contended: (1) That the pauper had resided from April, 1889, until the 1st of April, 1895, in the respondent union under such circumstances that he had thereby at the date of the application for the order of removal acquired a status of irremovability in his own right in the respondent union as his actual bodily residence for the period and under the circumstances above mentioned came within and satisfied section 1 of 9 & 10 Vict. c. 66, and the amending statutes 11 & 12 Vict. c. 111, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8.

(2) That Arthur Farr, the father of the pauper, had not acquired a settlement by his residence in the appellant union at the time of his death by reason of his absence from that union during the months of May, June, and July under the circumstances above mentioned.

It was contended for the respondents: (1) That the pauper being under the age of sixteen took the settlement of his father and had not acquired a settlement in his own right and was removable.

(2) That the father had acquired a settlement in the appellant union.

On these facts the recorder held (1) that Arthur Farr had acquired a settlement in the appellant union; and (2) that the pauper had not become

irremovable in the respondents' union, and he confirmed the order for removal.

Macmorran, Q.C. (*Harper* with him), for the appellants.—The father of the pauper never acquired a settlement in the parish of Rotherhithe. The residence referred to in section 34 of the Divided Parishes Act, 1876, must be consecutive: *Dorchester Union* v. *Weymouth Union*, 16 Q. B. D. 31, 34 W. R. Dig. 135. Under section 1 of 9 & 10 Vict. c. 66, all the time during which the father was in hospital must be excluded in the computation of his period of residence, and consequently he never resided in the parish of Rotherhithe for three years within the meaning of the Act of 1876. At the time when the removal order was made the father of the pauper was dead: at that time the pauper had resided in the respondent union a sufficient time to acquire a *status* of irremovability, and although being under sixteen years old, he could not become irremovable during his father's lifetime, on the death of the father he at once became irremovable: this view is not inconsistent with *West Ham Union* v. *St. Matthew, Bethnal Green*, 42 W. R. 573, [1894] A. C. 230, and is supported by the observations of Halsbury, L.C., in *Highworth and Swindon Union* v. *Westbury-on-Severn Union*, 38 W. R. 295, 14 App. Cas. 465, at p. 480.

Hohler and *Joseph*, for the respondents.—As to the settlement of the father, while he was in hospital his residence remained in Rotherhithe, and that is sufficient to satisfy section 34 of the Divided Parishes Act, 1876. The words in 9 & 10 Vict. c. 66, s. 1, referring to a hospital must be read as "confined as a patient in a hopital," and the father's absence in hospital was voluntary, and cannot be described as a confinement. The *West Ham case* shows conclusively that the pauper could not, by reason of his age, acquire a settlement in his own right.

WRIGHT, J.—I think that the appellants are right on the question of the settlement of the father. This question is not easy, and it really turns entirely upon the meaning of 9 & 10 Vict. c. 66, s. 1. It is conceded that the father resided a sufficient time in the parish of Rotherhithe in the appellant union to give him a *status* of irremovabilty and a settlement in that parish, unless the period of his residence in the hospital and convalescent home ought to be struck out from the computation. That depends on whether he was a patient in a hospital within the meaning of the Act to which I have referred. I say it depends upon that because we are bound by the *Dorchester case* to hold that in order that a settlement by residence may be acquired under section 34 of the Divided Parishes Act, 1876, there must have been a residence for three consecutive years under such conditions in each year as would have created a *status* of irremovability. Now, the 9 & 10 Vict. c. 66, s. 1, enacts that "the time during which a person shall be a prisoner in a prison, or shall be serving her Majesty as a soldier, &c., or shall be confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish, &c., shall for all purposes be excluded in the computation of time" in which irremovability is required. The section is very clumsily expressed; grammatically it must be read "confined as a patient in a hospital," but the whole clause is so badly drawn that I do not think we are obliged to say that that is the meaning unless that gives a reasonable construction. I do not think that such a construction is reasonable. It appears to me that the whole policy of this provision is that from the period of residence which is sufficient to confer a *status* of irremovability is to be excluded all time during which the person has not been maintaining himself. Taking the words to mean, as I think they do, that the period during which the person is a patient in a hospital is to be excluded, it is clear that in this case the time during which the father of the pauper was in the hospital must be excluded, and therefore that the requirements of the *Dorchester case* were not fulfilled by him. His conditions of residence were not such during each year of residence as to create a *status* of irremovability from the appellant union. The other point which was argued is one of greater difficulty, and our decision on the first point makes it unnecessary to consider it. But I think that if Mr. Macmorran had been wrong upon the point which we have decided in his favour, he could not have succeeded on the other point. It is difficult to see how this child, who never had an emancipated residence of his own in the respondent union, can be regarded as having acquired a *status* of irremovability in that union by virtue of his physical residence in it during his father's lifetime.

BRUCE, J.—I am of the same opinion. I find it almost impossible to give a grammatical meaning to the words of section 1 of 9 & 10 Vict. c. 66. The only meaning I can give it is that the period of residence in a hospital as a patient is to be excluded from the computation of time.

Appeal allowed.

Solicitors for the appellants, *Arkcoll, Cockell, & Chadwick.*

Solicitors for the respondents, *Speechly, Mumford, Landon, & Rogers*, for *John Plummer*, Canterbury.

Q. B. Div. (Wills and Wright, JJ.) — Dec. 10.

GOODLOCK *v.* COUSINS. (*a.*)

County court — Judgment debt — Execution — Sale by bailiff—Title of purchaser—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.

In the event of goods being seized in execution under a judgment of the county court, the bailiff is bound by section 156 *of the County Courts Act*, 1888, *to sell the goods if the claimant does not comply with any one of the three conditions laid down in that section, and a valid title to such goods is conferred upon the purchaser, although the claimant may afterwards prove that he had at the time of the sale a good title to them.*

This was an appeal by the defendant from a judgment of his Honour Judge Ellicott at the County Court, Cheltenham.

The action was brought to recover damages for wrongful conversion. The plaintiff was residing with his son, who kept an inn, and during his stay there judgment was obtained against the son for money due, and execution was levied. Among the goods seized were certain articles belonging to the plaintiff. Upon the seizure the plaintiff gave notice of claim to his goods pursuant to ord. 27, r. 1, of the County Court Rules, and upon this the bailiff gave the plaintiff the notice requiring deposit for value or security, which notice the plaintiff failed to comply with. The bailiff thereupon, in the presence of the plaintiff, sold the goods by auction, and the defendant became the purchaser.

The plaintiff, who was able to prove his claim to

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the goods on the interpleader summons, then brought this action against the purchaser of the goods.

The learned judge found as a fact that the articles claimed belonged to the plaintiff, but that the defendant had no notice of this, and that the sale gave no title to the purchaser. He assessed their value and the damages for their detention at £20 15s., and gave judgment for the plaintiff for that amount.

From this judgment the defendant now appealed.

Section 156 of the County Courts Act, 1888, provides that "where any claim shall be made to or in respect of any goods taken in execution under the process of the court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed . . . or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods . . . or may give to the bailiff in the prescribed manner security for the value of the goods claimed; and in default of the claimant so doing the bailiff shall sell such goods as if no such claim had been made, and shall pay into court the proceeds of such sale to abide the decision of the judge."

Stroud, for the appellant.—The judge found that the sale by the bailiff gave no title to the purchaser; but the bailiff is compelled by section 156 to sell the goods unless the claimant complies with the conditions mentioned in that section. Such compulsory sale gives a good title to any purchaser for value.

Cranstoun, for the respondent.—The bailiff can only sell goods belonging to the debtor, and he can give no better title to them than the debtor had; therefore here the purchaser acquired no title: *Davies* v. *Wise*, 29 W. R. 804, 50 L. J. Q. B. 651; *Chapman* v. *Speller*, 19 L. J. Q. B. 239; *Hills* v. *Renny*, 29 W. R. 328, 5 Ex. D. 313.

Stroud, in reply.—The plaintiff made no claim at the time of the sale, though he was present. The section uses the words "the bailiff shall sell such goods." A good title is given by such sale, and a claimant is precluded from asserting his title: *Death* v. *Harrison*, L. R. 6 Ex. 15, 19 W. R. C. L. Dig. 40; *Ex parte Villars*, 22 W. R. 397, L. R. 9 Ch. 432; *King* v. *England*, 12 W. R. 308, 4 B. & S. 782.

WILLS, J.—This is a case of considerable importance, no doubt, and I should take time to consider my judgment if I thought there would be any advantage in doing so; but I do not think I should alter my mind if I did so. In my opinion the words "shall sell," in section 156, mean that there must be a sale in the ordinary sense of that word. Now, the sale in this case is brought within the very conditions mentioned in that section, and it is clear therefore that a statutory duty is imposed upon the bailiff, in default of any of the conditions mentioned in the section being carried out, to sell the goods themselves, and not merely the debtor's interest in them. It seems to me it would be contrary to the intention of the Legislature, and would be holding the Legislature up to contempt and ridicule if we were to say that the words "shall sell" mean that the bailiff shall sell only the liability to a law suit. It is a common practice under interpleader orders in this court for the sheriff to be ordered to sell the goods. The claimant can never follow the goods in such a case. The statute says the bailiff "shall sell," and that being so, he must sell the goods, and such a sale is a sale for all purposes. It would be nonsense to hold that he can sell the goods but can give no title to them.

WRIGHT, J.—I am of the same opinion. I wish only to point out that in the case of *Hills* v. *Renny* it was not held that the claimant could recover from the purchaser. The court in that case declined to express an opinion upon that point.

Appeal allowed.

Solicitors for the appellant, *Martin & Co.*, for *Heath*, Cheltenham.

Solicitors for the respondent, *Peacock & Goddard*, for *Lamb*, Cheltenham.

Prob. Div. and Adm. Div. Divorce. } Jan. 25; Feb. 1.

BONSOR v. BONSOR. (a.)

Divorce—Permanent maintenance—Full inquiry on petition for alimony pendente lite*—Procedure—Husband's income—Voluntary allowance to husband.*

Where alimony pendente lite *has been fixed after a full inquiry, the facts so elicited constitute the grounds on which the amount of permanent alimony or permanent maintenance should be determined; and,*

Semble, *if alimony* pendente lite *has been awarded, no evidence can be given on the application for permanent alimony or maintenance except to show alteration in means since the first inquiry.*

In estimating the husband's income the court can take into calculation income to which he may have no legal claim.

In this case the court calculated in the respondent's income a monthly allowance made to him by his brother, to whom he was largely indebted, "so long as he remained out of the country."

Haviland v. Haviland, 11 *W. R.* 550, 3 *Sw. & Tr.* 114, *considered.*

Motion by the wife to vary the report of the registrar on her petition for permanent maintenance, and for an order that the respondent should pay her £250 per annum as permanent maintenance.

The wife's petition after alleging the marriage and its dissolution stated that on the 18th of October, 1895, she filed a petition for alimony pending suit, and that on the 17th of March, 1896, after a full inquiry into the means of the respondent an order was made that he should pay her alimony pending suit at the rate of £150 per annum, and then prayed relief.

The registrar submitted that the proper order would be for payment of £15 a month as permanent maintenance.

Jan. 25.—*Willock*, in support of the motion.—The registrar is bound by his finding on the petition for alimony *pendente lite*. The order then was for payment of £150; that should be a fifth of the respondent's income, which, therefore, must be taken to be £750, and the amount for permanent maintenance to which the wife is entitled is, following the rule, one-third of that sum, or £250. The registrar had no new evidence before him and the husband made no attempt to show that his income had altered since the exhaustive inquiry on the petition for alimony *pendente lite*.

Barnard, contra.—The respondent is not bound on this petition by the previous finding. It is usual in fixing permanent alimony to follow the findings on the petition for alimony *pendente lite*, but not so where there has been a divorce, then there must be a fresh inquiry; and on looking at the facts here the respondent has nothing, he is heavily in debt and has only a voluntary allowance from his brother, to whom

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

also he is heavily in debt, and that cannot, therefore, be regarded as income: *Haviland* v. *Haviland*, 11 W. R. 550, 3 Sw. & Tr. 114. In the case of *Clinton* v. *Clinton*, 14 W. R. 545, L. R. 1 P. & D. 215, where the trustees had an absolute discretion to pay an amount included as income, and the court took steps to enforce their order, the order was in terms to pay so long as the trustees continue to pay.

Willock in reply.

Cur. adv. vult.

Feb. 1.—JEUNE, P., delivered the following written judgment: In this case there was a decree for dissolution on the petition of the wife, and on an application for permanent maintenance the learned registrar has reported: "The respondent has no means, and is indebted to his brother in the sum of about £18,000, who, nevertheless, allows the respondent the sum of £60 a month so long as he resides out of this country; the respondent is also indebted to other persons in various sums amounting together to about £1,700"; and the registrar has submitted that the respondent should be ordered to pay to the petitioner the sum of £15 a month. On a previous application for alimony *pendente lite* accounts were gone into, affidavits filed, and the respondent was cross-examined. There was practically no additional evidence on the application for permanent maintenance, but the registrar proceeded on the evidence given before him on the application for alimony *pendente lite*. This was in accordance with the practice, and, I think, quite right. There are authorities which seem to go as far as to show that if alimony *pendente lite* has been awarded, no evidence can be given on this application for permanent alimony except to show alteration in the husband's means; see *Franks* v. *Franks*, 31 L. J. P. & M. 25, 10 W. R. D. & M. Dig. 13, and *Greenwood* v. *Greenwood*, 32 L. J. P. & M. 136, 11 W. R. D. & M. Dig. 13. It certainly is the practice that when alimony *pendente lite* has been fixed, not by consent, but after a full inquiry, the facts so elicited constitute the grounds on which the amount of permanent alimony, or permanent maintenance, should be determined. The learned registrar has arrived at the sum of £15 a month by taking one-third of the husband's income of £60 a month and making a deduction in respect of the debt of £1,700. This, on an application for permanent maintenance, is, I think, a correct conclusion.

But it was argued before me that the husband's income of £60 a month is a voluntary allowance from his brother, and that, therefore, it ought not to be taken into account in fixing alimony, and reliance was placed on the case of *Haviland* v. *Haviland*. I reserved judgment because I wished to ascertain whether since the date of that case, incomes to which the recipients have no legal claim have been excluded. I am informed that they have not; on the contrary, they have in many instances been taken into calculation. Not only do I think it right that this should be so, but I can easily understand why *Haviland* v. *Haviland* has not been considered to forbid such a practice. It will be observed that in that case all that the learned judge said was: "It seems to me that I ought not to allow alimony in respect of the voluntary allowance made by the husband's mother in this case, but I do not mean to say that cases may not arise in which alimony may properly be awarded in respect of an annual income to which the husband has no strict legal right." Accordingly, in the case of *Clinton* v. *Clinton*, the court ordered and enforced a payment of permanent alimony where the sole income of the husband consisted of a rent-charge, with regard to the payment of which trustees had an absolute discretion; and, later, in the case of *Moss* v. *Moss and Bush*, 15 W. R. 532, the court ordered alimony *pendente lite*, though the husband's only income consisted of a voluntary allowance from his father, which had, in fact, been stopped since the commencement of the suit. It appears to me that, if once it be conceded that recourse may be had to incomes of which the recipient has no legal power to enforce the payment, it is impossible to draw any distinction in principle between one or another kind of such incomes. Nor can I see any reason why a wife on separation or divorce from her husband should not, in a proper case, have a share of any kind of income in the whole of which she would have participated as his wife. Injustice to the husband is prevented by the provisions in the Act which allow the maintenance to be reduced or suspended if his means of paying it fail.

The report of the registrar will therefore be confirmed, with costs.

Registrar's report confirmed.

Solicitors for the petitioner, *Lewis & Lewis.*

Solicitors for the respondent, *Marshall & Marshall.*

House of Lords.

From C. A. (England). Nov. 13.

SUDELEY (LORD) AND OTHERS v. ATTORNEY-GENERAL. (a.)

Inland revenue—Probate duty—Undistributed residuary estate of English testator—Residuary legatee—Foreign assets.

A domiciled Englishman who died in 1892 (*by his will which was proved in England by his executors who had an English domicile*) *bequeathed one-fourth of his residuary estate to his wife, who died in* 1893, *before her husband's estate had been fully administered. The one-fourth of the husband's residuary estate included money invested upon mortgages of real estate in New Zealand, which had not been specifically transferred or appropriated to the wife's executors. The Crown claimed probate duty on the wife's one-fourth share in the New Zealand mortgage securities.*

Held, that the right of the wife's executors was to have the administration of the husband's estate completed and to have one-fourth of the proceeds paid to them; that, consequently, the wife's interest in her husband's residuary estate was an English asset, and probate duty was payable in England by her executors on one-fourth of the value of the New Zealand mortgages.

Decision of the Court of Appeal, 44 *W. R.* 340, [1896] 1 *Q. B.* 354, *affirmed.*

This was an appeal by the executors of Mrs. Tollemache from an order of the Court of Appeal (Lopes and Kay, L.JJ., Lord Esher, M.R., dissenting), 44 W. R. 340, [1896] Q. B. 354, reversing a decision of the Queen's Bench Division (Lord Russell of Killowen, C.J., and Charles, J.), reported 43 W. R. 700, [1895] 2 Q. B. 526.

The facts are given in the reports in the courts below, and sufficiently appear in Lord Herschell's judgment.

Channell, Q.C., Farwell, Q.C., and *Bremner*, for the appellants.—Probate duty depends in this case on what

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

are foreign assets. If assets become a trust fund, then the duty depends on the domicile of the trustees. It is admitted that these assets of the husband were foreign assets; and the trustees were directed to retain these investments. If everything had been carried out there would have been such a trust fund. The form of the suit ought not to affect the question. If I was equitable owner of £20,000 Consols in the name of an honourable foreigner, the liability would not depend on his domicile. The question is, What estate and effects had Mrs. Tollemache at the time of her death? She had a right in respect of the property as distinguished from a mere personal right against the executors. If property abroad, she would have to bring her action abroad should trustees be wrongfully dealing with that property: *Ewing* v. *Orr Ewing*, 32 W. R. 573, 9 App. Cas. 34, 10 App. Cas. 453; *Walsh* v. *Reg.*, [1894] A. C. 144, 42 W. R. Dig. 61; *In the Goods of Ewing*, 6 P. D. 19, 29 W. R. Dig. 474; *Laidlay* v. *Lord Advocate*, 15 App. Cas. 468, 39 W. R. Dig. 196. The right given is to a specific portion of each estate in the case of real property, and so here. The widow's executors have a right to have one-fourth of these assets transferred to them provided they are not needed for payment of debts—*i.e.*, one-fourth of each particular asset. [Lord HALSBURY, C.—She had no claim on any specific property.]

They referred also to the judgment of Stirling, J., in *Bulkeley* v. *Stephens*, 44 W. R. 490, [1896] 2 Ch. 241; *Howe* v. *Lord Dartmouth*, 7 Ves. 137; and *Dowsett* v. *Culver*, [1892] 1 Ch. 210, 40 W. R. Dig. 89.

Sir R. Webster, A.G., Sir R. Finlay, S.G. (*Vaughan Hawkins* with them), for the respondent, were not called upon.

Lord HALSBURY, C.—I confess I think the length of this argument has been in a great measure due to the fallacious use of language as applicable to the rights of these parties. In a certain sense a person may have a claim; a person may be entitled to this, that, and the other; but it is to be observed here that the whole controversy turns upon the character of the particular thing to which the legatee is entitled. With reference to a great many things it would be quite true to say that she had an interest in these New Zealand mortgages; it would be quite true to say that she had a claim on them; in a loose and general way of speaking nobody would controvert or deny that that was a very fair exposition of what her interest was. But the moment you come to give a definite effect to the particular thing to which she becomes entitled under the will, that moment you must use strict language and see what it is to which the person is entitled, because upon that, in this case, depends the solution of the question whether or not the thing, the asset, that which is to be the subject of benefit to the legatee, is a foreign asset or an English asset. Therefore it is idle to use such phrases as your lordships have heard, I think for a very considerable time, that this was what the person was "entitled to," that she had an "interest" in this estate. All those phrases are perfectly true in a general way of speaking, but as to the particular discussion before your lordships they are inapplicable unless you establish as the starting-point the proposition that the thing that the legatee was entitled to was the actual mortgage itself, so that the New Zealand mortgage, the foreign asset, was the thing that was to be administered. Now I confess it seems to me, when one looks at it accurately, that that is an entire mistake. The thing to which the legatee was entitled was one-fourth share of a residuary estate consisting, it may be, of many things; and I think that it was fallacious on the part of Mr. Channell to say that the residue was very nearly ascertained, because the question is not only of amount—although I think that of itself would not be sufficient if it were only of amount—but it is the category of substance as well as the category of amount. It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things—it may consist of only a sum of money, and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say, "I will have this or that part of the assets." If a trustee is to be the character filled, the *cestui que trust* has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted. In this case the trustees and executors happen to be the same persons, but I think that Mr. Channell made the point clear by adopting the hypothesis of supposing that the executors and trustees had been different persons; here they happen to be the same persons, but in point of time it is the same. Until the thing has been ascertained, until the fund has been constituted, the thing of which the trustees are the trustees has not been ascertained. Whether you treat them therefore as trustees or executors, the same consideration arises.

Now, if the only thing that the legatee is entitled to is the fourth share of an ascertained residuary estate, I say that to my mind it is impossible to maintain that the character of any part of that estate can be ascertained so as to make it possess a specific locality until that has happened; it is a condition precedent to know what the residuary estate is, and until that has been ascertained you cannot tell of what it will consist. The right of the person to bring an action or to insist upon the performance of the trust may be one thing, but I want to know what the thing is, and until I ascertain that, and until the thing comes into existence, it appears to me that the question does not arise. If that is right, then the thing to which the legatee is entitled—call it a debt, call it something that must be administered either by trustee or executor—the character of it, the local character of it is fixed by the persons—call them debtors or call them trustees, I do not care which; they are the debtors or trustees who are in this country, and have this sum of money to administer here for the purpose of satisfying the trust or the duty of executors. Under these circumstances it appears to me that there can be but one answer to the question, and that is, that the debtors are here. The fixing of the character of the assets by the presence of the debtor may or may not have been very philosophical in early times; but it is a fact that cannot be controverted, and if it is a debt and the debtor is here, that is the character of the asset as fixed by the residence of the debtor, and that asset is English.

It appears to me that that disposes of the whole question, and I believe that the length of the argument—a very ingenious and learned argument I do not deny—has entirely been produced by alternately using the words "estate" and "interest," sometimes in their legal technical sense, and sometimes in their more popular sense; while the whole foundation of the argument is that the New Zealand mortgages are specifically the property of the legatee, a proposition which to my mind it is impossible to maintain. I entirely agree with the language used by Lopes and Kay, L.JJ. I believe that they have put in very terse and accurate language the true situation of the property in respect of its local character as assets, and

I would wish to adopt the language which they have used.

I accordingly move your lordships that this appeal be dismissed with costs.

Lord HERSCHELL.—I am of the same opinion. The appellants, as the executors of Mrs. Tollemache, became entitled on her death to one-fourth part of the clear residue of the estate of her husband. That estate has not been fully administered; one legacy and some debts remain unpaid. The executors, who are the appellants here, have brought in an account, as part of their testatrix's estate, of a certain sum of money as being what they are entitled to and bound to pay probate duty upon under the will of which they are executors in respect of the estate of their testatrix. They have taken, as I understand, the whole of the assets of Algernon Tollemache except between £400,000 and £500,000 invested in New Zealand mortgages; they have put on the other side the legacy and debts still remaining unpaid; they have struck a balance between the two, and one-fourth part of that sum is, as they contend, the sum upon which they are bound to pay probate duty. It is contended, on the other hand, on behalf of the Crown, that the amount of these New Zealand mortgages ought to have been one of the items on the asset side of the account, and that, of course, would have increased the amount upon which duty was payable by one-fourth of that amount. The appellants claim a right to exclude that sum on the ground that the mortgages are foreign assets, and that, therefore, no duty is payable in respect of them; and no doubt, if they can make out that any particular asset which is part of their testatrix's estate is a foreign asset, then in respect of that no duty is payable. I agree with my noble and learned friend on the woolsack that the whole fallacy of the argument on behalf of the appellants rests on the assumption that Mrs. Tollemache, or they as her executors, were entitled to any part of these New Zealand mortgages as an asset, she in her own right or they as an asset of their testatrix. I do not think that they have any estate, right, or interest, legal or equitable, in these New Zealand mortgages, so as to make it an asset of her estate. What she had a right to, what they as her executors had a right to, is one-fourth of the clear residue of Mr. Tollemache's estate; that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists as contended for on the part of the appellants. It seems to me, as my noble and learned friend has pointed out, that until the estate is fully administered it is impossible to say of what assets the residuary estate will consist; we do not know how much of the debt remaining unpaid was in the present case, and there was only one legacy unpaid. But the argument must be precisely the same; if there had been a large amount of debt and many legacies still unpaid, it could not have made any difference in point of legal effect. In that case how is it possible to say that any one of the residuary legatees can point to any part of the assets of the testator and say, "This is a part of my share," when it depends entirely on the method of administration of the trustees in what form the share becoming divisible will exist when the administration is at an end. That really seems to me decisive against the claim of the appellants. I do not go further than that. It is unnecessary to say what would have been the case if the estate had been administered; but I certainly am very far from thinking, as at present advised, that it would have made any difference, and that even in that case it could have been said that this was a foreign asset as regards the estate of the testatrix, whose estate is in question.

But it is said that it was open to the executors of Algernon Tollemache to make over, if they please, to the testatrix or to her executors, in satisfaction of her rights under the residuary clause in her husband's will, these New Zealand bonds, or a portion of them; and for that authority has been cited. That authority, so far from telling in favour, seems to me to tell against the argument of the appellants. If it was open to the executors in the course of administration to make over to her these New Zealand bonds, it was equally open to them to make them over to other legatees and not to her. And if that be the right which an executor possesses, not only to choose and select what assets he shall use for the purpose of paying debts, but also to determine the way of administration by arrangement with the legatees as to what portion of the estate shall go to this or that legatee, it seems to me impossible under such circumstances as those to say that at the time of the death of the testatrix her executors were in a position to insist that a certain portion of these bonds, or an interest in the undivided fourth part of these bonds, was a part of the estate of the testatrix. In truth, what she had a right to was to require the executors of her husband to administer his estate completely, and she had an interest to the extent of one-fourth of what should prove to be the residuary estate of the testator, Algernon Tollemache. Where was that situate? It seems to me that it can only be said to have been situate in this country. Indeed, I do not think it was seriously disputed on the part of the appellants that, unless their contention could be made out that there was a right to these assets, making them foreign assets, in Mrs. Tollemache, or her executors, probate duty is payable upon the whole sum, and the whole of it must be regarded as an asset situate in this country. For these reasons I think the judgment appealed from must be affirmed.

Lord MACNAGHTEN.—I am of the same opinion. I think the point is a very short one, and I think the claim of the Crown is very clear. For my part I am quite content to adopt the judgments of Lopes and Kay, L.JJ.

Lord SHAND.—I am of the same opinion, and I am satisfied to rest my judgment on the reasons given by the learned judges, Lopes and Kay, L.JJ. It is quite clear that the New Zealand mortgages were the property of Mr. Tollemache when he died, and I have seen nothing that occurred after that to make these mortgages the property of his widow. There was no allocation of any kind; and the trust fund was not in a position to be wound up. Even although the legacies and debts had all been paid I should hold the same view. There were a number of persons having right to the residue, and interested in its realization. The claim of Mrs. Tollemache's executors and trustees was really a claim to a share of the residue, and it had never been changed by allocation either by Mr. Tollemache's trustees, or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets. They might have objected to accept the New Zealand mortgages if it had been proposed to allocate these to them as part of the residue, and the other parties interested might also have had valid objection to such an allocation. If Mr. Tollemache's executors had held the entire estate for behoof of his widow, the case might have been different; but, with other persons interested in an undivided and

unrealised residue, none of the beneficiaries had in themselves a right of ownership in particular assets of Mr. Tollemache's estate.

Lord DAVEY.—The principal testator in this case, Algernon Gray Tollemache, died on the 16th of January, 1892. His widow, Mrs. Tollemache, was entitled to a life interest in the entirety of his residuary estate, and was also entitled to one-fourth of the capital; that is to say, Mrs. Tollemache had an immediate title to one-fourth of her husband's residue and a life interest in the other three-fourths. She died a little more than a year after the death of her husband. At the time of the lady's death the testator's personal estate had not been fully administered, and was in course of administration, and the amount of the clear residue had not been ascertained. I read the very clear statement in the answer of the executors, not forgetting Mr. Channell's statement, which seems to me to be irrelevant, that the estate had very nearly been administered. In the events which happened the residuary estate of the original testator is divisible into sixty-four shares, of which the present appellants are entitled to sixteen. What, then, are the rights of the appellants? Their right, and the only right which they could enforce adversely, is to have the administration completed and the residuary estate ascertained and realized, either wholly or so far as may be necessary for the purpose, and to have one-fourth of the proceeds paid to them. The residuary legatees may no doubt agree between themselves to take any portion of the estate in specie, or an appropriation may be made of particular portions of the estate in satisfaction of any share by any fair agreement between the executors and the residuary legatees, or a scheme of division of that kind might no doubt be made by the executors either with the sanction of the court, or possibly at their own risk. In this case there has been no election to take the estate or any portion of it in specie; nor has there been any appropriation by the executors, and, indeed, at the time of Mrs. Tollemache's death the time had not arrived for any such election or appropriation.

Mr. Channell endeavoured to argue that a trust fund had "practically" (I think that was the expression) been constituted of these colonial mortgages in Mrs. Tollemache's lifetime, and that she, at the time of her death, was entitled to an undivided share of that trust fund. It is sufficient answer to that argument to say that (on the statement in the answer) no trust fund had been constituted, or could have been constituted, until the residue had been ascertained, and it is unnecessary to consider what would have been the case if these mortgages had formed part of a duly constituted trust fund vested in trustees for the lady.

I am of opinion, on the facts of this case, that Mrs. Tollemache at the time of her death had no right of property in, or right to claim any part of, the mortgages in specie, and that the appellants, her executors, acquired only a right to have the estate duly administered, and to enforce that right by an action for the purpose, but had no right *virtute officii* to have any part of the New Zealand mortgages appropriated to the estate of their testatrix in specie.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *J. A. Bertram.*

Solicitor for the respondent, *F. C. Gore.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), — Feb. 26.

WILLIAMS v. GOOSE. (a.)

Practice—Payment into court—Issue—Method of leaving issue to jury—Ord. 22, *r.* 22—*Judicature Act*, 1875, *s.* 22.

Ord. 22, *r.* 22, *is not* ultra vires *as a contravention of section* 22 *of the Judicature Act*, 1875.

Application for a new trial of an action tried before Mathew, J., and a jury.

The action was brought to recover damages for personal injuries. The defendant in his defence, denied liability, and paid £30 into court. The plaintiff joined issue on the question of liability, and said that the sum paid into court was not sufficient to satisfy the claim.

At the trial the jury, in accordance with ord. 22, r. 22, were not informed of the fact that any money had been paid into court, and they returned a verdict for the plaintiff for £15.

Mathew, J., entered judgment for the defendant, directing that the sum of £15 should be paid out to the plaintiff, and that the balance of £15 should be paid back to the defendant.

Ord. 22, r. 22, is as follows: "Where a cause or matter is tried by a judge with a jury, no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages, as the case may be, without reference to any payment into court."

The plaintiff applied for a new trial on the ground of misdirection.

Crump, Q.C., and *Hohler*, for the plaintiff.—Ord. 22, r. 22, is *ultra vires*, as being in contravention of section 22 of the Judicature Act, 1875, which enacts that "Nothing in the principal Act, nor in any rule or order made under the powers thereof or of this Act, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury, before whom the same shall come for trial, with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues." Where money is paid into court, the only issue is whether the money so paid in is sufficient to satisfy the plaintiff's claim. Up to the year 1893, when ord. 22, r. 22, was made, the practice was that the jury were told what sum had been paid into court, and the judge directed them that the only question for them was whether that sum was enough. In this case the only question was whether the plaintiff was entitled to more than £30. The learned judge, therefore, ought to have disregarded the rule, and told the jury that £30 had been paid into court, and asked them whether that was enough.

Dickens, Q.C., and *Mallinson*, for the defendant.

Lord ESHER, M.R.—The argument in this case that it was misdirection on the part of the learned judge not to tell the jury what amount had been paid into court. It is put upon this ground, that, when money is paid into court, the issue is whether the sum so paid in is enough, whether the damages to which the jury think the plaintiff is entitled are more or l

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

than that sum. And it is argued that that issue must be put to the jury in those terms. Against that view there is ord. 22, r. 22, which says that no communication shall be made to the jury either of the fact that money has been paid into court or of the amount paid in until after verdict. It is argued, however, that that rule is *ultra vires*, and that it is the duty of the judge to tell the jury what amount has been paid into court. It is said that in an unreported case the Lord Chief Justice disregarded the rule; it does not seem, however, that he said it was *ultra vires*, and I do not comment on that case. I am of opinion that the rule is not *ultra vires*. The Rule Committee are authorized by section 17 of the Judicature Act, 1875, to make rules for regulating pleading, practice, and procedure, and rules so made have to be laid before Parliament. I have no doubt that what takes place in the course of a trial with regard to the conduct of the trial is a matter of procedure. This rule in effect says that though the *issue is* whether the sum paid into court is sufficient, that issue is to be left to the jury in a particular way. The judge is to direct the jury to find the amount of damages to which they think the plaintiff is entitled, and, after he has taken their finding, he is to enter judgment one way or the other according as the amount found by them is more or less than the sum paid into court. That is a matter of procedure, and we cannot say that the rule is *ultra vires*, even supposing that we have any power to consider the question whether it is *ultra vires*. The application must therefore be dismissed.

LOPES, L.J.—It is contended that ord. 22, r. 22, is *ultra vires*. I will not express any opinion on the question whether we have power to decide whether it is *ultra vires*, for in my opinion it is not *ultra vires*. It deals with procedure only. It is said that by section 22 of the Judicature Act, 1875, the issues must be left to the jury. But in this case it cannot be said that any issue has been withdrawn from the jury. The issues were, first, was there any liability; secondly, if there was any liability, what was the amount of the damages. It was not necessary to put the question expressly to the jury whether £30 was sufficient, though the result would be that, according as the damages found by them were more or less than that sum, judgment would be entered one way or the other. In my opinion the rule is a wholesome rule, and has worked satisfactorily.

CHITTY, L.J., concurred.

Application dismissed.

Solicitors for the plaintiff, *Sismey & Sismey*, for *Tolhurst, Lovell, & Clinch*, Gravesend.

Solicitors for the defendant, *L. Kirkman*, for *Mitchell & Macartney*, Gravesend.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Feb. 16.

WORCESTERSHIRE COUNTY COUNCIL (*Appellants*) *v.* ASSESSMENT COMMITTEE OF WORCESTER UNION (*Respondents*). (*a.*)

Poor law—Rating—Exemption—County council—Joint occupation by county council and justices.

Premises which are jointly occupied by a county council for administrative purposes and by justices for judicial purposes are rateable in respect of the occupation by the county council.

The principle laid down in Greig *v.* University of Edinburgh, *L. R. H. L.* (*Sc.*) 348, *as to exemption from rateability, followed.*

Appeal from the judgment of the Queen's Bench Division upon a case stated under 12 & 13 Vict. c. 45, s. 11, on appeal to quarter sessions against an assessment to the poor rate.

Under 1 & 2 Will. 4, c. xlviii. the justices of the peace for the county of Worcester purchased property in the city of Worcester for the purpose of erecting thereon a county hall, courts of justice, offices, and judges' lodgings. The buildings were erected and were known as the Shire Hall. The premises having been assessed to the poor rate, it was held in 1839 (*Reg.* v. *Justices of Worcestershire*, 11 A. & E. 57) that the justices were not liable to poor rate for the premises.

By section 64 of the Local Government Act, 1888, the Shire Hall became vested in the appellants.

In April, 1896, the appellants were assessed to the relief of the poor of the parish of St. Nicholas in respect of certain portions of the Shire Hall as the owners and occupiers thereof. Those portions comprised the council chamber, which was used for meetings of the county council, and also for holding a second court of quarter sessions and for other judicial purposes; the offices used by the clerk of the peace, who was *ex officio* clerk of the county council, for both the judicial business of quarter sessions and the administrative business of the county council; and a hall and other rooms used as waiting-rooms for witnesses and the public at assizes and quarter sessions, and at other times for county council purposes. The premises were assessed in so far as they were used for administrative as distinguished from judicial purposes; and it was agreed that if the premises or any part thereof were liable to be rated the amounts at which they were rated and the apportionments were to stand.

The question for the court was whether the appellants were liable to be rated in respect of the above premises or any part thereof.

The Divisional Court, upon the authority of *Middlesex County Council* v. *St. George's Union*, *ante*, p. 215, [1897] 1 Q. B. 64, held that they were liable to be rated.

Alfred Young and *C. F. Vachell*, for the appellants.—In *Middlesex County Council* v. *St. George's Union* the parts used jointly by the justices and the county council were used for administrative purposes only. Here the user by the justices is for judicial purposes, and that exempts those parts from rating. Before the Local Government Act, 1888, the justices discharged both their administrative and judicial duties in this building, and yet the whole building was exempt: *Nicholson* v. *Holborn Union*, 35 W. R. 230, 18 Q. B. D. 161. The fact that the county council now discharge the administrative duties which were formerly discharged by the justices cannot make the parts jointly used rateable. The only parts liable to be rated are those which are separately occupied by the county council for administrative purposes.

Bosanquet, Q.C. (*R. Harington* with him), for the respondents.—The test of exemption from rateability is laid down by Lord Cairns in *Greig* v. *University of Edinburgh*, L. R. 1 H. L. (Sc.) 348—namely, that the occupation must be by the Crown or by persons using the property exclusively in and for the service of the Crown. Here there was no such exclusive occupation.

Lord ESHER, M.R.—Certain parts of the Shire

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Hall have been assessed to the relief of the poor, and the county council have been assessed as the occupiers thereof. There is a part which has not been assessed, and that is the part which is used exclusively for the assizes and quarter sessions. The parts which are rated and the mode in which those parts are used are described in the case. It is clear that the county council are the owners and occupiers. All the parts so rated are used partly for county council purposes. Upon occasions those parts are also used by the justices for judicial purposes, and it is contended that those parts are exempt from rating, the argument coming to this, that because those parts are sometimes used by the justices, the county council, which also uses those parts for county purposes, are exempt from rating. The county council have not been rated at the full value of those parts, but the value has been apportioned. We have nothing to say to the figures, and we can give no opinion whether the county council have not been treated too favourably. The question whether there should be an apportionment may arise on some future occasion, and the court may have to say whether if the premises are not exempt the county council should not be rated at the full value.

Now, the general principle of exemption has been laid down by Lord Cairns in the House of Lords in *Greig* v. *University of Edinburgh*: "Any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor."

In the present case the parts of the building which are rated are not occupied by persons using them exclusively in or for the service of the Crown. They are therefore rateable.

LOPES, L.J.—The decisions in the House of Lords show that buildings occupied and used for public purposes are rateable unless they are occupied by the Crown or by persons using them in or for the service of the Crown. They must be occupied exclusively by the Crown or by persons for the purposes of the Crown to make them exempt.

CHITTY, L.J.—I am of the same opinion. The case comes within the principle laid down in the House of Lords in *Greig* v. *University of Edinburgh*.

Appeal dismissed.

Solicitors for the appellants, *Clarke & Blundell*, for *S. Thorneley*, Worcester.

Solicitor for the respondents, *G. Astell Hall*, for *A. W. Knott*, Worcester.

High Court of Justice.

Chan. Div. North, J. — Feb. 17, 18.

LONDON AND COUNTY BANKING CO. *v.* GODDARD. (*a.*)

Mortgage—Equitable mortgage by deposit—Declaration of trust—New trustee—Vesting declaration—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 12, *sub-sections* (1) (3); 50.

Real estate was conveyed in 1883 *to A. in fee, who sold it again, and afterwards repurchased it on the* 26*th of August*, 1887. *In* 1890 *A. made an equitable mortgage of the property to B. by deposit of the deed of conveyance of the* 26*th of August*, 1887. *On the* 20*th of February*, 1894, *A. made a second equitable mortgage by depositing with a bank the deed of conveyance of* 1883, *and this deposit was accompanied by a memorandum in which A. declared that during the continuance of the loan then advanced by the bank he held the property on trust for the bank, and thereby further gave the bank power to appoint a new trustee in his place and to make a declaration vesting the property in such new trustee. The bank had then no notice of B.'s prior equitable mortgage. On the* 22*nd of February*, 1896, *A. executed a legal mortgage of the same property to C., who, however, took with notice of the bank's equitable mortgage. On the* 23*rd of March*, 1896, *the bank (having then become aware of B.'s equitable mortgage) executed a deed appointing the manager of the bank a new trustee in place of A., and containing a declaration vesting the property in such new trustee.*

Held, (1) *that, by reason of the power of appointing a new trustee and the above-mentioned vesting declaration, the bank could, by virtue of section* 12, *sub-section* (1), *of the Trustee Act*, 1893, *vest the legal estate in the new trustee, and that neither section* 12, *sub-section* (3), *nor section* 50 *of the same Act prevented this;*

(2) *That C., the legal mortgagee, having taken with notice of the bank's equitable mortgage, only took the legal estate subject to the power of the bank to divest it; and*

(3) *That the bank had got in the legal estate, not by means of a conveyance from a bare trustee, but by means of the declaration of trust which the bank stipulated for when it advanced the money, and, consequently, that the bank was entitled to priority over B.'s prior equitable mortgage.*

Action.

In 1883 certain property in Middlesex was conveyed to Samuel Goddard, who sold it on the 15th of March, 1886.

The purchaser mortgaged the property to Battcock and King, and on the 26th of August, 1887, resold the property to Samuel Goddard, subject to the mortgage to Battcock and King.

On the 1st of July, 1890, Samuel Goddard deposited the conveyance of the 26th of August, 1887, with Barrell to secure an advance of £300.

Battcock and King were paid off, and, having no notice of Barrell's charge, reconveyed the property to Samuel Goddard on or before the 20th of February, 1894.

On the 17th of February, 1894, Samuel Goddard went to the bank and deposited the title deeds of other properties to secure an advance of £5,500.

On the 20th of February, 1894, a further advance of £2,000 was made, and Samuel Goddard deposited with the bank the deeds relating to this property down to and including the first conveyance to him in 1883, which he said conferred a clear title upon him, and said that he was willing to submit it to the bank's solicitors, who thought the title good. The bank had then no notice of Barrell's charge.

The Middlesex registry was not searched by either Barrell or the bank. The sale by Samuel Goddard on the 15th of March, 1886, and the repurchase by him on the 26th of August, 1887, were (*inter alia*), however, in fact, registered.

The memorandum given by Samuel Goddard to the bank upon the occasion of this deposit was in the following printed form, the names only being written:

"I declare that during the continuance of the charge I will hold the premises in trust for the bank, and will convey them as the bank or its general manager may direct, and I authorize the bank to remove me from being a trustee, and to appoint another person and make a declaration vesting the property in such other person."

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

By an indenture dated the 22nd of February, 1896, Samuel Goddard conveyed by way of mortgage the legal estate of the property in question to Joseph Goddard to secure the repayment of a loan of £1,000 advanced by Joseph Goddard.

A statement in the pleadings that Joseph Goddard had notice of the charge to the bank was not denied, and the mortgage to him was subject to the bank's equitable charge.

By an indenture dated the 23rd of March, 1896, the bank, in exercise of the powers conferred by the memorandum of the 20th of February, 1894, appointed its general managers trustees in the place of Samuel Goddard, and declared that the property should vest in such trustees. At the time of the execution of this deed of the 23rd of March, 1896, the bank had notice of Barrell's equitable charge.

Samuel Goddard became bankrupt on the 23rd of March, 1896.

On the 29th of April, 1896, the writ in the action was issued, the bank claiming to be first mortgagees as against Barrell, Joseph Goddard, and Samuel Goddard's trustee in bankruptcy.

Rawlins, Q.C., and *Vaughan Hawkins*, for the bank.—We have got in the legal estate by virtue of the Trustee Act, 1893, s. 12 (1), and there is no equity preventing us from availing ourselves of its protection: *Taylor* v. *Russell*, 38 W. R. 663, [1891] 1 Ch. 8. If we have not got in the legal estate, we have the right to get it in.

They cited *Willoughby* v. *Willoughby*, 1 T. R. 763; *Wilmot* v. *Pike*, 5 Hare 14; *Roberts* v. *Croft*, 6 W. R. 144, 2 De G. & J. 1; *Dixon* v. *Muckleston*, 21 W. R. 178, L. R. 8 Ch. 155; *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353; *Bushell* v. *Bushell*, 1 Sch. & Lef. 90; *In re Ingham*, [1893] 1 Ch. 352.

Swinfen Eady, Q.C., and *Greenwood*, for Barrell.—Priority is not affected by getting in the legal estate from a trustee: *Sharples* v. *Adams*, 11 W. R. 450, 32 Beav. 213. Moreover, an equitable incumbrancer cannot, after receiving notice of a prior incumbrance, obtain priority over it by getting in a legal estate from a bare trustee: *Harpham* v. *Shacklock*, 30 W. R. 49, 19 Ch. D. 207. In that case the bare trustee was a paid-off mortgagee. *A fortiori* priority cannot be obtained by getting in the legal estate from the mortgagor. The Trustee Act does not apply to a mortgage.

Bilton, for Joseph Goddard.

Jenkins and *Clayton*, for other parties.

Rawlins, in reply.—The relations of mortgagor and mortgagee are not fiduciary, but if they choose to make them so, they can. This is commonly done as regards the outstanding three days in a mortgage of leasehold property. A person who takes a legal estate from a trustee with notice of a prior charge himself becomes a trustee: *Saunders* v. *Dehew*, 2 Vern. 270; so even if Joseph Goddard has the legal estate, he is a trustee for the bank. *Harpham* v. *Shacklock* is explained in *Taylor* v. *Russell*. There is a distinction between getting in the legal estate by a new transaction, and a man clothing himself with the legal estate in pursuance of a former arrangement. *Sharples* v. *Adams* is criticized in *Maxfield* v. *Burton*, 22 W. R. 148, p. 149, L. R. 17 Eq. 15, p. 19. See, too, *Garnham* v. *Skipper*, best reported 34 W. R. 135. We were less negligent than Barrell, although neither of us searched in the Middlesex registry, for we investigated the title and got the deeds.

NORTH, J.—[His lordship, after observing that the Middlesex register was not searched by either Barrell or the bank, referred briefly to the effect of the Middlesex Registry Act, which he seemed to consider was not material in the present case, and continued:] The deposit with Barrell being in 1890, Samuel Goddard in 1894 deposited the deeds with the bank, who had no notice of Barrell's charge. It is said the deed of the 20th of February, 1894, did not give the legal estate, but only the right to call for it, and that the mortgage is equitable only as the property had been previously mortgaged to Barrell. I do not, however, see why section 12 (1) of the Trustee Act, 1893, should not have effect. It is true that the bank did not get any legal estate on the 20th of February, 1894, but it took the deeds and a security in such a form that it could take the legal estate at any moment it chose, and the legal estate vested under the provisions of the Trustee Act, 1893. It is said that this is a mortgage deed, and that the Act does not apply. Section 12 is very important. The reference in section 12 (3) is to the practice of keeping notice of the trusts of mortgage money out of the mortgage to facilitate the reconveyance. [His lordship also referred to sections 10, 11, 12, 15, 26, 28, 29, 30, and 36.] Under the definition clause (section 50) "trust" does not include the duties incident to an estate conveyed by way of mortgage. It is said that it follows that the legal estate cannot be vested by such a declaration. But the definition is taken from the Trustee Act, 1850. As between the mortgagor and mortgagee there is no trust during the continuance of the security. But the words "conveyed by way of mortgage" mean where there is a mere mortgage. Whatever the interpretation clause may be, there is nothing to say that the Act is not to apply to a case in which a mortgage contains an express declaration of trust. The declaration of trust in a mortgage of a lease is similar. I recollect the form used to be a declaration of trust for a purchase after sale, but another form seems to have come into use. I think the vesting was co-extensive with the declaration of trust. I do not express any opinion as to what effect it would have had if Joseph Goddard had not known of the memorandum to the bank. He knew that the person from whom he derived title had declared himself a trustee for the bank, and had given the bank power to vest the property in any persons the bank might thereafter appoint as trustees in place of him. He could not, therefore, acquire the legal estate except subject to the power of the bank to divest it. It is said that the legal estate was not given at the time the money was advanced. But Lord Herschell says in *Taylor* v. *Russell*, [1892] A. C., p. 253; "It is not disputed that the doctrine of equity is well settled that a man who has *bonâ fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it, though during the interval between the payment and the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." Lord Macnaghten says, [1892] A. C. 259: "The mere fact that the subsequent incumbrancer has notice of the prior incumbrance when he gets in the legal estate counts for nothing. It is, as Lord Hardwicke says, the very occasion which shows the necessity of it."

Barrell had no declaration of trust in his security, but merely the right to foreclosure conferred by the deposit. The bank obtained an express declaration of trust, and advanced cash, and that being the case, What is there inequitable in allowing them to take advantage of the legal estate? If "squeezing out" is ever justifiable, it is here. It is not a conveyance from a trustee, but the bank has what it stipulated

for when it advanced the money, and there is nothing to make it inequitable that the bank should have what it contracted for.

Solicitors, *S. Pilley; Howard & Shelton; Woodbridge & Sons; Sole, Turner, & Knight; Ward, Perks, & M'Kay.*

Chan. Div. } Stirling, J. } Dec. 10, 15; Jan. 30.

THE MAYOR, &c., OF WEST HARTLEPOOL v. ROBINSON. (a.)

Local Government—Public health—Charges for paving—Duty imposed by Act of Parliament—Trespass—Memorial to Secretary of State—West Hartlepool Extension and Improvement Act, 1870 (33 & 34 *Vict. c.* 113), *ss.* 80, 349—*Public Health Act,* 1875, *s.* 268.

Where the Legislature has imposed on any persons duties the discharge of which requires entry on lands, these duties are imposed irrespective of the ownership of the lands in question, and acts done in due discharge of such duties do not constitute a trespass.

The judge, being of opinion that under the circumstances of the case the defendant had a grievance on account of certain charges made against him for paving and sewering streets,

Held, following Walthamstow Local Board *v.* Staines, [1891] 2 *Ch.* 606, 40 *W. R. Dig.* 131 (*which was decided on section* 268 *of the Public Health Act,* 1875, *with which section* 349 *of the local Act was practically identical*), *that the proper course for the defendant was by way of appeal to the Secretary of State by memorial for relief.*

These were two summonses by which the Corporation of West Hartlepool sought to establish and enforce against certain lands of the defendant abutting on two streets known as Murray-street and Sandringham-road two charges for sums of £27 15s. 6d., and £328 3s. 4d. in respect of paving and sewering the two streets. These charges were claimed under the West Hartlepool Extension and Improvement Act, 1870. In 1878 the lands in question formed part of the Lynnfield Estate, which was the property of the defendant and occupied by him residentially. In the same year the owners of the land immediately adjoining on the south, being desirous of developing their property as a building estate, applied to the West Hartlepool Improvement Commissioners (the predecessors in title of the plaintiffs) to sanction a scheme for that purpose. A plan was submitted to the commissioners showing the proposed road called Middle Park-road, running along the boundary between the two estates, half being on the land of the proposers of the scheme and half on that of the defendant. The plan bore on it a note "It is proposed to leave half of Middle Park-road 18ft. wide." The scheme was sanctioned by the commissioners, and the road now called Sandringham-road was made. First this road was only 18ft. wide, and there was an agreement between the defendant and the commissioners that the defendant would afterwards contribute a sufficient quantity of land on the north side to give a street 36ft. wide. The existence of this agreement was denied on the part of the surveyor to the corporation and another person, but this denial was based rather on the absence of documents than personal knowledge, and his lordship, having regard to the weight of evidence, came to the conclusion that there was such an agreement. As above mentioned, when originally constructed Sandringham-road was only 18ft. wide and ran along the south boundary of the defendant's estate. No portion of his property was taken for the purpose of the road and his land was properly fenced off. In January, 1892, the Corporation of West Hartlepool made an order for paving, &c., this original 18ft. wide road. Notice of this order was served on the defendant and other adjoining landowners. None of the landowners on whom notice was served executed any part of the works required, which were performed by the corporation. The cost of the works was apportioned by the borough surveyor, and notices were sent to the defendant that he had been charged with the above mentioned amounts. The defendant sent these notices to a Mr. Muir, alleging reasons why he should not be called on to pay, and also sent the following letter to the corporation: "The demand note for £27 16s. 4d. dated the 15th of September we have handed to Mr. J. Muir, Church-street, to whom the whole of the Lynnfield Estate has passed. We therefore leave you to settle the matter with him, as we are told the account is a disputed one." Some correspondence took place between Muir and the borough surveyor, and finally proceedings were instituted against Muir before the magistrates. These proceedings were successful, as were those which were subsequently instituted before the Quarter Sessions. An appeal from the sessions to the Queen's Bench failed on the ground that it was too late, more than six months having elapsed since the apportionment. The present summons was then issued against Muir in the belief that he was the owner and not merely the agent. On the 5th of February, 1896, an order was made substituting the present defendant for Muir. It was proved that the defendant had thrown the agreed portion of his land into the road, making it 36ft. wide, and that he had done the necessary work of paving, &c., that portion of the road, the claim now made against him being in respect of the 18ft. of road which was not on his land at all.

Buckley, Q.C., and *S. B. Druce,* for the plaintiffs.—The local Act on which our claim is based is almost identical with the Public Health Act.

Graham Hastings, Q.C., and *Strachan, Q.C.,* for the defendant.—The defendant did not own the soil, and would have had to trespass to execute this work.

Buckley, Q.C., replied.

Cur. adv. vult.

Jan. 30.—STIRLING, J., after stating the facts and deciding certain other points raised in favour of the plaintiffs, continued: It is next said that the order of the 15th of January, 1892, was inoperative as against the defendant, the reason being that if he attempted to obey it he would have been guilty of a trespass, because the soil was vested in the successors to Messrs. Callender, Pape, & White, or at all events was not vested in the defendant. Now, section 80 says this: "If at any time any street, &c., shall not be completed as the order directs the owners of the buildings and lands in such street shall at their own respective expense remove all obstructions in, on, or under, and sewer, drain, level, flag, pave, macadamize, and otherwise complete the same within the time and in the manner prescribed by the order." It says nothing about the land or the soil or the ownership of the land on which it is to be executed. It is true as a general rule that owners of land abutting on a street are owners of the soil of each side up to the middle of the road. But that is subject to many exceptions of which the Legislature must be

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

taken to have been aware, for the Act of Parliament has not provided anything on this point with reference to the duties imposed, and it is necessary that the persons to carry them out should enter on the soil as to which the duties are so imposed irrespective of the question whether they are owners or not. It seems to me that the acts necessary would be done in discharge of that duty, and would not constitute a trespass. [His lordship then dealt with other points raised, and continued:]

Then I have to decide whether the existence of the agreement of 1878 as to half the road constitute a defence to the action. As regards that agreement, according to the defendant's evidence, it was to throw the land into the road, and not to make the road. It is true he has actually made it, but after notice had been given by the letter of the 15th of September, 1893, of the position taken up by the plaintiffs, and I have great difficulty in seeing how the defendant can base a legal defence on those circumstances. No doubt there is a certain amount of hardship apparently on the defendant, because unquestionably he has executed works which would have fallen naturally on the adjoining owners, and I should be glad if I could see my way to relieve him of the expenses so in part charged against him. At the conclusion of the argument I could see no way except by appeal to the forbearance of the plaintiffs. But there is a section which was not called to my attention at the Bar—namely, 349, which runs thus: "Whenever any new street or other expenses are charged by the commissioners on the owners or occupiers of buildings or lands, and any such owner or occupier shall deem himself to be aggrieved thereby, he may address a memorial to one of her Majesty's principal Secretaries of State, stating the grounds of his complaint, and the said Secretary of State may make such order in the matter as to him may seem equitable, and the order so made shall be binding and conclusive upon the commissioners, and if the commissioners shall have proceeded to recover such expenses the said Secretary of State may if he shall think fit direct the said commissioners to pay to the person so proceeded against such sum as he may consider to be a just compensation for the loss, damage, or grievance thereby sustained by him."

So far as I am able to discover the remedy provided by that clause is still available to the defendant. I will also add that, although down to this point the defendant has not relied on that section, its existence has a material bearing on the various points of the case already mentioned. There is in the Public Health Act, 1875, a very similar provision. Section 268 is as follows: [His lordship read the section, and continued:] That section has come under the consideration of the courts in several cases, particularly in *Wake* v. *The Mayor, &c., of Sheffield*, 32 W. R. 82, 12 Q. B. D. 142. That was rather a remarkable case. [His lordship read the headnote, and continued:] It appeared on the evidence that the plaintiffs were able to show that a considerable part of the work was expended on land which formed no part of the road, but was private property. In point of fact it was actually fenced off from the road altogether. The present Master of the Rolls says, in his judgment: [His lordship read the judgment at p. 145, from "The statute has," to p. 146, "which can be taken," and continued:] More recently that decision has been followed in the Court of Appeal in *Walthamstow Local Board* v. *Staines*, [1891] 2 Ch. 606, 40 W. R. Dig. 131. The whole substance of the defendant's case is that he has land which is charged by the plaintiffs with expenses which, regard being had to the agreement, ought not to be borne by him. Moreover, by reason of the expenses so charged that brings the case within section 349 of the local Act. If, as laid down by the Master of the Rolls in the case of *Wake* v. *The Mayor, &c., of Sheffield*, there is a grievance in respect of a new liability created by the Act, and the aggrieved party is confined to the particular remedy conferred by the Act, then many of the defendant's points cannot be raised here, but are subject to review by the Secretary of State. As far as the matter is before me the plaintiffs have made out their case, and there must be judgment for them on the usual terms. As the second summons seems to have been unnecessary, the costs so far as occasioned by that summons must be set off.

Solicitors, *Baker, Lees, & Postlethwaite*, for *Higson Simpson*, West Hartlepool; *Bell, Brodrick, & Gray*, for *Harrison & Barker*, West Hartlepool.

Chan. Div. Kekewich, J. — Feb. 4, 18.

In re THE CONTINENTAL OXYGEN CO. (LIMITED). ELIAS *v.* THE CONTINENTAL OXYGEN CO. (LIMITED). (*a.*)

Company—Debenture—Floating security—Foreclosure—Debenture-holders' action for foreclosure—Absence of one debenture-holder.

In a debenture-holders' action the court will not make an order for foreclosure where one of the debenture-holders has neither been made a party nor given his consent.

Sadler *v.* Worley, 42 *W. R.* 476, [1894] 2 *Ch.* 170, *distinguished.*

Further consideration.

The defendant company in this case was incorporated in 1886 under the Companies Acts, 1862 to 1883, for the purpose (among others) of manufacturing and supplying oxygen in different countries in Europe.

In May, 1891, the company, in pursuance of its powers for borrowing and raising money, raised the sum of £15,000 by the issue of 150 mortgage debentures of £100 each, charging thereby by way of floating security its patents and all other real personal property then or at any time thereafter belonging to it.

Condition 6 endorsed on the debentures provided that on default (as therein mentioned) by the company in payment of principal or interest, the debentures should become immediately enforceable.

The plaintiff, Ellis Elias, was the registered holder of 133 debentures, the other seventeen debentures being held by four other persons, one of whom, Madame la Baronne Jorant, who held two debentures, resided in Paris.

On the 1st of April, 1894, the company made default in the payment of the principal moneys due upon the debentures, having for three years previously also failed to pay the interest due on 125 of the debentures held by Elias.

In March, 1896, the plaintiff brought this action "on behalf of himself and all other holders of debentures issued by the defendant company," asking for a declaration that the said mortgage debentures were a first charge upon the real and personal property of the company; an account of what was due to the holders upon the security of the mortgage debentures; and that the mortgage debentures might be enforced by foreclosure or sale.

In May, 1896, judgment was given directing the

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

usual inquiries, and in November, 1896, the chief clerk found by his certificate that the debentures were held by five persons, of whom the plaintiff was one and Madame la Baronne Jorant was another; he also found that the property charged by the debentures consisted of certain patents and certain fully paid up shares in joint-stock companies. It appeared that the above property had little or no marketable value.

The case came on for further consideration on the 4th of February, 1897, and the plaintiff asked, with the consent of all the other debenture-holders except Madame la Baronne Jorant, to whom notice of the judgment had been sent in the usual way through the post, but who neither appeared nor took any steps in the matter, for an order of foreclosure.

Percy F. Wheeler, for all the debenture-holders except Madame la Baronne Jorant, who did not appear.—I ask for an order similar to that in *Sadler* v. *Worley*, 42 W. R. 476, [1894] 2 Ch. 170, or in *Welch* v. *National Cycle Co.*, 35 W. R. 137, W. N. 1886, pp. 97, 196. The latter case helps me inasmuch as the order was granted even though there was an order for sale first: Palmer's Company Precedents, 6th ed., p. 909; *Oldrey* v. *Union Works*, 43 W. R. Dig. 139. (The other cases cited appear in the judgment.)

KEKEWICH, J., doubted whether he could make the order in the absence of Madame Jorant, and reserved judgment.

Feb. 18.—KEKEWICH, J., delivered the following written judgment: On the further consideration of a debenture-holders' action, I am asked to make an order for foreclosure. The property comprised in the debentures, and to which the order of foreclosure would apply, is set out in the second schedule to the chief clerk's certificate, and consists of certain foreign patents and certain shares, all stated to be fully paid, in joint-stock companies. The first question is whether an order of foreclosure can properly be made with reference to such property, bearing in mind that it is only charged by the debentures, and has never been in any way vested in the debenture-holders, or in any persons in trust for them. Although property of this particular kind did not exist, so far as I remember, in *Sadler* v. *Worley*, I embraced it in my consideration of that case, and the language of my judgment was intended to extend to it. I have been unable to ascertain how far the conclusions at which I arrived on that point in *Sadler* v. *Worley* have been criticised or approved by other judges or by the profession. Under these circumstances I am not disposed to reconsider my conclusions, and if this were the only point for decision, I should hold the plaintiff entitled to the relief asked. The foreclosure would, in that event, have to be worked by proper directions for vesting the charged property in the debenture-holders free from redemption.

But there is a greater difficulty in the plaintiff's way, which also was before me in *Sadler* v. *Worley*. It is noticed in the opening sentence of my judgment in that case, and being there immaterial, was dismissed in a few words; but it was, nevertheless, then much considered. I have considered it again with special reference to the circumstances of this case, and it now calls for further treatment. I shall not endeavour to decide what may hereafter happen in other cases, where the facts are not substantially the same as they are here. It will suffice to deal with the actual case in hand. The plaintiff is not the owner of all the debentures. There are four others whose names, with their respective holdings, are set out in the first schedule to the chief clerk's certificate. Three of them combine with the plaintiff, whose counsel was instructed to appear for them on the hearing on further consideration, but the fourth, Madame la Baronne Jorant, who holds debentures for £200, is not a party to the action. According to the established practice in chambers, notice of the judgment was sent to her in Paris through the post; but this, of course, did not make her a party, and she has never appeared.

This has neatly raised the question whether I can properly make an order of foreclosure in favour of her as well as the other debenture-holders, in her absence. When considering whether a particular order can be made or not—in other words, whether there is jurisdiction to hear and grant any particular application—it is useful to reduce the proposed order into form, and to test the question by the language of that form. I therefore inquired of counsel what precise order he asked, and his reply was that he asked such an order as was made by Chitty, J., in *Welch* v. *National Cycle Co.*, which is set out in the last edition of Mr. Palmer's Company Precedents, p. 909. In that case the debenture-holders consisted of the plaintiff and two defendants, and the order provided for redemption on payment to the three, and for conveyance in default to them. I omit all reference to a third-class debenture-holder as not touching the present question. On principle, it seems right that an order of foreclosure in the primitive sense—that is, an order which merely discharges the equity of redemption remaining in a mortgagor who has conveyed the legal estate to the mortgagee—should be made on the application of one or two mortgagees as against the other, because this release of the equity of redemption really adds nothing to the mortgagee's original estate, and is the inevitable result of the mortgage contract; but it does not follow that an order of foreclosure ought to be made as against one of two mortgagees where it has to provide for the conveyance to him of property which it is possible he has no wish or intention to take as his own, although he accepted a charge on it. This point is not touched by the order to which I have just referred; for, though it declares a charge and directs a conveyance operating as foreclosure, the debenture-holders other than the plaintiff were not only parties as defendants, but consented to the order, so that it was made with the concurrence of all. There still, therefore, remains open the question whether such an order can be made where the consent of one of the debenture-holders has not been obtained. Mr. Wheeler has been good enough to furnish me with a list of authorities bearing on this point which his industry has dicovered, including *Drage* v. *Hartopp*, 33 W. R. 410, 28 Ch. D. 414; *Davenport* v. *James*, 7 Hare, 249; *Lowe* v. *Morgan*, 1 Bro. Ch. C. 368; *Palmer* v. *Earl of Carlisle*, 1 Sim. & St. 423. None of these cases can be cited as an authority for the proposition that foreclosure can be granted in the absence of one or two or more mortgagees. The only suggestion to the contrary is to be found in *Drage* v. *Hartopp*, but it illustrates the maxim that "the exception proves the rule." There the mortgage was vested in two executors; one of them had absconded and could not be made a defendant with any prospect of service upon him. Pearson, J., held that he was a unnecessary party; but as appears from the report and especially from the arguments, on the ground that one of two executors sufficiently represented the estate. Much learning on this subject is to be found in the judgment of the Court of Appeal in *Lake* v. *South Kensington Hotel Co.*, 27 W. R. 514, 11 Ch. D. 121, where the right of one of two or more mortgagees to maintain an action of foreclosure against the others was upheld, provided that the others were unwilling to be joined as co-plaintiffs or had done some action precluding them from being plaintiffs.

In this case I have one debenture-holder who is not a party. I do not see my way to a workable provision for payment to her and the others of the money due on the debentures; and even if that difficulty were got over, I do not see how I can properly direct an assignment to her of a share of the patents, or a proportion of the shares in the joint-stock companies. It may be said that it is not right for the plaintiff and those who act with him to be debarred from what otherwise would be just relief by reason of the negligence of one debenture-holder to protect her interests in the ordinary way—negligence which, from what I was told of the character of the property, may possibly arise from knowledge that it is worth little or nothing. On the other hand, it must not be forgotten that the extension of relief by way of foreclosure to such charges, and on such property, is one by no means naturally following from the early history of this branch of jurisdiction; and that persons advancing money on these peculiar floating charges must be deemed to have done so with a knowledge of the risk incurred, including the difficulty of realising the assets of an insolvent joint-stock company. The property being, as I understand, worthless, it is only right that the plaintiff and those acting with him should have every facility for acquiring it, if they please, in the hope of turning it into account hereafter; and I will give any assistance which the practice of the court allows in that direction; but for the reasons already stated, I do not see my way to make a foreclosure order. I will, however, make an order for sale of the property comprised in the debentures under the direction of the judge in chambers, and if the plaintiff brings in a reasonable proposal the result of which will be to vest the property in the plaintiff and those acting with him, I will listen to it.

Solicitor, *William Sharp.*

Chan. Div. } Feb. 2.
Kekewich, J. }

GEILIGER *v.* GIBBS. (*a.*)

Solicitor—Costs—Infant made plaintiff without authority—Application by defendants—Liability of plaintiffs' solicitors.

Upon the application of the defendants to an action in which an infant was made a co-plaintiff without proper authority, the solicitors who wrongly made him a co-plaintiff were ordered to pay the costs of the defendants occasioned by the infant being made a party, including the costs of the application.

The principle laid down by the Court of Appeal *in* Fricker v. Van Grutten, ante, *p.* 53, [1896] 2 *Ch.* 649, *followed.*

On the 10th of December, 1895, Walter Geiliger and Bertie Hallett commenced an action against F. Gibbs and W. Wright for the specific performance of an agreement for the sale of certain patents, and for other relief in respect thereof. Walter Geiliger was at this time an infant, he did not attain his majority until the 2nd of July, 1896. It appeared, however, that the solicitors for the plaintiffs, Messrs. Williams & Neville, were unaware of this fact, and that they took their instructions from Hallett, and had no authority from Geiliger. Geiliger first knew of the issue of the writ and that he was a plaintiff on the 13th of December, 1895. At that time he took no steps to have his name removed from the record, but on the 7th of July, 1896, he took out a summons, upon which he obtained an order, dated the 13th of July, striking out his name as plaintiff, ordering Hallett to pay the defendants' costs of the summons in any event, and, by consent, also ordering Hallett to pay Geiliger's costs of the summons.

On the same day, the 13th of July, the defendants took out this summons, asking that all their costs occasioned by the plaintiff Geiliger being made a party to the action, and their costs of this summons, should be taxed and paid by the plaintiffs' solicitors, Messrs. Williams & Neville.

Warrington, Q.C., and *Cave*, for the applicants.—The solicitors had no authority to make Geiliger a plaintiff, the applicants are therefore entitled to have their costs paid them by the solicitors: *Fricker* v. *Van Grutten, ante*, p. 53, [1896] 2 Ch. 649.

Renshaw, Q.C., and *Eldon Bankes*, for Messrs. Williams & Neville.—Geiliger has, by his conduct, ratified what was done in his name. In *Fricker* v. *Van Grutten* the order was made at the instance of a person added as co-plaintiff, here it is the defendants who apply.

They also referred to *Reynolds* v. *Howell*, 22 W. R. 18, L. R. 8 Q. B. 398; *Nurse* v. *Durnford*, 28 W. R. 145, 13 Ch. D. 764; *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 28 W. R. 217, 13 Ch. D. 310; *Thomas* v. *Finlayson*, 19 W. R. 255; and *In re Jones*, 19 W. R. 361, L. R. 6 Ch. 497.

Warrington, Q.C., replied.

KEKEWICH, J.—The utmost that can be said against the solicitors in this case is that they trusted to one client too much, and did not under the circumstances take the extreme care which they ought to have taken with respect to joining Walter Geiliger as a plaintiff. There is nothing to be said against them professionally. But it appears to me clear that they acted without authority in joining him as plaintiff. Are they, therefore, liable to the defendants for the costs occasioned to them by Geiliger being made a plaintiff. It is said on behalf of the solicitors that they were not without authority, for that although Geiliger was made a plaintiff without his consent, yet so far as he could he ratified what had been done—that is to say, that he knew of the proceedings which were being taken, and he knew that he was a plaintiff three days after proceedings were commenced and then took no steps to repudiate them; and reliance is placed on what Lord Blackburn said in *Reynolds* v. *Howell*: "I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority hears of it and does not repudiate it, he will be supposed to have ratified the attorney's act." But the answer to that argument is that all this time Geiliger was an infant. It is suggested that a solicitor may take authority to act from an infant to make him a plaintiff, but no decision is cited to that effect, and it is unsound. The infant cannot give such authority, the person to give it must be his next friend on his behalf. And that being so, neither can the infant himself ratify what has been done, any ratification must also be by a next friend. That clears the way for the main question as to whether Messrs. Williams & Neville ought to be ordered to pay the defendants' costs. If Geiliger were liable at all there is no question but that he would have his remedy over against his solicitors, but the question here is, what are the defendants' rights as against these solicitors, and that depends on the principle laid down in the case of *Fricker* v. *Van Grutten*, and discussed before, that in *Reynolds* v. *Howell*, in which case the court (Blackburn and Archibald, JJ.) con-

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

sidered that some former cases were erroneous, and decided that the plaintiff in an action brought without his authority was not liable to the defendant in costs, the result being that the action was stayed without payment of costs. It was the same principle which was in question in *Fricker* v. *Van Grutten*, although the question there was not precisely the same as here; take what Rigby, L.J., says at p. 662 ([1896] 2 Ch.): "Ultimately in *Reynolds* v. *Howell* the common law courts under the guidance of Blackburn, J., emancipated themselves from the old doctrine"—that is, the doctrine that a plaintiff although placed on the record without his authority must nevertheless be held liable to the defendant in costs. The result of *Fricker* v. *Van Grutten* is that the principle is now extended so that not only is such a plaintiff not liable to pay the defendants' costs, but the solicitors who put him forward as plaintiff having no authority to do so, must pay both his costs and the defendants' costs. But here it is the defendants who ask for costs, while in *Fricker* v. *Van Grutten* it was the plaintiff. Can the defendants ask for costs? It seems to me that once the principle is admitted they can. For if we stop short and say that the defendants are not entitled to ask for costs, and that it must be at the instance of the plaintiff, we should be adopting the principle and yet not giving it thorough effect. The plaintiffs' solicitors must therefore pay the defendants' their costs of the action so far as they may be attributable to Geiliger's having been made a plaintiff, and also the costs of this application.

Solicitors, *Hulberts, Hussey, & Metcalfe*, for *Carr & Wilson*, Birmingham; *Williams & Neville*.

Q. B. Div.
(Wright and Bruce, JJ.) Feb. 1.

REG. v. TURNER AND HODGSON. (a.)

County court—Practice—Summons out of the district—Discretion of judge to grant leave for such summons to be issued—County Court Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 74—*Ord.* 5, *r.* 9a, *of County Court Rules*, 1889.

By section 74 *of the County Court Act*, 1888, *an action may be commenced by leave of the judge against a defendant resident out of the district if the cause of action arose wholly or in part within the district.*

Held, that the words of the section were permissive only, and that the judge therefore had discretion to refuse leave for such a summons to issue, although he was satisfied that the cause of action was such as to give him power to grant the summons if he had thought fit to do so.

Julius *v.* The Bishop of Oxford, 28 *W. R.* 726, 5 *App. Cas.* 214, *considered and applied.*

The point raised in this case was whether, under section 74 of the County Court Act, 1888, a judge had discretion to refuse leave for a summons to be issued against a defendant, who resided out of the district, when he had satisfied himself, from the facts set out in the plaintiff's affidavit, that he had jurisdiction under that section to try the plaint.

The facts were shortly these. The plaintiff claimed £2 for goods sold and delivered to one Hodgson, who resided at Langdale, a town within the district of the Stokesley County Court. The goods were sent from Stockton, and were delivered upon the railway at Stokesley, so that the cause of action arose, if not wholly, at any rate in part, in Stockton.

The plaintiff applied to his Honour Judge Turner, sitting at the Durham County Court, holden at Stockton, for leave to issue a summons in that court against the defendant. The judge, while deciding that he had jurisdiction to allow the plaintiff to take out the summons in the Stockton County Court, held that he had a discretion to refuse the application, and in the exercise of that discretion he refused, for reasons not here material, to give leave for the summons to issue.

A rule *nisi* was then obtained calling upon his Honour to show cause why he should not give leave for a summons to be issued in the Stockton County Court against the defendant at Stokesley.

Section 74 of the County Court Act, 1888, is as follows: "Every action or matter may be commenced in the court within the district of which the defendant shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced by leave of the judge or registrar in the court within the district of which the defendant dwelt or carried on business at any time within six calendar months next before the time of commencement, or, with the like leave, in the court in the district of which the cause of action or claim wholly or in part arose."

Ord. 5, r. 9 (*a*), of the County Court Rules in force at the time of this decision provided that "the judge or the registrar shall duly consider the facts disclosed by the affidavit in each case as to the grant or refusal of leave in accordance with the circumstances."

By the County Court Rules of March, 1897, ord. 5, r. 9 (*a*), has been annulled, and the following substituted: Ord. 5, r. 9 (*a*), clause 7—"The judge or registrar shall duly consider the facts disclosed by the affidavit, and if he considers that the facts relied on . . . are sufficient to legally justify the granting of such leave, he shall further consider the facts relied on . . . showing that the balance of convenience is in favour of such leave being granted; and he shall exercise his discretion in each case, as to the grant or refusal of leave according to the circumstances." Clause (8)—"If the judge or registrar is of opinion that leave may legally be granted, and that the balance of convenience is in favour of such leave being granted, he may grant such leave." Clause 9—"If he is not so satisfied he shall refuse such leave" (see 41 SOLICITORS' JOURNAL, pp. 271-2).

H. Sutton, showing cause.—The rule *nisi* ought to be discharged, because the judge, under the section, has discretion to grant or refuse a summons. The claim is made in the present case under the last part of the section. But it is a condition precedent to the exercising of this discretion at all that the cause of action must be shown by affidavit, to the satisfaction of the judge, to have arisen wholly or in part within the district: *Brown* v. *London and North-Western Railway Co.*, 11 W. R. 884, L. J. Q. B. 318. The judge having got that jurisdiction, it is then for him to say, in the exercise of that discretion, whether or not on the ground of convenience or otherwise, a summons in that particular case ought to be issued. *Société Générale de Paris* v. *Dreyfus Bros.*, 36 W. R. 609, 37 Ch. D. 215. The County Court rule (ord. 5, r. 9 (*a*)) ought not to be held by your lordships to be *ultra vires* because it is to the same effect as ord. 11 of the Rules of the Supreme Court, which do not go further than or contravene this section.

Poyser v. *Minors*, 29 W. R. 773, 7 Q. B. D. 32 and *In re Baker*, 38 W. R. 417, 44 Ch. D. 262, were also referred to.

Scott-Fox, in support of the rule.—Whenever the cause of action wholly or in part arises within

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law

district, then the judge, having satisfied himself as to the facts, is bound at once to allow a summons to be issued. His discretion is limited to deciding this question of jurisdiction. The section does not give him a further discretion, and leave it to him to grant or refuse to the plaintiff the right to put in motion the process of the court. The words, although in form permissive, refer to a public right, and must be construed as obligatory: *Rex* v. *The Stewards and Suitors of the Manor of Havering-atte-Bower*, 5 B. & Ald. 691. The Act says in the clearest terms that in certain given cases the plaintiff may commence an action out of the district of that judge. The judge having decided that the plaintiff has proved his right to put the process of that court in motion, has no discretionary power to take that right away from the plaintiff, and the summons ought, therefore, to issue as of right.

WRIGHT, J.—To my mind the language of the section is as explicit as it can be made. It is that in certain cases the plaintiff has the right to sue "in the court within the district of which the defendant shall then reside or carry on his business." In another case the action "may be commenced by leave of the judge or registrar in the court within the district of which the defendant dwelt or carried on business at any time within six calendar months next before the time of commencement." In the third case, "with the like leave, in the court in the district of which the cause of action or claim wholly or in part arose."

Now, under that section a rule has been framed which binds the judge and the parties unless it is *ultra vires*. That rule is 9*a* of order 5 of the County Court Rules, 1889, and that expressly obliges the judge in these terms: "The judge or registrar shall duly consider the facts disclosed by the affidavit in each case as to the grant or refusal of leave in accordance with the circumstances." Unless it is *ultra vires* as going beyond or contravening the 74th section of the Act, it is perfectly clear that the judge must exercise a discretion in each case, and is not bound to grant leave, as was contended by Mr. Scott-Fox.

I think, therefore, the rule *nisi* must be discharged.

BRUCE, J.—I am of the same opinion. The rule which governs this case is found in the case of *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214. There, in the course of Lord Penzance's judgment (p. 230), referring to a *dictum* of Coleridge, J., he says: "Had the words been more precise they would hardly justify the use that has been made of them, for what Coleridge, J., said was, not that permissory or enabling words are to be held to have a compulsory force where the thing to be done is for the public benefit, but only that such words 'may' in some cases have that effect. If the matter were to be decided by previous definitions I should prefer that of Jervis, C.J., who said in the case of *Reg.* v. *The York and North Midland Railway Co.*, 1 El. & Bl. 858, at p. 861, that such words as 'it shall be lawful' were to be understood as permissive only, unless some 'absurdity or injustice' would follow from giving them that their natural meaning." Then I find in the judgment of Lord Selborne (5 App. Cas. p. 235) this passage: "The language (certainly found in authorities entitled to very high respect) which speaks of the words 'it shall be lawful,' and the like, when used in public statutes, as ambiguous and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense is, in my opinion, inaccurate. . . . The question whether a judge or a public officer to whom power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general it is to be solved from the context from the particular provisions or from the general scope and objects of the enactment conferring the power."

The question arises in the present case whether there are any considerations sufficiently cogent to exclude the idea that the Legislature intended a discretion to be vested in the judge. It seems to me to be proved from the context and the general character of that section that the Legislature did intend a discretion to be vested in the judge, and that it would be putting a very unreasonable construction upon the words to hold that the judge had not in such cases a discretion.

Rule discharged.

Solicitors for the appellant, *Eldridge & Sprott*, for *C. J. Archer & Parkin*, Stockton-on-Tees.

Solicitor for the respondent, *The Treasury Solicitor*.

Q. B. Div. (Wright and Bruce, JJ.) — Jan. 26.

CALE v. JAMES. (*a*.)

Justices — Married woman — Summary jurisdiction — Application by wife for separation — Costs — County court — Jurisdiction — Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5.

Section 5, sub-section (d), *of the Summary Jurisdiction (Married Women) Act*, 1895, *gives the court of summary jurisdiction power to make provision for the payment of the costs of either party upon an application under the Act by a married woman against her husband.*

Held, that this provision gives the court of summary jurisdiction exclusive jurisdiction over these costs, and that no action can be maintained in a county court by a wife or her solicitor to recover these costs from the husband.

Appeal from Birmingham County Court.

The plaintiff, who was a solicitor, brought an action in the county court to recover a small sum for costs incurred by him as the solicitor of the wife of the defendant.

The wife of the defendant instructed the plaintiff to take out a summons against her husband for a separation order on the ground of his cruelty, the summons being taken out under section 4 of the Summary Jurisdiction (Married Women) Act, 1895.

This summons was heard by the court of summary jurisdiction and dismissed. The wife paid her solicitor's costs and went back to live with her husband. Subsequently she again left her husband, and instructed the plaintiff to take out another summons on the ground of cruelty. This second summons was also dismissed by the justices, who made no order as to the payment of the costs.

The solicitor of the wife then brought this action in the county court against the husband to recover from him the costs he had incurred for the wife in the unsuccessful proceedings against her husband.

The county court judge held that he had jurisdiction to entertain the action, and gave judgment for the plaintiff for his costs to be taxed.

The defendant appealed.

The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), provides: Section 5, "The court of summary jurisdiction to which any application under this Act is made may make an order or

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

orders containing all or any of the provisions following—viz., (*a*) A provision that the applicant be no longer bound to cohabit with her husband. . . . (*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit."

Loehnis, for the appellant.—The county court judge had no jurisdiction to entertain the action. Section 5 (*d*) of the Act gives the court of summary jurisdiction before which any application under the Act may come, power to make an order as to the costs. A new tribunal was thus created, and this tribunal has exclusive jurisdiction to make any order as to the costs. The wife was unsuccessful in these proceedings, and that being so, there was no power in any court—apart from the practice in the Divorce Court—to give costs to the unsuccessful wife. However, if there was any such power, it was in the justices and not in the county court.

McCardie, for the respondent.—Sub-section (*d*) of section 5 applies only when an order is made in the wife's favour under section 4, so that "order" in section 5 means an order made under section 4. If an order against the wife be made, the sub-section does not apply. There is nothing in the Act which speaks of an order of dismissal; and if an order of dismissal be made, it must be under the Summary Jurisdiction Act, 1848. The section only applies as between the husband and wife, and even if the wife would be prevented from maintaining an action against her husband in the county court, the solicitor of the wife would not be so prevented, as the right of the solicitor is a common law right, and stands apart from the wife's right.

WRIGHT, J.—The case is one of importance and of great difficulty. I think that under this Act the Legislature did not intend that there should be proceedings in other courts as to these costs. The section, after making it possible that an application for costs could be made to the court of summary jurisdiction, could not have intended that an action could be brought in another court in respect of these costs. I think the fair meaning of the Act is that all questions as to costs should be dealt with by the court of summary jurisdiction, and it leaves that court perfectly free to make any order as to costs they think fit, either against the husband or the wife. It was argued that the provision in section 5 (*d*) did not prejudice the right of the wife's solicitor to take proceedings against the husband in another court to recover the costs. That, however, depends on the true construction of the Act. If the Act intended that all questions of costs should be disposed of by the court of summary jurisdiction, then it seems to me we ought to hold that that provision applies to the solicitor of the wife as much as to the wife. Other points were argued, but we have not sufficient information before us to decide them, and it is unnecessary to do so, as we think we can dispose of the case upon the construction of the statute itself.

BRUCE, J., concurred.

Appeal allowed; leave to appeal refused.

Solicitors for the appellant, *T. A. Dennison & Co.*, for *Seymour, Price, & Adcock*, Birmingham.

Solicitors for the respondent, *Tippetts & Son*, for *Edward Eaden*, Birmingham.

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 23.

SOUTHCOMBE *v.* GUARDIANS OF YEOVIL UNION. (*a.*)

Vaccination—Proceedings against parent—Summons—Order signed by a different magistrate—Non-compliance with order—Defence—Vaccination Act, 1867 (30 *&* 31 *Vict. c.* 84), *s.* 31.

It is no defence to proceedings under section 31 *of the Vaccination Act,* 1867, *against a parent, for non-compliance with an order directing him to have his child vaccinated, that the magistrate who issued the summons did not sign the order. If the order were bad on that ground proceedings should have been taken to quash it; but,*

Semble, *as the Summary Jurisdiction Acts apply to proceedings under the Vaccination Acts the order was not bad.*

Special case stated by justices for the borough of Yeovil.

An information was laid before John Curtis, a magistrate, by the respondent, a duly-appointed vaccination officer, charging the appellant under section 31 of the Vaccination Act, 1867, with non-compliance with a notice requiring him to procure the vaccination of his child. On this information a summons was granted by the magistrate. On the hearing of the summons an order was made requiring the appellant to have his child vaccinated. The magistrate Curtis and three other magistrates were present at the hearing, but the order when drawn up was signed by two only of the magistrates, Curtis not being one of them. The appellant having failed to comply with the order, these proceedings were instituted under section 31 of the Act for a penalty.

It was contended for the appellant that under section 31 it was necessary that the magistrate before whom the original information was sworn should not only sign the summons but should also sign the subsequent order, and that that course not having been followed the appellant was not bound to obey the order.

The justices convicted the appellant subject to this case.

The Vaccination Act, 1867, s. 31, provides that: "If any . . . officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has reason to believe that any child . . . has not been successfully vaccinated, and that he has given notice to the parent . . . to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent . . . to appear with the child before him . . . and upon the appearance if the justice shall find . . . that the child has not been vaccinated . . . he may if he see fit make an order under his hand and seal directing such child to be vaccinated . . . and if at the expiration of such time the child shall not have been so vaccinated . . . the person upon whom such order shall have been made shall be proceeded against summarily . . . and shall be liable to a penalty not exceeding twenty shillings."

Schultess Young, for the appellant.—The order was bad because it was not signed by the justice who issued the summons. Section 31 is explicit. It says that the vaccination officer shall give information to "a justice of the peace"; then, "the justice" may summon the parent, and "the justice" may make an order "under his hand and seal." The provisions of the

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

section not having been followed in making the order, the appellant was not bound to obey it.

No one appeared for the respondent.

WRIGHT, J.—I think that this objection to the validity of the order has been taken at the wrong stage. Assuming the objection to be a good one, it does not, in my opinion, afford a good defence to proceedings for the recovery of a penalty for disobedience to the order. Proceedings should have been taken to quash the order.

But, in the second place, I think it is very doubtful whether there is anything in the objection, inasmuch as the Summary Jurisdiction Acts apply to proceedings under the Vaccination Acts, and there is provision in those Acts for one magistrate to issue a summons and for another to hear the case and sign the order.

BRUCE, J.—I agree. It is often necessary for a case to be heard by a different justice from the one who issued the summons. But quite apart from that, if the order was bad, it ought to have been appealed against.

Appeal dismissed.

Solicitors for the appellant, *Sharpe, Parkers, & Co.*, for *Rendall*, Yeovil.

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 23.

HOLLOWAY v. COSTER. (a.)

Vaccination—Notice—Service—Proof—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.

No particular mode of service is necessary in the case of a notice under section 31 *of the Vaccination Act*, 1867, *requiring a parent to procure the vaccination of his child. It is for the justices to determine whether they are satisfied on the evidence that the notice reached the person for whom it was intended.*

Special case stated by justices of the peace for the borough of Andover.

An information was laid under section 31 of the Vaccination Act, 1867, by the respondent, who was a duly-appointed vaccination officer, against the appellant, for non-compliance with a notice requiring him to have his child vaccinated.

At the hearing the justices made an order on the appellant for the vaccination of his child, but stated this case on the question whether the notice under section 31, if delivered otherwise than personally, must be shown to have reached the person notified.

The evidence as to the service of the notice was as follows: The respondent drew out a notice in respect of the appellant's child, addressed it to the appellant, and handed it, with other notices, to one Plumley for delivery. Plumley took the notice to the appellant's house and handed it to a woman there, telling her that it was a vaccination notice.

He could not swear that the woman was the appellant's wife, nor could he swear as to the date of delivery, except that it was the day after the notice was handed to him by the respondent. He could not swear that the notice was in respect of the appellant's child, because the notice was folded up when he received it, and he did not open it.

The justices held that the notice was served upon the appellant in a manner as effectual as if the respondent had addressed it and sent it by post.

Schultess Young, for the appellant.

No one appeared for the respondent.

WRIGHT, J.—I do not think that there is any particular mode of service necessary in the case of a notice under section 31 of the Vaccination Act, 1867, requiring a parent to procure the vaccination of his child. It is for the justices to say whether they are satisfied that the notice reached the person for whom it was intended. In this case the justices were satisfied that there was a good service, and the question being one for them to decide, we cannot interfere with their decision.

BRUCE, J.—The justices have decided that the notice reached the appellant. I think there was sufficient evidence to justify that decision.

Appeal dismissed.

Solicitor for the appellant, *Cheverton*, for *Talbot*, Andover.

Q. B. Div.
(Wills and Wright, JJ.) Dec. 10.

OSBORN (*Appellant*) v. WOOD & BROTHERS (*Respondents*). (a.)

Justices—Mitigation of penalties—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 4—*Cotton Cloth Factories Act*, 1889 (52 & 53 *Vict. c.* 62), *s.* 13.

Section 13 *of the Cotton Cloth Factories Act*, 1889, *enacts that, "If in the case of any cotton cloth factory there is a contravention of, or non-compliance with, any of the provisions of this Act, the inspector shall give notice in writing to the occupier of the same of the acts or omissions constituting the contravention or non-compliance, and if such acts or omissions, or any of them, are continued or not remedied, or are repeated within twelve months after such notice has been given, the occupier of such factory shall be liable, on summary conviction, for the first offence, to a penalty of not less than five pounds nor more than ten pounds, and for every subsequent offence to a penalty of not less than ten pounds nor more than twenty pounds."*

On a summons taken out under the above section, justices at petty sessions convicted the defendants of a first offence, but, holding that they had discretionary power under section 4 *of the Summary Jurisdiction Act*, 1879, *to do so, they reduced the fine to twenty shillings.*

Held, that the justices had acted wrongly. Section 4 *of the Summary Jurisdiction Act*, 1879, *does not apply to section* 13 *of the Cotton Cloth Factories Act*, 1889. *A particular and a serious offence is created by section* 13, *and when such offence is committed the magistrates have no power to reduce the penalty under the provisions of section* 4 *of the Summary Jurisdiction Act.*

This was a case stated by the justices for the county of Lancaster.

At a petty sessions held at Bury, in the county of Lancaster, an information was preferred by E. H. Osborn, the appellant, an inspector of factories, against Wood & Brothers, the respondents, that on the 27th of March, 1896, they, the respondents, the occupiers of a cotton cloth factory, within the meaning of the Cotton Cloth Factories Act, 1889, did allow an amount of moisture in the atmosphere of such cotton cloth factory to be in excess of such

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(a.) Reported by E. G. STILLWELL, Esq., Barrister at-Law.

amount as is represented by the number of grains of moisture per cubic foot of air shown in column 1 of the table in Schedule A of that Act, opposite to such figure in column 2 as represented the temperature existing in such cotton cloth factory on the 27th of March, 1896, this being a contravention of the Act repeated within twelve months after notice in writing to the occupiers of the said factory of a similar contravention of the provisions of the said Act contrary to the form of the statute.

On the 12th of August, 1895, and on the 6th of September, 1895, notices in writing were given to the respondents of their having contravened the Cotton Cloth Factories Act, 1889, on two occasions prior to the dates of their notices but within twelve months of the 27th of March, 1896, the date upon which the offence the justices adjudicated upon was alleged to have been committed.

The justices found as a fact that the respondents had been guilty of the offence charged in the said information, but they were of opinion that by section 4 of the Summary Jurisdiction Act, 1879, they had a discretionary power, this being a first offence, to reduce the penalty to be imposed below the sum of £5 named in section 13 of the Cotton Cloth Factories Act, and they accordingly only fined the respondents the sum of twenty shillings and costs. From this decision the inspector of factories appealed.

The question for the opinion of the court was whether section 4 of the Summary Jurisdiction Act, 1879, gives the justices power to reduce the penalty of £5 for a first offence imposed by section 13 of the Cotton Cloth Factories Act, 1889.

By section 5, sub-section 1, of the Cotton Cloth Factories Act, 1889 (52 & 53 Vict. c. 62), it is provided that there shall only be a certain prescribed amount of moisture in the temperature of the air in a factory.

By section 13 it is provided that: "If, in the case of any cotton cloth factory there is a contravention of or non-compliance with any of the provisions of this Act, the inspector shall give notice in writing to the occupier of the same of the acts or omissions constituting the contravention or non-compliance, and if such acts or omissions, or any of them, are continued or not remedied, or are repeated within twelve months after such notice has been given, the occupier of such factory shall be liable on summary conviction, for the first offence, to a penalty of not less than five pounds nor more than ten pounds, and for every subsequent offence to a penalty of not less than ten pounds nor more than twenty pounds."

By section 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), it is provided that: "Subject as in this Act mentioned, and notwithstanding any enactment to the contrary, where a court of summary jurisdiction has authority under this Act, or under any other Act, whether past or future, to impose imprisonment or to impose a fine for an offence punishable on summary conviction, that court may, in the case of imprisonment, impose the same without hard labour, and reduce the prescribed period thereof, or do either of such acts; and in the case of a fine, if it is imposed as in respect of a first offence, may reduce the prescribed amount thereof."

Sutton, for the appellant.—The justices were wrong. Section 13 of the Cotton Cloth Factories Act deliberately says that for a first offence the penalty shall not be less than five pounds. Clearly, therefore, section 4 of the Summary Jurisdiction Act would not apply here. The particular offences mentioned in section 13 have been expressly taken out of the scope of section 4.

Danckwerts, for the respondents.—The justices had power under section 4 to reduce the fine. There is nothing inconsistent in sections 4 and 13, nor is there any implied repeal of section 4. Both Acts can be read together. If it had been the intention of the Legislature to exclude the scope of section 4 in cases of offences under section 13, very much stronger and more express terms would have been used.

Sutton replied.

The following cases were cited: *Reg.* v. *County Court Judge of Halifax*, 39 W. R. 545, [1891] 2 Q. B. 263; *Dobbs* v. *Grand Junction Waterworks Co.*, 31 W. R. 13, 9 Q. B. D. 151; *Reg.* v. *Oastler*, 50 L. J. M. C. 4, at p. 6; *Kutner* v. *Phillips*, 39 W. R. 526, [1891] 2 Q. B. 267.

WILLS, J.—I am of opinion that this appeal must succeed. I think that the words of the Cotton Cloth Factories Act, 1889, are quite plain. It is true that section 13 uses the expression that the fine is to be recovered "on summary conviction," and therefore, by section 51 of the Summary Jurisdiction Act, 1879, that Act does apply here unless we can see plainly that the two Acts are inconsistent. I think, when you come to look at the character of the offence which is created here, it is only too plain that what Parliament meant to say was, that if this particular offence has been committed it shall be treated as a serious matter and as a matter upon which the magistrate shall have no power to go below £5. It is not a common offence which is created here by section 13; such an offence is only constituted when there has been a breach of the provisions of the Act, when notice in writing has been given to the inspector, and when, notwithstanding that notice in writing, the acts complained of have been repeated, or the omissions have not been remedied within twelve months. That is an offence which shows something like a very intentional violation of the Act and a determination not to carry out its provisions. I feel no doubt myself that what Parliament meant is that, notwithstanding the incorporation of the Summary Jurisdiction Act, if this particular type of offence is committed the magistrates shall treat it as a serious offence, and that they shall have no power to apply the provisions of section 4 of the Summary Jurisdiction Act which would enable them to reduce the penalty. This is not a case of the repeal of the Act of 1879; what we say is merely that in this specific instance Parliament meant the provision as to penalties contained in section 13 of the Act of 1889 to override the provision in section 4 of the Summary Jurisdiction Act.

WRIGHT, J.—I am of the same opinion. I think we should be assuming legislative power if we held otherwise. It might be explanation enough to say that if you read this later Act into section 4 of the Summary Jurisdiction Act the Legislature has deliberately engrafted an exception on to the Act of 1879. I am not sure there is not another explanation—namely, that the Legislature intended that in dealing with cases arising under existing Acts in such cases there should be a power of mitigation, but that in cases arising under future Acts of Parliament there shall only be power to mitigate where Parliament does not prohibit mitigation by such future Act.

Appeal allowed with costs, and case remitted.

Solicitor for the appellant, *Solicitor to the Treasury*.

Solicitors for the respondents, *Rowcliffes, Rawle & Co.*, for *John Hall*, Bury, Lancashire.

Lunacy.

(Lindley, A. L. Smith, and Rigby, L.JJ.) Feb. 15.

In re M'GAREL (*A Lunatic*). (*a.*)

Solicitor—Costs—Taxation—Remuneration—Leases—Scale fee—Percentage—General Order under Solicitors' Remuneration Act, 1881, *Schedule I., Part II.; and rule* 6.

The omission of the words "per cent." from the first scale in Schedule I., Part II., to the General Order under the Solicitors' Remuneration Act, 1881, *in cases where the rent exceeds* £100 *is intentional. A solicitor, therefore, is not entitled to a proportional fee for fractions of* £100 *as remuneration for preparing a lease when the rental exceeds* £100.

This was an appeal by the committee of the lunatic against a ruling of the taxing-master, disallowing certain fees to solicitors paid in connection with the lease of a house as a residence for the lunatic; and involved a question of the construction of the General Order under the Solicitors' Remuneration Act, 1881.

Part II. of Schedule I. to that order provides by the first scale, which applies to leases at a rack-rent, that the remuneration of the lessor's solicitor "for preparing, settling, and completing lease and counterpart" shall be, "where the rent does not exceed £100," "£7 10s. per cent. on the rental, but not less in any case than £5"; "where the rent exceeds £100 and does not exceed £500," "£7 10s. in respect of the first £100 of rent, and £2 10s. in respect of each subsequent £100 of rent." The lessee's solicitor is to charge one-half of the amount payable to the lessor's solicitor. Under the second scale, which applies to building leases reserving rent, or other long leases not at rack-rent (except mining leases), "where the annual rent does not exceed £5, the amount of remuneration is to be £5; where the rent exceeds £5 and does not exceed £50," "the same payment as on a rent of £5, and also 20 per cent. on the excess beyond £5." Then follow provisions for cases where the rent exceeds £50 but does not exceed £150, and where it exceeds £150. Then, by rule 6 of the "rules applicable to Part II. of Schedule I., as to all leases or conveyances at a rent or agreement for the same, other than mining leases or agreements therefor," fractions of £5 are to be reckoned as £5.

In the present case the committee of a lunatic had been directed in 1887 by the master to take a seven years' lease of a house as a residence for the lunatic at a rent of £350 per annum. On this occasion the committee paid to the lessor's solicitor a fee of £13 15s.—viz., £7 10s. for the first £100 of the rent, £2 10s. for the second £100, £2 10s. for the third £100, and £1 5s. for the additional £50. A fee of half this amount was paid by the committee to his own solicitor.

In 1894 the lease was renewed for another seven years at the same rent, and similar fees were paid by the committee to the lessor's solicitors and his own solicitor respectively. The committee carried in his charges for taxation in the lunacy, in order that they might be allowed to him out of the lunatic's estate. The taxing-master disallowed in each case the fee paid in respect of the additional £50 of rent (beyond the £300), holding that its payment was not authorised by the Schedule to the General Order.

R. F. Norton, for the committee.—The words "per cent." must be taken to be implied in the case of rents exceeding the £100; if not, rule 6 is meaningless as applied to the first scale. The practice of the taxing-masters in the Chancery Division has always been to allow a proportional fee for fractions of £100 where the total has exceeded £100. This is shown by the amount allowed in *In re Negus*, 43 W. R. 68, [1895] 1 Ch. 73. [LINDLEY, L.J.—This point was not raised in that case.]

Borthwick, for the next-of-kin, was not called on.

LINDLEY, L.J.—I think the taxing-master is correct. The case falls under Schedule I., Part II., of the General Order to the Solicitors' Remuneration Act, 1881—that is to say, it is a case which is governed by the scale as to leases. Now, that applies to leases at a rack-rent, and provides for the remuneration of the lessor's solicitor "for preparing, settling, and completing lease and counterpart." The first item is this, that where the rent does not exceed £100 the remuneration shall be £7 10s. per cent. on the rental, but not less in any case than £5. That works out to this, that for all rents below £65 £5 is to be charged, and between £65 and £100 £7 10s. per cent. There is clearly a percentage given there. Now we go on to where the rent exceeds £100, and there the solicitor's fee is to be £7 10s. in respect of the first £100 of rent, and £2 10s. in respect of each subsequent £100 of rent. And then the next item is where the rent exceeds £500. Now, in these last items the words "per cent." are omitted, and I have no doubt that they were intentionally omitted. It is quite obvious what was in the minds of those who framed these rules: they thought that the remuneration given by the Act was sufficient without giving any percentage. They were solicitors who understood perfectly well what they were about. They were clearly not thinking about a percentage after the first £100 of rent. Now, the second scale is a percentage scale, and does not apply to this case at all.

Then comes rule 6, by which fractions of £5 are to be reckoned as £5. That rule, no doubt, applies to both scales, the first and the second. It is quite intelligible. It applies to the first scale as to rents between £65 and £100, and to all leases under the second scale. But rule 6 has no application to the present case. I think the case is so plain that but for the ingenuity of counsel I could not have thought there would have been a doubt about it.

The taxing-master is quite right.

A. L. SMITH, L.J.—I concur. The court could not, it seems to me, allow this appeal without altering the phraseology of the rule.

RIGBY, L.J.—I quite agree.

Solicitors, *Frere, Cholmeley, & Co.; Lawford, Waterhouse, & Co.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Jan. 28; Feb. 6

ANDREWS *v.* GAS METER CO. (LIMITED). (*a.*)

Company—Memorandum of association—Alteration of articles—Increase of capital—Preference shares—

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Rights of shareholders—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 12, 50, 51.

There is no condition implied in a memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary.

Held, consequently, that a limited company, not being expressly prohibited from so doing by its memorandum of association, might, under section 12 *of the Companies Act,* 1862, *make provision, either in its original articles of association, or by alteration, under sections* 50 *and* 51 *of the same Act, of the original articles, for the increase of its capital by the issue of shares bearing a preferential dividend.*

Decision of Kekewich, J. (ante, *p.* 46), *reversed.*

Hutton *v.* Scarborough Cliff Hotel Co. (No. 2), 13 *W. R.* 1059, 2 *Dr. & Sm.* 521, *overruled.*

Appeal by the preference shareholders of the above-named company from a decision of Kekewich, J., (reported *ante*, p. 46), whereby his lordship held that a limited company, having no provision in its memorandum or original articles of association for the issue of preference shares, had no power to issue preference shares.

The facts fully appear from the report in the court below and from the written judgment of the Court of Appeal.

Warrington, Q.C., and *A. R. Kirby*, for the appellants.—The plaintiffs in the court below used the arguments which, in consequence of the decision of Kekewich, J., the appellants are now bound to adopt. The shares were validly created, and the appellants are shareholders; if not preference shareholders at any rate they are ordinary shareholders without any preference. The bargain which was made between the parties at the time was binding, and has been acted on ever since. The appellants rely upon the last words of clause 5 of the memorandum of association. The decision of Kindersley, V.C., in *Hutton* v. *Scarborough Cliff Hotel Co.* (*No.* 2), 13 W. R. 1059, 2 Dr. & Sm. 521, that a company has no power to issue preference shares, unless such power is specially given by the memorandum and articles of association, is wrong and ought to be overruled. That case has never been followed, but was dealt with by Sir G. Jessel, M.R., in *Harrison* v. *The Mexican Railway Co.*, 23 W. R. 403, L. R. 19 Eq. 358, where his lordship got out of the previous decision, and held that by inference preference shares could be created. The question came indirectly before this court in *In re South Durham Brewery Co.*, 34 W. R. 126, 31 Ch. D. 261, where passages occur which cannot be reconciled with *Hutton* v. *Scarborough, &c., Co.* Lord Macnaghten in the House of Lords, in *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, expressly dissented from *Hutton* v. *Scarborough, &c., Co.*, but it was extra-judicial, and not necessary for that decision. In this particular case the increase of capital is provided for in effect by the articles and not by the memorandum of association. All the cases help the contention that the increase of capital is capable of being dealt with by the articles.

See also *In re Bridgewater Navigation Co.*, 36 W. R. 769, 39 Ch. D. 1; *McIlquham* v. *Taylor*, 43 W. R. 297, [1895] 1 Ch. 53.

Ogden Lawrence, Q.C., and *Eustace Smith*, for the respondents.—If the second decision in *Hutton* v. *Scarborough, &c., Co.* is good law it covers this case. The articles of association in clause 5, mean the articles as they were registered, as they were in existence at the time. The principle of this case has been recognized by the Court of Appeal in *Ashbury* v. *Watson*, 33 W. R. 882, 30 Ch. D. 376. If the issue of shares was *ultra vires* in its inception, neither the company nor the shareholders could ratify the action of the company in allotting shares: *In re London and New York Investment Corporation*, 44 W. R. 137, [1895] 2 Ch. 860; *In re Guardian Permanent Benefit Building Society*, 23 Ch. D. 440, 31 W. R. Dig. 28. This being so, one has to inquire what were the rights of these so-called shareholders at the date of the issue. In the alternative, we adopt the whole position; leave out the word "preference," which is invalid, and make them ordinary shareholders: *In re Bridgwater Navigation Co.*

No reply was called for.

Cur. adv. vult.

Feb. 6.—The judgment of the court was delivered by

LINDLEY, L.J.—The question raised by the appeal is whether certain preference shares issued by a limited company as long ago as 1865 were validly issued or not. If they were not, a further question will arise, which is—What are the rights of their present holders? The company was formed and registered as a limited company under the Companies Act, 1856, but in October, 1862, it was registered under the Companies Act, 1862, and it is by that Act and the decisions upon it that the above questions have to be determined. The company's original capital as stated in its memorandum of association was "£60,000, divided into 600 shares of £100, each share being divisible into fifths, with power to increase the capital as provided by the articles of association." By the articles of association which accompanied the memorandum of association and were registered with it, power was given to the company to increase the capital (article 27), and it was provided that any new capital should be considered as part of the original capital (article 28). The issue of preference shares was not contemplated or authorized.

In 1865 the company desired to acquire additional works, and passed a special resolution under the powers conferred by the Companies Act, 1862, ss. 50 and 51, altering the articles and authorizing the issue of 100 shares of £100 each fully paid and bearing a preferential dividend of £5 per cent. per annum. Those shares were accordingly issued to the vendors of the works referred to and are the shares the validity of which is now in question. The company has been prosperous, and the ordinary shareholders have for years received a higher dividend than the preference shareholders. A considerable reserve has been also accumulated, and this action has been brought to determine the rights of the preference shareholders to this reserve fund. The learned judge below has held that the creation of the preference shares was *ultra vires*, and that their holders never became and are not now shareholders in the company, and that they have none of the rights of shareholders, whether preference or ordinary. He has not, however, declared more definitely what their rights are. They have appealed from this decision, but on the appeal they only claimed to be preference shareholders entitled to a preferential dividend of 5 per cent. Their claim to any share of the reserve fund was dropped.

The judgment against the validity of the preference shares is based upon the well-known case of *Hutton* v. *Scarborough Cliff Hotel Co.*, which came twice before Kindersley, V.C., in 1865, and which Kekewich, J., very naturally held to be binding on him. Kindersley, V.C.'s, first decision (13 W. R. 574, 2 Dr. & Sm. 514) was that a limited company which had not issued the whole of its original capital could

not issue the unallotted shares as preference shares unless authorized so to do by its memorandum of association or by its articles of association. This decision was affirmed on appeal (13 W. R. 631, 4 De G. J. & Sm. 672), and was obviously correct; and would have been correct even if the whole of the original capital had been issued and the preference shares had been new and additional capital. The company, however, afterwards passed a special resolution altering the articles and authorizing an issue of preference shares. This raised an entirely different question, and led to the second decision reported 13 W. R. 1059, 2 Dr. & Sm. 521. The Vice-Chancellor granted an injunction restraining the issue of the preference shares, and he held distinctly that the resolution altering the articles was *ultra vires*. He did so upon the ground, as we understand his judgment, that there was in the memorandum of association a condition that all the shareholders should stand on equal footing as to the receipt of dividends, and that this condition was one which could not be got rid of by special resolution altering the articles of association under the powers conferred by sections 50 and 51 of the Act of 1862. The judgment of the Vice-Chancellor is a little obscure, because he treats the condition as a condition of the constitution of the company, and he may have meant by that expression either the constitution as fixed by the memorandum of association, or the constitution as fixed by the memorandum of association and the original articles. But unless he had meant the constitution of the company as fixed by the memorandum of association his decision is unintelligible; for, so fas as the constitution depended on the articles, it clearly could be altered by special resolution under the powers conferred by sections 50 and 51 of the Act. A company cannot deprive itself of this power: see *Malleson* v. *National Insurance and Guarantee Corporation*, 42 W. R. 249, [1894] 1 Ch. 200, and *Walker* v. *London Tramways Co.*, 28 W. R. 163, 12 Ch. D. 705. The Vice-Chancellor further seems to have been of opinion that the condition could be excluded by contemporaneous articles of association, and his decision has been so understood by succeeding judges. Accordingly, in 1875, in the case of *Harrison* v. *Mexican Railway Co.*, Sir G. Jessel, M.R., held that the condition of equality imported into the memorandum of association by Kindersley, V.C.'s, decision was negatived by one of the articles of association filed with the memorandum, and which article authorized the creation of additional capital by the issue of new shares, "in such manner, to such amount, and with and subject to such rules, regulations, privileges, and conditions" as the company should think fit. In our opinion it is impossible to uphold this decision, or the view of Kindersley, V.C., himself, as to the effect of articles on the memorandum, if it is once conceded that it is a condition in the memorandum of association that there shall be equality amongst the shareholders. If the condition is really one of the conditions of the memorandum it is immaterial whether the condition is express or implied. If the memorandum of association really prescribed equality amongst all the shareholders, as Kindersley, V.C., held that it did, the articles of association could not override the memorandum of association in that particular. (See section 12 of the Act, and *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653, 667, and *Guinness* v. *Land Corporation of Ireland*, 31 W. R. 341, 22 Ch. D. 349.) The departure thus made by Sir G. Jessel from the principle on which the Vice-Chancellor based the second decision in *Hutton* v. *The Scarborough Cliff Hotel Co.* was sanctioned by the Court of Appeal in 1885 in the case of *In re South Durham Brewery Co.*, and again in 1887 in *In re Bridgewater Navigation Co.*, a case which, although reversed on another point (14 App. Cas. 525), was not questioned on the point now under consideration. These decisions turned upon the principle that, although by section 8 of the Act the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum as in *Ashbury* v. *Watson*) may be determined by the company from time to time by special resolution pursuant to section 50 of the Act. This view, however, clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary. That proposition is, in our opinion, unsound. Its unsoundness was distinctly pointed out by Lord Macnaghten in *The British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, at pp. 416, 417. The view taken by Kindersley, V.C., cannot, in our opinion, be supported by reference to the Companies Act of 1862; and it is inconsistent with the decisions to which we have referred, and which, if wrong, can only now be set right by the House of Lords.

It was, however, contended that this court, at all events, had approved and followed the decisions of Kindersley, V.C.; and *Ashbury* v. *Watson* was referred to on this point. In that case the memorandum of association stated that preferential shares might be created and what the preferential rights were to be; and it was held that these were conditions which could be properly introduced into the memorandum of association, and which, being introduced there, could not afterwards be departed from and be treated as articles of association capable of change. No doubt Fry, L.J., relied on *The Scarborough Hotel case* to show that provisions about preference shares were conditions which could properly be inserted in the memorandum of association, but the propriety of the decision of Kindersley, V.C., in that case was not before the court, and we do not regard *Ashbury* v. *Watson* as conflicting with any of the other decisions of the Court of Appeal, in which Kindersley, V.C.'s, decision has been judicially considered. We desire to add that we do not base our judgment in this case on the words "with power to increase the capital as provided by the articles of association," which are in the memorandum of association. That power would have existed under section 12 of the Act if those words had not been in the memorandum. We prefer to rest our decision on the grounds above explained. But the words in the memorandum to which we are now referring certainly show that the conditions on which new capital was to be issued were not to be implied from the memorandum of association, but were to be ascertained from the articles; and as these might be changed from time to time under the powers conferred by sections 50 and 51 of the Companies Act, 1862, it would follow from *Harrison* v. *Mexican Railway Co.* and other cases like it that the resolutions of 1865 would be valid, even if the second decision in the *Scarborough Hotel case* could still be regarded as good law. For the reasons, however, which we have given we are of opinion that the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* was wrong, and ought not to be followed, and that the decision appealed from must be reversed and the resolutions thereby declared to be *ultra vires* must be declared

intra vires and valid. If, by declining to follow the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* we were disturbing titles or embarrassing trade or commerce, we should treat it as one of those decisions which, though wrong, it would be mischievous to overrule. But such is not the case; and it is desirable, from all points of view, to remove from companies a fetter which ought never to have been imposed upon them, and which in practice has been got rid of by skilled draftsmen by the insertion of power to issue preference shares in the original articles of association or the memorandum of association itself. These devices will no longer be necessary. The costs will be provided for as arranged by the parties.

Appeal allowed.

Solicitors for all parties, *Blyth, Dutton, Hartley, & Blyth.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Jan. 11, 12, 30.

In re ROUNDWOOD COLLIERY CO. (LIMITED). LEE *v.* ROUNDWOOD COLLIERY CO. (*a.*)

Landlord and tenant—Company—Mining lease—Distress for rent—Express power to seize chattels of lessee on adjoining mine—Bill of sale—Registration—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 6—*Voluntary winding up—Debenture-holders' action—Priority of landlord to debenture-holders.*

A power in a lease of a coal mine, which has no separate shaft and can be worked only through a neighbouring colliery, authorizing the lessor to distrain for rent in arrear on chattels of the lessee upon "adjoining or neighbouring collieries" is not a bill of sale within the Bills of Sale Act, 1878.

A distress under such a power made on chattels of the lessee, a limited company, before the commencement of its winding up, and before judgment has been given in a debenture-holders' action or a receiver effectually appointed, is good as against the debenture-holders.

Decision of Stirling, J., ante, *p.* 217, *reversed.*

Appeal by Lord Effingham from the decision of Stirling, J., reported *ante*, p. 217.

The Roundwood Colliery Co. was registered under the Companies Acts on the 19th of November, 1889, and in November, 1891, it duly issued debentures. On the 10th of November, 1890, the company acquired by assignment a lease granted by Mr. Foljambe of a colliery at Rotherham in Yorkshire, having a shaft of its own, for thirty years at a rent of £1,600 a year and royalties.

By a lease dated the 20th of November, 1891, the Earl of Effingham demised to the company certain seams of coal which adjoined those demised by Foljambe, and had always been worked, and could only be worked through Foljambe's colliery. By this lease the landlord was empowered, in case of non-payment of the rent, to distrain upon and sell the goods and chattels of the company "in or about any of the premises hereby demised, or any adjoining or neighbouring collieries."

On the 24th of September, 1896, the company resolved to wind up voluntarily.

On the 1st of October, 1896, a debenture-holders' action was commenced, and on the 7th of October, 1896, an order was made in that action appointing a receiver subject to his giving security, but it was not drawn up and there was no evidence that Lord Effingham had any notice of it.

On the 12th of October, 1896, Lord Effingham, to whom rent was then owing by the company, distrained and seized chattels of the company on Foljambe's colliery.

On the 13th of October, 1896, the winding-up resolution was confirmed, a liquidator was appointed, and the winding up commenced.

On the 15th of October, 1896, judgment was given in the debenture-holders' action, and the receiver, having given security, was duly appointed and proceeded to take possession of the company's property.

Subsequently applications were made by the liquidator and by the plaintiff in the debenture-holders' action for an injunction to stay a sale of the goods distrained, and on the 28th of November, 1896, Stirling, J., made an order staying the sale on the ground that the power in Lord Effingham's lease to distrain upon and seize chattels on adjoining or neighbouring collieries was a bill of sale within the Bills of Sale Act, 1878, and as such void for want of registration (see the report *ante*, p. 217).

Against this decision Lord Effingham appealed. On the appeal another question was raised—viz., whether, assuming the power of distress to be valid, it was exercised too late to prevail against the debenture-holders of the company.

Hastings, Q.C., and *Upjohn*, for the appellant.—By section 6 of the Bills of Sale Act, 1878, mining leases are expressly exempted from the Act. A power of distress such as this is a usual power in a lease of a mine which is to be worked along with an adjoining colliery: Davidson's Precedents, 2nd ed., vol. 5, pt. 2, pp. 311, 395; Key and Elphinstone's Precedents, 2nd ed., vol. 1, p. 771; 3rd ed., p. 878; 4th ed., p. 901. A power of distress for rent is not within the Act: *In re Willis, Ex parte Kennedy*, 36 W. R. 793, 21 Q. B. D. 384, even where in a mining lease it extends to lands other than those demised: *Daniel* v. *Stepney*, 22 W. R. 662, L. R. 9 Ex. 185. In *Pulbrook* v. *Ashby*, 35 W. R. 779, 56 L. J. Q. B. 376, on which Stirling, J., relied, the power was given to secure a debt and not rent. A clause like this creates a charge upon the adjoining land: Co. Litt. s. 221, p. 146-7. If, therefore, it requires registration under this Act, it must equally require it under section 43 of the Companies Act, 1862.

Buckley, Q.C., Eustace Smith, and *Younger*, for the respondents.—The Bills of Sale Act, 1878, does not apply to ordinary leases. Mining leases, however, are different from ordinary leases: *Gowan* v. *Christie*, L. R. 2 H. L. Sc. 273, 21 W. R. Dig. 132; *Coltness Iron Co.* v. *Black*, 29 W. R. 717, 6 App. Cas. 315—and it is because they are different that they are expressly excepted in section 6. This power is not a usual incident of a mining lease, and the section does not, therefore, apply to it. A power of distress in the strict sense is exempt from the Act, but it exists only over the land demised. In *Daniel* v. *Stepney* it was not decided that such a power as this was exempt from the Act. The question was never raised. Such a power would be prejudicial to the adjoining landlord. If it is valid without registration, so also might a power be in an agricultural lease to distrain upon a farm in another part of the country. This is a pledge of chattels the existence of which could not in ordinary circumstances be suspected, and it is the policy of the Act to require such pledges to be registered. It is a "licence to take possession of personal chattels as security for

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

a debt" within section 4 of the Act. The claim of the appellant cannot prevail against that of the debenture-holders: *In re Opera (Limited)*, 39 W. R. 705, [1891] 3 Ch. 260; *In re Marriage, Neave, & Co.*, *ante*, p. 42, [1896] 2 Ch. 663.

Upjohn, in reply.—*In re Opera (Limited)* only decides that debentures were good against an execution creditor. The appellant claims as an incumbrancer, and is entitled to prevail against the debenture-holders by reason of the priority of his seizure. The debentures do not prevent the chattels from remaining the property of the company: *In re Marriage, Neave, & Co.*, nor did they prevent the company from dealing with them until either it was wound up or a receiver appointed: *Wheatley* v. *Silkstone & Haigh Moor Coal Co.*, 33 W. R. 797, 29 Ch. D. 715; *Biggerstaff* v. *Rowatt's Wharf Co.*, 44 W. R. 536, [1896] 2 Ch. 93. The exercise of a right of seizure has been held good as against the assignees of a bankrupt: *Krehl* v. *Great Central Gas Co.*, 18 W. R. 1035, L. R. 5 Ex. 289, and a power of distress is better than a mere right of seizure. The debenture-holders' floating charge implies a licence to the company to deal with the chattels for the purpose of carrying on its business: *Government Stock Investment Co.* v. *Manila Railway*, 44 W. R. 166, [1895] 2 Ch. 551. The case is the same as if on the 12th of October, 1896, specific chattels had been handed to the appellant to secure a debt due to him.

Younger, in reply to *Upjohn*.—The company had no power to create a specific security in priority to the debentures. If it had such a power, this security was not given for the purpose of carrying on the business.

LINDLEY, L.J.—This is an appeal from an order of Stirling, J., restraining a lessor of a seam of coal in Yorkshire from selling under a distress for rent, goods of his lessee, but which goods were seized on lands not comprised in the lease. Stirling, J., held that the power to distrain for rent off the premises demised was a bill of sale within section 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and that as the lease was not registered as a bill of sale the distress was invalid. Another question was raised before us, which was that, assuming the power of distress to be valid, it was exercised too late to prevail against the debenture-holders of the company,, the company being the lessee. This latter question turns upon circumstances which have no bearing on the decision on the Bills of Sale Act, and for the present it will be convenient to consider those facts only which are material to the extremely important question to which that Act gives rise.

The Roundwood Colliery Co. (Limited) is a company which, at the date of the lease under which the distress was made, was working a colliery at Rotherham, in Yorkshire, under a lease from a gentleman named Foljambe. This colliery had a shaft of its own through which the coal was raised, and which, of course, could be used for working any adjoining minerals which the company might acquire and properly work through Foljambe's colliery. By a lease dated the 20th of November, 1891, the Earl of Effingham demised to the company a seam of coal adjoining Foljambe's colliery at rents varying with the acreage worked. Although these rents were in the nature of royalties payable for the coal won, they were rents which could be distrained for at common law on the property demised, without any express power of distress. This point was settled in *Daniel* v. *Brucie*, 6 Q. B. 145. The lease, however, contained a power in case of non-payment of the rent to distrain upon and sell the goods and chattels of the company "in or about any of the premises hereby demised or any adjoining or neighbouring collieries." These last words give rise to the difficulty which has arisen. The seam of coal demised by this lease has always, in fact, been worked through the adjoining mine held by the company under Mr. Foljambe. It is plain, moreover, that this was always contemplated. The lease contained no demise of any surface lands; no provision was made for sinking any pit or shaft, and only one seam of coal was comprised in the lease. The words "neighbouring colliery" are large enough to apply to collieries in the neighbourhood not worked with the seam of coal demised. I am, however, of opinion that to construe those words in that wide sense would be unreasonable and extravagant. The power of distress must, in my opinion, be construed to apply to those neighbouring mines only which, though not actually adjoining the seam of coal demised, might be or become connected with it by underground workings. This is a matter of some importance; for, if the power of distraining off the property demised extended to any goods and chattels of the lessee on any mines in the neighbourhood wholly unconnected with the property demised, the power would be very unusual, and might well be regarded as a licence to seize and sell chattels as distinguished from a power of distress for rent. If, however, the power is read as I read it, that is, as confined to the goods of the lessee on adjoining or neighbouring mines worked with the seam of coal demised, the power is one which is very common in mining leases where the minerals demised are to be worked through and with other mines worked by the same lessee. The precedents referred to by Mr. Upjohn from Davidson's, and Key and Elphinstone's well-known collections, and other precedents which are to be found in Bainbridge on Mines, p. 825, and in 3 Bythewood's Precedents by Robbins, p. 598, show that such a power is by no means uncommon in mineral leases. I do not say it is a usual clause which would be inserted if parties differed, but it is a clause very commonly inserted in such cases as I have mentioned.

Passing now to the Bills of Sale Acts, and speaking of them generally, it is impossible to read the preamble of the Act of 1854, which is the first of the series, without seeing that those Acts are not Acts to amend the law of real property, or the law relating to leases. The object of the Acts is to prevent secret pledges of chattels for money lent. It was not their object to interfere with leases or powers of distress for rents, although provision is made by section 6 of the Act of 1878 for attornments and leases and powers of distress created to secure the repayment of money lent on the security of chattels. I will return to this section presently. *Morton* v. *Woods*, 17 W. R. 414, L. R. 4 Q. B. 293 [1869], went far to show that the Act of 1854 did not apply to ordinary leases. In *Daniel* v. *Stepney*, L. R. 7 Ex. 327, 9 *ibid.* 185 [1872 and 1874], the power of distress in a mining lease was extended to chattels off the land demised. The case was decided on demurrer. The pleadings might have raised, but did not raise, the point that the power was invalid under the Act of 1854 as against the plaintiffs, who were trustees for the lessee's creditors. The probable explanation of this is that, having regard to *Morton* v. *Woods* the point was not considered worth raising; other cases, especially *In re Willis*, 36 W. R. 793, 21 Q. B. D. 384 [1888], and *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627, may also be referred to as showing that distresses for rent, not reserved to secure some other debt, are outside the Bills of Sale Acts altogether. As, however, the exact point which has to be determined has not yet been actually decided, it is necessary to examine more closely sections 4 and 6 of the Bills of Sale Act, 1878, on which

the case really turns. [His lordship referred to those sections, and continued:] It is plain that section 6 was inserted in order to extend the operation of section 4. Section 4 says what a bill of sale shall include. Powers of distress for rent are not mentioned. The only words used in section 4 which are material for the present purpose are "licences to take possession of personal chattels as security for any debt." Those words are the same as those used in the previous Act of 1854, see section 7. But section 6 is evidently based upon the supposition that powers of distress for rent are not within section 4. Section 6 expressly deals with powers of distress, and says that such powers, if conferred by way of security for any debt or advance, are to be "deemed to be bills of sale"—language which plainly does not include an ordinary lease or distress for rent, which is not itself a security for some other debt. But then section 6, whilst enacting that powers of distress if conferred by way of security for a debt or advance are to be deemed bills of sale, contains two exceptions—viz. (1) mining leases, and (2) leases at fair and reasonable rents by mortgagees in possession to their mortgagors. Why mining leases were excepted from section 6 I cannot say. Possibly it was to prevent any doubt arising as to the validity of powers of distress for payments which cannot be distrained for at common law, especially in those so-called mining leases which are mere licences to win and remove minerals. Anyhow, section 6 cannot invalidate any mining leases, nor any power of distress which is commonly inserted in such a document.

The case therefore stands thus. If the power of distress in the present case is to be regarded as a power of distress for rent it is out of the Bills of Sale Act altogether, and is neither within section 4 nor within section 6 of the Act of 1878. If, on the other hand, the power of distress in the present case is not to be regarded as a power of distress for rent, but as a power of distress for a debt, so as to fall within section 6, then, being a common form in a mining lease, it falls within the exception contained in the same section. Either way, therefore, it appears to me that this power is not invalidated by the Act of 1878. If, indeed, powers of distress for rent were "licences to take possession of personal chattels as security for a debt" within the meaning of section 4 the case would be very different; for it is reasonably plain that the object and effect of section 6 are to extend and not to curtail the operation of section 4. The case of *Pulbrook* v. *Ashby*, on which Stirling, J., relied, appears to me quite consistent with the above view. The power of distress there was not for rent, but for the price of goods sold. Such a power clearly falls within section 4. The decision was quite right. I have no doubt that a power of distress for rent off property demised might be so unusual and suspicious as to justify the inference that a lease containing such a power was being used as a cloak for a transaction which really fell within section 4. But no such inference is possible in the present case. For these reasons I am unable to concur in the view taken by Stirling, J., that the power of distress in this lease is invalid by reason of the Bills of Sale Act.

There remains the other point, to which the learned judge did not allude—viz., the right to distrain as against the debenture-holders of the company. The company had issued debentures in the ordinary form, and those debentures created what is called a floating charge on the goods and chattels of the company. On the 24th of September, 1896, the company resolved to wind up voluntarily, and on the 1st of October, 1896, an ordinary debenture-holders' action was commenced. On the 7th of October, 1896, an order appointing a receiver was made, subject to his giving security. This order, however, was not drawn up, and there is no proof that the lessor had notice of it. On the 12th of October, 1896, the lessor distrained, and seized goods and chattels of the company which were off the property demised—viz., on Mr. Foljambe's adjoining colliery. On the 13th of October, 1896, the resolution to wind up was confirmed, and a liquidator was appointed. The winding up of the company commenced on this day. On the 15th of October, 1896, judgment was given in the debenture-holders' action, and the receiver, having given security, was appointed, and he proceeded to take possession of the property of the company. Shortly afterwards applications were made by the liquidator and by the plaintiff in the debenture-holders' action to stay a sale of the goods distrained, and on the 28th of November, 1896, an order staying the sale was made, on the ground that the distress was invalid under the Bills of Sale Act. This ground being, in my opinion, erroneous it becomes necessary to consider the respective rights of the landlord and of the debenture-holders to the goods seized. These rights depend upon the question whether the landlord distrained while the debentures were still a floating security or whether the debentures are to be regarded as having definitively attached to the goods seized, so that, as between the landlord and the debenture-holders, those goods had become the property of the latter before the landlord seized them. It is not contended that the landlord could distrain, off the property demised, on goods which were not the goods of the company both at law and in equity. The debenture-holders contend that the goods seized were not the goods of the company, except subject to the equitable charge created by the debentures. As between the debenture-holders and the company this proposition is true, but it does not decide the respective rights of the lessor and the debenture-holders, which is what we have to consider. The goods seized by the lessor were seized under a power conferred either before the debentures were issued or whilst they were clearly a floating security, and in either case that power could be exercised before the debentures ceased to be floating securities. They did not cease to be so before the distress was put in. The winding up did not commence until after that date, nor was any effectual order for a receiver made until after the same date. The order of the 7th of October was never really effective. It was never drawn up, the lessor had no notice of it, and before the receiver could take possession he had to give security. The distress, having been made before the commencement of the winding-up of the company, and before a receiver was effectively appointed, was, in my opinion, valid as against the debenture-holders. This conclusion is in accordance with the decision in *Biggerstaff* v. *Rowatt's Wharf Co.*, and is not at all inconsistent with *In re Opera (Limited)*, which it was held that the sheriff could only seize the goods of a company subject to the equitable rights of the debenture-holders. The right of the sheriff to seize was not conferred by the debts either before the debentures were issued or afterwards with the implied authority of their holders.

For these reasons I am of opinion that the appeal should be allowed and the order appealed from should be reversed, with costs both here and below. If the goods seized have been sold by the receiver he must pay over the proceeds of sale to the lessor or so much of them as may be necessary to cover the rent distrained for, and the costs of the distress.

A. L. SMITH, L.J.—In this case this court is asked to hold that a mining lease granted by the Earl

Effingham for the purpose of enabling his lessees to work the demised coal, reserving therefor an acreage rent, is a bill of sale within the meaning of the Bills of Sale Acts, and consequently that the lease is void, it not having been registered pursuant to those Acts. It appears that in the years 1890 and 1891 the Earl of Effingham and Mr. Foljambe were respectively owners of seams of coal lying adjacent to each other in the county of York. The shaft whereby these coals would be brought to bank was situated upon the lands of Mr. Foljambe. In these circumstances in the year 1890 a mining lease was granted to a limited company by Mr. Foljambe, which contained the usual covenants to be found in mining leases, as also the covenant by the lessees to pay the rent reserved. It also contained the following power of distress: "Provided always, and it is hereby agreed and declared that if and whenever any of the rents shall be in arrear for twenty-one days, the lessor, his heirs, or assigns may enter and seize, distrain, sell, and dispose of in the same manner as landlords may for rent in arrear any engines, machinery, implements, tools, chattels, or effects then belonging to the lessees or their assigns in or about any of the premises hereby demised, or any adjoining or neighbouring colleries." In 1891 the Earl of Effingham granted a similar lease of his seams of coal to the same lessees, and this lease contained an identical power of distress as that contained in the lease granted by Mr. Foljambe. In due course of working, the coal won by the lessees from the Earl of Effingham's seams was taken by them through the workings in Mr. Foljambe's land and was brought to bank up the shaft constructed thereon, the coal from the two properties being thus worked together. The question is, Is this lease by the Earl of Effingham a bill of sale? I should have thought *off*-hand that the answer would be "No." But Stirling, J., has held the contrary, and as in argument it has been strongly insisted by counsel for the respondents that he is right, the matter obviously requires serious examination.

In the first place I cannot doubt that had the express power of distress in default of payment of the contracted rent contained in this lease by Lord Effingham been confined to seizing, distraining, selling, and disposing of the lessees' chattels in or about the demised premises it could not have been maintained that the power caused the lease to be a bill of sale within the meaning of section 4 of the Bills of Sale Act, 1878; for though such a power might be said to be within the words "licenses to take possession of personal chattels as security for a debt," yet, in my judgment, such a power is not within either the object of or the mischief aimed at by the Bills of Sale Acts, which apply to dealings between creditors and debtors, and not to leases between landlords and tenants. The object of the Bills of Sale Acts was not to bring *bonâ fide* leases within the provisions of those Acts. Such leases are outside those Acts altogether. In the case of *Re Willis, Ex parte Kennedy*, 21 Q. B. D. 384, Lindley, L.J., sets forth the true view of the provisions of the Bills of Sale Acts of 1854 and 1878. He points out that if those Acts are looked at it will be seen that what the Legislature was aiming at was not the case of leases between landlords and tenants, but the rendering of it compulsory on lenders of money on the security of goods and chattels to register their securities, and that if money be lent on the security of chattels this must be done by a registered bill of sale—and in that I entirely agree. Bowen, L.J., also, when delivering the judgment of his court in *In re The Standard Manufacturing Co.*, [1891] 1 Ch. 627, showed that until the passing of the Act of 1882 the express and avowed design of the Legislature was to strike at frauds perpetrated upon creditors by secret bills of sale; and that although the general words in the Act—the question before the court there was whether debentures of a joint-stock company were bills of sale—were large enough to include debentures, yet they could not, considering the manifest objects of the Acts, be brought within their meaning. I cannot think that though in a mining lease, or indeed in any other lease, there be an express power to distrain upon the demised premises such a power comes within the true meaning of the words, "licence to take possession of personal chattels as security for a debt," and thus render the lease a bill of sale; and I have no doubt that it does not. Indeed this was not disputed at the bar; but why not, if such a power is within the actual words of section 4 of the Act of 1878? It was said that such an express power in a lease was merely the expression of the right that every landlord possessed at common law—namely, a right of distress upon the demised premises, and was not therefore within the meaning of the words of the section. But I think that the true answer to be given is, because real leases with real rents reserved are not within the scope of the Bills of Sale Acts at all. I do not doubt that there may be provisions inserted in a lease which would bring the instrument, although principally a lease, within the provisions of the Bills of Sale Acts and the case of *Pulbrook* v. *Ashby* is an instance of this. There by the lease the landlord took an express power to distrain upon the demised premises for money due for goods sold and delivered by him to the tenant, and this power of distress was held to be a "licence to take possession of personal chattels as security for a debt" within section 4, and in this I agree. It was a power having no relation whatever to rent due from a tenant to his landlord; it was altogether outside the relationship of landlord and tenant, and had reference to that of debtor and creditor. To get a lease within section 4 of the Act of 1878, there must be in the lease something in addition to and *dehors* the lease which sins against provisions of the Bills of Sale Acts. Stirling, J., said the present case was on all fours with that of "a lessor granting an ordinary lease of a house, but reserving to himself a power to distrain on goods of a lessee found in another house not comprised in the lease"; and he said that he thought that such a power would be a "licence to take possession of personal chattels as security for a debt." Such a power, I apprehend, would be wholly exceptional, if not unique. I never saw the like. If the power to distrain in the present case gave power to distrain upon the goods of the lessee, say, in Grosvenor-square, as was put in argument, I should have thought that such an exceptional and peculiar power might legitimately give rise to the inference that it was not really a power whereby to enforce the landlord's usual and ordinary rights against his tenant, but inserted for some other purpose foreign to the relationship of landlord and tenant, in which case the instrument might well be held to be a lease and something more, which something more might then come within the words of section 4 as a "licence to take possession of personal chattels as security for a debt," and thus be a bill of sale, and require to be registered. But that case is not this case. In the present case the power to distrain upon "any adjoining or neighbouring colliery" is by no means unique or exceptional in mining leases. It is a power inserted in mining leases when it is intended that two collieries are to be worked together, as in the present case. And so we find a like power was inserted in the lease by Mr. Foljambe. Similar forms

of powers are to be found in the recognized and well-known precedents of forms of mining leases. To these Lindley, L.J., has referred. The true construction of this power to distrain upon "any adjoining or neighbouring collieries" is not, in my opinion, a power that the lessor may distrain upon the lessees' chattels upon any collieries in the neighbourhood, no matter where situated, upon which the lessees might happen to have chattels. The power is expressly confined to adjoining or neighbouring collieries, and it would be a most unreasonable and not the true construction of the power to hold that it extended to collieries wholly unconnected with the demised seams of coal. It is a power limited by the subject-matter to which it was applied—viz., a power to distrain upon an adjoining or neighbouring colliery worked, as in this case in connection with the demised premises. I cannot bring myself to think that the present lease is a mining lease and something more, for in my judgment it is a mining lease and nothing more, and therefore not a bill of sale within the true intent and meaning of section 4 of the Act of 1878.

As regards the argument of Mr. Graham Hastings for the earl, founded upon section 6—viz., that this section comprises real *bonâ fide* transactions between real landlords and real tenants in which are reserved real rents, and consequently, as leases are within section 6 they are not within section 4, I am by no means convinced that section 6 applies in any way to what I will call real *bonâ fide* leases between landlords and tenants with real rents; and in my opinion it does not. In my view section 6 was intended to defeat the schemes of lenders of money who had resort to forms embracing ostensibly the relation of landlords and tenants for the purpose of securing their advances and the accruing interest thereon; and it does not embrace the case of real *bonâ fide* leases with actual rents. But if I am wrong as to this and section 6 does include such leases, though I think it does not, then it is obvious it does not include the present case for mining leases are expressly excepted from the section.

As regards the further point which was taken by Mr. Buckley, that if the power to distrain be held valid and the lease not a bill of sale, in that case the distress could not be made effective against the debenture-holders, I have nothing to add to what my brother Lindley has said thereon, and I agree with him. For these reasons I think this appeal must be allowed.

RIGBY, L.J.—Concurring as I do in the judgments already given, I will only say, out of respect for the learned judge from whose judgment we are differing, so much as will explain my view of the true construction of the Bills of Sale Act, 1878. By section 3 the Act is to apply to "every bill of sale"—I will not read the whole of the section—"whereby the holder or grantee has power . . . to seize or take possession of any personal chattels comprised in or made subject to such bill of sale." The definition of "bill of sale," which is contained in section 4, comprises "licences to take possession of personal chattels as security for any debt," words which were found in the previous Act of 1854. Now, having regard to the purview of the Bills of Sale Act, 1878, I am satisfied that it never was intended to include powers of distress contained in mining leases or others which are reserved or incident by the common law to landlords in any usual and well-known form of lease. I think that this was clearly established before the passing of the Act of 1878, and, indeed, there were decisions which seem to me to have gone much further—namely, those which held that, where in mortgages there was an attornment at what is called a "rent," and what technically is a rent, but which was not a rent incident to any ordinary agreement between landlord and tenant, but a mere security for money, it was nevertheless outside the Act.

By reason of those decisions it was thought necessary to insert the provision included in the Act of 1878, s. 6. The effect of that section is, to my mind, that with the express exception therein contained of mining leases, and leases made by mortgagees who have actually entered into possession and actually made a demise to their mortgagors, artificial rents created by attornment and also by powers of distress are not to be treated as arrangements between landlord and tenant, but that the existence of them will be treated as nothing more than giving licences to seize chattels as security for a debt, and that consequently they are within the Bills of Sale Act. Therefore for my part I do not doubt that a power of distress, even though it be contained and included in the lease, may be of such a nature as to be entirely outside the scope of ordinary agreements between landlord and tenant; and I should accept such a case as that of a brewer's lease as one of those cases. I think that if in a lease you take a power of distress over property entirely unconnected with the demised premises, that would be outside; as, for instance, where there is a demise of one house—as in the case put by the learned judge in the court below—with a power of distress over the chattels in another. That is because no one could suppose that in the ordinary course of events the owner of a town house had in any way pledged his furniture for the rent of a property which might be situated far away in the country, and with which there was no apparent connection at all. Such a power of distress, it appears to me, would really be a licence to seize whatever chattels there might be in the house at the time when it was exercised; and with regard to those chattels in that house the rent would not be rent at all; it would be a debt and nothing else. That being so, we have to consider whether we can distinguish the present case from cases of that description. I think that we can, and on this plain ground: Here we have a mining lease containing provisions which, construed as they have been by Lindley, L.J.,—a construction which I do not differ from—are, I will not say "usual," because I have no means of knowing whether they are usual or not, but at any rate not uncommon and not unreasonable terms in a mining lease, where the minerals are of necessity worked through an adjoining or neighbouring mine in the sense which we give to the words in this lease, and where the chattels may or may not be at the moment when a distress is being put in, on the very mine which is the subject of the lease, or on the mine through which the minerals are being carried. Of course the reasonableness of that view is made more clear by the fact that there may be mining leases in which powers of distress are given, although there be no absolute interest in any land or in any minerals demised. Though a well-known incidence of the mining industry, they are not in any way, according to my view, within the meaning of the Bills of Sale Act. I think, therefore, that the power of distress is fairly within what is understood to be an arrangement between the owner of a mine and the person who works under a lease from him, or a licence from him through a neighbouring mine.

With regard to the other question, about debenture-holders, since the learned judge in the court below did not deal with that I have nothing to add. Therefore I say nothing at all upon that except that I agree.

Appeal allowed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, agents for *Parker, Rhodes, & Co*, Rotherham.

Solicitors for the respondent, *J. & R. Gole*, for *Pashley & Hodgkinson*, Rotherham.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Jan. 22.

In re WARD.
Ex parte WARD. (*a*.)

Bankruptcy—Officer retired from the Army—Appropriation of pay or salary—Pension—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 53, *sub-sections* 1, 2.

An officer who has retired from the Army with permission, and who is placed on the reserve list and receives retired pay under Article 1057 *of the Royal Warrant*, 1887, *is in receipt of a salary or income within the meaning of sub-section* 2, *and not within sub-section* 1 *of section* 53 *of the Bankruptcy Act*, 1883, *and therefore, in the event of his bankruptcy, the court may order so much of such pay as it thinks just to be distributed amongst the creditors without obtaining the consent of the chief officer of the department under which the pay is enjoyed, as required by sub-section* 1.

Sub-section 1 *relates to the case where a bankrupt is in receipt of pay for services which he is still rendering, while sub-section* 2 *relates to the case where he is in receipt of pay for services which he has already performed.*

This was an appeal by the debtor, from an order made by Mr. Registrar Linklater under section 53 of the Bankruptcy Act, 1883, whereby the appellant, a retired military officer, was ordered to pay the official receiver the sum of £40 per annum out of the pension he received as a retired officer.

The appellant had been formerly lieutenant-colonel of the 2nd Battalion Cameronians.

In April, 1888, he retired from the Army under article 77 of the Royal Warrant (Pay and Promotion) of 1887, and was placed upon the reserve list. He elected to retire, and so was not placed upon half-pay, but received a pension of £420 per annum, which, after deduction of income tax, amounted to £406.

The Royal Warrant of 1887 provides as follows:

Article 77: "A lieutenant-colonel shall, if not previously liable to retirement on account of age, be placed upon half-pay, unless he elect to retire from our Army, on completing four years' service in command of a regiment of cavalry or a battalion of infantry."

Article 103: "A retired officer, whether he shall have commuted his retired pay or not, shall remain liable to be recalled to service in our regular forces at a time of emergency until the age of . . . fifty-five, if he retire as major, lieutenant-colonel, or colonel."

Article 519: "The reserve of officers shall be composed of (*a*) officers who have served in our regular forces, but who, having retired either with retired pay or gratuity are still liable for service in case of emergency."

Article 520: "An officer retired from our Army on a pension or gratuity with the condition of being liable for service in a case of emergency shall be an Army reserve officer, so long as he is liable for service."

Article 1057: "An officer permitted to retire from our Army shall receive upon retirement a gratuity or retired pay according to the following scale. . . . After four years' employment as substantive lieutenant-colonel or colonel in our cavalry or infantry, £420 yearly."

The appellant was under fifty-five years of age. He had no other income than his pension, and out of this had to support himself, his wife, and a young child.

The appellant was indebted to his solicitor to the amount of about £250. This was his only liability, and was a judgment debt.

On the application of the official receiver the registrar made the above order.

Section 53 of the Bankruptcy Act, 1883, provides as follows:

(1) "Where a bankrupt is an officer of the Army or Navy, or an officer or clerk or otherwise employed or engaged in the Civil Service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this sub-section the court shall communicate with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment."

(2) "Where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or any part thereof, to the trustee to be applied by him in such manner as the court may direct."

H. Reed, Q.C. (*E. P. Willes* with him), for the appellant.—The appellant is an officer in receipt of pay within the meaning of sub-section 1 of section 53, as he is still liable to serve in a case of emergency, and therefore the consent of the chief officer of the department under which such pay is made must be obtained. This consent was not obtained, and therefore the order of the registrar is void. Sub-section 2 does not apply in this case, as the appellant is not an officer in receipt of half-pay, nor a pension for past services, as he is still in the service of the Crown, nor in receipt of compensation. The pay or salary which the appellant receives comes within the rule laid down in *Ex parte Webber*, 35 W. R. 308, 18 Q. B. D. 111. The court ought not, in the exercise of its discretion, to make an order where the officer has no other income than his pay: *Ex parte Saunders*, 44 W. R. 30, [1895] 2 Q. B. 424; *In re Shine*, 40 W. R. 386, [1892] 1 Q. B. 522.

Sir R. Webster, A.G. (*Muir Mackenzie* with him), for the official receiver.—This case comes within sub-section 2. The appellant is in receipt of a pension for past services. Sub-section 1 applies only to officers on active service. The appellant is not on active service, though he is liable to serve in a case of emergency. Therefore, the consent of the chief of the department is not necessary before an order can be made, and the order now appealed from is valid. The amount ordered to be paid is entirely a matter of discretion. The registrar in this case has exercised his discretion properly.

Counsel cited *Ex parte Huggins*, 30 W. R. 878, 21 Ch. D. 85.

E. P. Willes replied.

(*a*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Lord ESHER, M.R.—The first thing we have to do is to construe section 53 of the Bankruptcy Act, and then to apply it to the case of an officer in the Army in the position of the bankrupt.

Now, the first sub-section appears to me to relate to the case where the bankrupt is an officer who is in receipt of pay or salary for services which he is still rendering, and does not apply to the pay, or whatever the other sum may be called, which is not given to him in respect of services which he is performing, but which is given to him in respect of services which he has already performed. Then the second sub-section provides for the case "Where a bankrupt officer is in receipt of a salary or income other than aforesaid"—that is, in receipt of salary or income other than pay for services which he is rendering, 'or is entitled to any half-pay or pension, or any compensation granted by the Treasury.'"

Now, what is this officer entitled to? He is an officer who has been permitted to retire from the Army under the Royal Warrant of 1887. Now, that cannot mean retired altogether from the Army so that he has no longer any relation to it, because he is still bound by certain rules of the Army, therefore it means retired from the Army in the sense in which that is meant in article 1057 of the Royal Warrant. "An officer permitted to retire from our Army shall receive, upon retirement, a gratuity or retired pay according to the following scale." Now, that gratuity is not in respect of services which he is rendering, because if he has retired from the Army in the sense in which that article means, he is not doing any service. It is true he may, if he is put on the reserve list, be called upon to serve in the event of an emergency; but what he is receiving is a payment, not in respect of services which he is rendering, but for services which he has rendered. I am of opinion that wherever that is so—that is to say, wherever article 1057 applies—the case is within sub-section 2, and not sub-section 1. That is the short way of enunciating the rule applicable to this case. Therefore the objection to the order on the ground that the leave of the chief of the department was not obtained falls to the ground. Now there comes a rather more difficult question, which is this: How ought the discretion given by section 53 to be exercised in this case? The registrar has exercised his discretion and has said that £40 a year must be given over to the trustee. He first of all laid down the right rule—that this is a matter of discretion depending upon that knowledge of life which the court is assumed to have, and which it is bound to have—the general knowledge of life, not a knowledge of law—and that it must bring to bear that knowledge of life to each particular case itself, without reference to any other; then, having said that he broke from that rule which he had laid down, and which is the right rule, and began to consider it, not from his general knowledge of the world applied to this case, but he looked out for what he calls help or assistance from what learned judges have said in other cases.

It is now for me to exercise my knowledge of life. I take into account in this case that the bankrupt is an officer who has been a colonel, and I take into account that he is an officer in ill-health, and who will, therefore, require medical assistance, and probably from time to time change of air. Then I consider that this officer has nothing but this allowance, he has nothing else, neither has his wife anything else. That is all he has to live upon. He has a young child, and he has, therefore, a nurse, and there is the washing for himself and his wife, and the nurse and the baby, and there is the medicine which is necessary for him. I think at least we ought to allow him to live, not as if he were a working man, but to live as a colonel in the Army may, without extravagance, be expected to live. I think to reduce this sum of £406, which is his only income, by £40 is a greater reduction than we ought to make; it is more than will leave him after that sufficient to live with his wife and child as I think he ought to do. I think, therefore, that this £40 is more than I should take off in this case. I should think if £20 a year is taken from him that would be sufficient to meet the justice of the case. I think, therefore, we should reduce the sum mentioned in the registrar's order from £40 to £20, leaving the whole of the rest of the order exactly and precisely as it is.

LOPES, L.J.—The question here is whether this case is brought within sub-section 1 or sub-section 2 of section 53 of the Bankruptcy Act, 1883. Now it is important, in the first place, I think, to consider what Colonel Ward is. He is an officer coming under the description in Article 1057—namely, an officer permitted to retire from the Army but subject to be recalled into active service in case of emergency. That he comes under that rule is pretty clear, because I find that £420 is the exact sum which is given as retired pay to a colonel after four years' employment as substantive Lieutenant-Colonel or Colonel in the cavalry or infantry.

Now, that being so, does he come within sub-section 1 or sub-section 2? In my judgment sub-section 1 is intended to apply to "pay or salary"—those are the words used—"where the bankrupt is an officer in the Army receiving pay or salary," meaning thereby full pay or full salary for services then being rendered at that time. In that case it seems very intelligible indeed why the consent of the chief officer of the department should be obtained before any order directing any portion of the pay or salary to be applied in payment of the debts is made. I can quite understand that because it may be that the officer is entrusted with some command, and it is necessary that he should maintain a certain position and would require certain funds in order to support that position. I can quite understand it is very undesirable indeed that any reduction should be made in the remuneration that he is receiving unless the consent of the chief of the department is first obtained. I should say, if Colonel Ward was brought within the first sub-section of section 53, this order could not be made, because this consent has not been obtained; that is admitted. However, I think that sub-section 1 applies to an officer who at the time in question is engaged on active service, and receiving for services then being rendered full pay or salary. But then, when we come to sub-section 2 the words are very different. They are: "Where the bankrupt is in receipt of a salary or income other than as aforesaid." Now "other than as aforesaid" I understand to mean other than pay or salary spoken of in the previous sub-section. The case of Colonel Ward comes within that section. I think, therefore, the order was properly made, and that there was jurisdiction to make it under that section.

Then, with regard to the amount, of course that is a matter entirely in the discretion of the court, and it is said here in this case that the sum of £40, which has been directed to be paid to the trustee for the purpose of discharging the debt, is too large. I am inclined on the whole to think that probably it is more than should be directed. We have had furnished to us a very carefully prepared list of the expenses to which the Colonel and his establishment are subjected. The Master of the Rolls has dealt with that at length, and as he has had a very long experience of

life, and thinks that £20 would be sufficient, I think the order should be so varied.

CHITTY, L.J.—I also think there was jurisdiction to make this order, and that the case falls within sub-section 2 of section 53. There was an attempt made to argue that the case did not fall within section 53 at all. I agree with the argument so far as the first sub-section is concerned. I think that the first sub-section, which applies not merely to an officer in the Army or Navy, but to an officer or clerk "otherwise employed or engaged in the Civil Service of the Crown," applies to them when they are in active employment, and that is the reason why the consent of the chief officer of the department is required before the court sees fit to deal with the case. With regard to an officer in the Army on active service, the reason for obtaining the consent of the chief officer of the department is to see whether his reduced salary would be sufficient to support him in the position in life in which he is while in the service.

Then I pass to the second sub-section, which deals not merely with officers in the Army and Navy, but also with officers and clerks, and I think these are the words which bear upon the case, "entitled to any half-pay or pension or to any compensation."

Now, this officer has retired from the Queen's Army, and what he is now in the enjoyment of is, in substance, a pension for past services, not the less so because there may be included in what he receives a sort of retaining fee for serving his country or the Queen again.

Then with regard to the discretion, it is quite unnecessary for me to go over the circumstances again. They have been very carefully considered by us all, and I think the proposed reduction is right. The discretion must be exercised judicially and carefully upon all the circumstances of the particular case, and I cannot find any assistance from decisions in other cases under other circumstances.

Order varied accordingly.

Solicitor for the appellant, *F. W. Tonkin.*

Solicitor for the Official Receiver, *Solicitor to the Board of Trade.*

High Court of Justice.

Chan. Div. } Stirling, J. } July 21, 1896; Nov. 17.

In re THE MANCHESTER AND MILFORD RAILWAY CO. *Ex parte* THE CAMBRIAN RAILWAY CO. (a.)

Railway company — Judgment against — Execution — Private Act of Parliament—Action not on a contract —The Railway Companies Act, 1867 (30 & 31 *Vict.* c. 127), *s.* 4.

Section 4 *of the Railway Companies Act,* 1867, *prohibits the issue of execution against a railway company in two classes of cases only*—i.e., *where the judgment is recovered* (a) *in an action on a contract entered into after the passing of the Act; and* (b) *in an action not on a contract commenced after the passing of the Act—and the burden of proof is upon those who assert that in any particular case the issue of execution is prohibited.*

A private Act of Parliament, passed in 1862, *imposed upon the L. Railway Co. a liability to do certain acts for the benefit of the M. Railway Co., in respect whereof certain payments were thereby directed to be made by the M. Co. to the L. Co., and for the recovery of such payments a remedy by action against the M. Co. was thereby given to the L. Co. Neither of the said companies was competent to enter into any agreement embodying the said provisions of the Act.*

Held, that actions brought after 1880, *by the L. Co. against the M. Co. to recover the aforesaid payments were actions "not on a contract" within the meaning of section* 4 *of the Act of* 1867; *and that, such actions having been commenced after the passing of that Act, the judgments obtained therein could not be enforced by the issue of execution.*

This was a summons on behalf of the Cambrian Railway Co. for leave to issue execution in respect of ten debts due on judgments recovered against the Manchester and Milford Railway Co. at various dates from the 19th of May, 1883, to the 28th of June, 1895, on the rolling stock and other chattels of the company; or in the alternative, for a declaration that the applicants were entitled to a charge on the rolling stock and other chattels in respect of the judgment debts, and that a proper sum might be fixed and paid by the receiver for the use and occupation of the rolling stock and chattels.

It was admitted at the hearing that although the summons was expressed to be in the alternative, the strict right, if any, of the applicants was according to the first alternative, but it was stated that they were willing to accept relief in accordance with the second.

The circumstances which gave rise to the application were shortly these:

In 1860 there were three railway companies authorized to make lines of railway to stations in Llanidloes, in Wales—viz., the Llanidloes and Newtown Railway Co., the Mid-Wales Railway Co., and the Manchester and Milford Railway Co.; and the railways, as they appproached Llanidloes, ran parallel and close to each other.

To avoid unnecessary expense an arrangement was made between the three companies and embodied in a written agreement, whereby it was provided, *inter alia*, that the Llanidloes and Newtown Co. should adopt and pay for the lands and works between Llanidloes and Penpontbren, then in possession of the Mid-Wales Co. and the Manchester and Milford Co., to a point at Penpontbren equally suitable to the departures of both the above lines for their respective routes, and make a double line to such point; that the station at Llanidloes, including both passengers' and goods', and all accommodation required for the three companies should be made by and be the property of the Llanidloes and Newtown Co.; that the Mid-Wales, and the Manchester and Milford Companies should have equal rights of user of the station with the Llanidloes and Newtown Co.; and should each pay 5 per cent. upon one-third of the cost of such station; that the line, when made, was to be, without the right of user except for the purposes of maintenance, the property of the Llanidloes and Newtown Co., who were to grant to each of the other two companies full powers to use the line, they paying 5 per cent. each on a moiety of the whole outlay, with a *pro rata* proportion of the costs of sustaining and repairing the lines; and that each of the three companies should join in doing all that was necessary to obtain the authority of Parliament to carry out these arrangements.

This agreement received Parliamentary sanction by Act (25 & 26 Vict. c. clxii.) passed the 17th of July, 1862.

This Act provided for the transfer of the lands and line of railway to the Llanidloes and Newtown Co.,

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

and for the construction and maintenance by them of the joint line and station, and for the user of the joint line by the other two companies, and of the joint station by the three companies. Section 27 enacted that after the opening of the joint line for public traffic, the Mid-Wales Co. and the Manchester and Milford Co. should pay half-yearly to the Llanidloes and Newtown Co. interest at the rate of 5 per cent. per annum on the amount actually expended by the Llanidloes and Newtown Co. upon the joint line, and should also, at the end of each half-year after such opening, repay to the Llanidloes and Newtown Co. the amount actually expended by them in the previous half-year in maintaining the joint line, and that the interest and other payments should be due from and paid by the Mid-Wales Co. and the Manchester and Milford Co. in moieties, and that if those companies, or either of them, should make default in payment of the moiety of such interest or other payments due from each of them respectively, after demand should have been made by the Llanidloes and Newtown Co. for payment thereof, such moiety might be recovered by such company from the company making such default in any county or other court having by law cognizance of the action. Section 30 contained similar provisions for the payment to and recovery by the Llanidloes and Newtown Co. of interest at the rate aforesaid, on one-third of the amount actually expended by such company on the joint station, and also of one-third of the amount of the cost of maintaining the same.

The joint line and station were duly constructed by by the Llanidloes and Newtown Co., whose undertaking and rights subsequently became vested in the Cambrian Railway Co., the applicants.

The joint station had been maintained by the applicants.

The Manchester and Milford Co. never completed their line, and never were in a position to use the joint line and station; but it was decided in an action in the Queen's Bench Division, brought by the Cambrian Co. against the Manchester and Milford Co., that the Manchester and Milford Co. were, nevertheless, bound to make the payments provided for by sections 27 and 30 of the said Act of 1862; and the judgments mentioned in the summons had been obtained in respect of arrears of such payments.

On the 23rd of July, 1875, upon the petition of certain judgment creditors of the Manchester and Milford Co., a receiver of the undertaking was appointed under the Railway Companies Act of 1867; subsequently, on the 14th of April, 1880, an order was made on the application of the Cambrian Co. for the appointment of a manager and receiver of the undertaking (see *In re Manchester and Milford Railway, Ex parte Cambrian Railway*, 14 Ch. D. 645, 28 W. R. Dig. 190).

The undertaking still remained in the hands of such manager and receiver.

Section 4 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), which was passed on the 20th of August, 1867, provides that "The engines . . . used or provided by a company shall not . . . be liable to be taken in execution at law or in equity at any time after the passing of this Act where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract, commenced after the passing of this Act," and enables the judgment creditor to obtain the appointment of a receiver and (if necessary) a manager of the undertaking of the company.

Graham Hastings, Q.C., and *G. Cave*, for the applicants.—The Act of 1867 does not apply here. The applicants are seeking to enforce a contract made in 1862 and sanctioned by the Act of 1862—that is to say, it is a contract not made since the passing of the Act of 1867: *Rothes (Countess of)* v. *Kirkcaldy, &c.*, 7 App. Cas. 694.

Buckley, Q.C., and *F. C. Norton*, for the Manchester and Milford Railway Co.—The agreement of 1862 was not a contract at all, it was an obligation imposed upon the parties under a Parliamentary sanction not having any of the ordinary incidents of a contract, for the parties had no power to rescind or vary it, and the actions in which these judgments were obtained were therefore not actions upon any contract.

Hastings, Q.C., replied.

STIRLING, J., stated the facts and said: The present application is to be regarded as one not for payment by the receiver, but for leave to issue execution against property in his hands as an officer of the court; and the question is whether section 4 of the Act of 1867 has deprived the applicants of the right to issue such execution. [His lordship read section 4.] I read that section as prohibiting the issue of execution in two classes of cases only—viz., (1) where the judgment is recovered in an action on a contract entered into after the passing of the Act; and (2) where the judgment is recovered in an action not on a contract commenced after the passing of the Act (the 20th of August, 1867).

It lies, therefore, with those who say that the issue of execution is prohibited to show that the judgment falls within one or other of these two classes of cases.

On behalf of the Manchester and Milford Co. it is said that the actions in which these judgments were recovered were actions "not on a contract" within the meaning of the Act of 1867. On the other hand the applicants contend that these actions were brought on a contract—*i.e.*, that constituted by the Private Act passed on the 17th of July, 1862, a date prior to the passing of the Railway Companies Act, 1867.

I think that under the terms "actions on a contract," and "actions not on a contract," as used in section 4, every kind of action is included. If, then, the actions in which these judgments were recovered do not fall within the first class of cases they fall within the second class, all of them having been commenced subsequently to the passing of the Act of 1867.

The question, then, is, were these actions "actions on a contract"?

Now, at the date when the arrangement embodied in the deed of the 20th of October, 1861, was made, these companies had no power to enter into a contract to any such effect as therein expressed. The arrangement of 1861 was *ultra vires* of the three companies, and the heads of agreement in which it was embodied, though under the seals of the three companies, could not give rise to any rights as between them, and did not constitute a contract between them.

The rights and obligations of the several companies depend entirely on the Act of Parliament. The Act does not purport to ratify or make binding on the companies the heads of agreement. It empowers the Llanidloes and Newtown Co. to construct certain works; it then, by sections 27 and 30, confers on the same company, upon its constructing and maintaining those works, a right to receive from the Manchester and Milford Co. certain payments, and imposes on the Manchester and Milford Co. an obligation to make those payments, and those payments are specially made recoverable by action.

The Act therefore imposes a liability on the prede-

cessors of the Cambrian Co., and gives a remedy in respect of that liability, by action. Those predecessors were no doubt willing that the liability should be imposed, but they had no capacity to enter into a contract to that effect. Moreover, the liability becomes absolute not upon the Manchester and Milford Co. doing any act whatever, but simply upon certain things being done by the Llanidloes and Newtown Co. It seems to me under those circumstances that the action to enforce the liability is not an action on a contract, but an action on a statute. It is no doubt true that there are cases in which "a statute enables an action to be brought which, nevertheless, is not an action on a statute," per Maule, J., in *Cork and Bandon Railway* v. *Goode*, 1 W. R. 410, 13 C. B. 826. An illustration of this is afforded by the case of the *Tobacco Pipe Makers' Co.* v. *Loder*, 16 Q. B. 765, which was brought to recover a penalty under a bye-law from the defendant, who was a member of the plaintiff company. There the bye-law was made under powers contained in a Royal Charter incorporating the company, and it was contended that the right to recover was under the Charter so as to be a specialty and not a simple contract, debt, but it was held that the defendant had incurred the liability to the penalty by becoming a member of the company, and thus impliedly contracting to fulfil the obligations imposed by the bye-laws on the members of the company. If the bye-law had been made under the powers conferred by statute the result would, I apprehend, have been the same. If in the present case it had been necessary in order that the Manchester and Milford Co. should incur liability that that company should do some act, as, for example, use the joint line or station, then there would have been much ground for contending that the case fell under the principle of the last mentioned case, but the decision of the Queen's Bench Division shows conclusively that the liability of the Manchester and Milford Co. became absolute without any act on the part of that company.

For the applicants reliance was placed on the case of *Rothes (Countess)* v. *Kirkcaldy Waterworks*, in which it is said [7 App. Cas. p. 707] that a statutory provision such as was found in a particular section of the private Act of Parliament there under consideration "must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the Legislature." The section there under consideration conferred a benefit on a private person whose estates were affected. Whether the same principle applies to a case such as the present, where the Legislature is modifying statutory rights conferred upon public companies may require further consideration. In any case, it appears to me that this language does not mean that such enactments constitute contracts for all purposes. I think it means simply that for certain purposes—*e.g.*, ascertaining the legal effect of such clauses and the nature of the rights conferred by them, enactments of this kind are to be treated as if they were contracts. I cannot look upon that language as authorizing me to hold that these actions were "actions on a contract" within the meaning of section 4 of the Act of 1867.

In my judgment, therefore, the application must be refused.

[Notice of appeal against this decision was given, but on the appeal coming on to be heard on the 11th of January, 1897, the appeal was withdrawn.]

Solicitors, *Le Brasseur & Oakley*, for *H. Christian Corfield*, Oswestry; *Young, Jones, & Co.*

Chan. Div. }
Kekewich, J. } Feb. 3.

In re FOSTER.
THOMAS *v.* FOSTER. (*a.*)

Inland revenue—Account stamp duty—Voluntary disposition—Death of donor within twelve months—Incidence of duty—Customs and Inland Revenue Act, 1881 (44 *&* 45 *Vict. c.* 12), *ss.* 38, 39—*Customs and Inland Revenue Act,* 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11.

Account stamp duty in respect of property coming within the meaning of section 38 *of the Customs and Inland Revenue Act,* 1881, *is payable by the person delivering the account thereof required by section* 39 *of that Act, and not out of the estate of the deceased.*

Adjourned summons.

The question which arose for determination upon this summons was whether account stamp duty in respect of a certain sum of £1,700, given by the testatrix, Mary Foster, to the defendant, Arthur Foster, within twelve calendar months previous to her death on the 14th of November, 1892, ought to be paid by the said defendant or out of the estate of the testatrix.

Sub-section 2 of section 38 of the Customs and Inland Revenue Act, 1881, provides that the personal or moveable property to be included in an account shall be property of the following descriptions—viz., (*a*) "Any property taken as a *donatio mortis causâ* made by any person dying on or after the 1st of June, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise which shall not have been *bonâ fide* made three months before the death of the deceased"; and section 39 of the same Act enacts as follows: "Every person who as beneficiary, trustee, or otherwise, acquires possession or assumes the management of any personal or moveable property of a description to be included in an account according to the preceding section shall, upon retaining the same for his own use, or distributing or disposing thereof, and in any case within six calendar months after the death of the deceased, deliver to the Commissioners of Inland Revenue a full and true account, verified by oath, of such property, duly stamped as required by this Act."

By section 11 of the Customs and Inland Revenue Act, 1889, the period of three months specified in section 38 of the Act of 1881 was extended to twelve months.

G. Henderson, for the plaintiff, one of the residuary legatees under the testatrix's will.—Section 39 of the Act of 1881 requires that the donee of such a gift as this should bring in a full and true account verified by oath and duly stamped; and the true inference is that the duty of providing the stamp is imposed upon him. There is no action known to the law by which the donee, having himself paid this duty, can recover it from the deceased's estate.

In re Croft, 40 W. R. 425, [1892] 1 Ch. 652, was referred to.

Warrington, Q.C., and *Beaumont*, for the defendant.—The duty is payable by the testatrix's estate. The object of the Act is to prevent the Crown from being defrauded. If this money had been left in the estate the estate would have been larger and the amount of duty payable in respect of it would have been greater. The estate, therefore, ought to bear the burden of this duty.

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

They referred to *In re Bourne*, 41 W. R. 70, [1893] 1 Ch. 188.

KEKEWICH, J.—It seems to me that this question is not covered by authority. *In re Croft* was cited to me, but I do not think it has anything to do with this case. In this Act there is not to be found a direction how probate duty is to be paid, but one does not expect to find administration rules laid down in an Act of Parliament. Section 38 imposes new duties [his lordship referred to the section] and says that the property therein specified shall pay duty. Now, if the matter rested there, the duty would be borne by the testatrix's estate. Section 39, however, says that "every person who as beneficiary, trustee, or otherwise, acquires possession, or assumes the management of any personal or moveable property of a description to be included in an account according to the preceding section," must render an account as therein specified, and this provision is, no doubt, for the protection of the Crown. Such person is to render the account, and the account is to be brought in duly stamped. The obvious result is that the person who renders it must pay the stamp duty, and that the liability to render the account must carry with it the liability to pay the duty. It has been urged in argument that there is no right of action left to the donee by which, if he pay the duty, he can recover it from the testatrix's estate. I am of opinion that in the circumstances he would not have any such right of action. Whether, on the other hand, if the duty were paid out of the estate, the residuary legatees would have any right of action for the recovery of the duty against the donee, I do not decide, as the question does not arise. As regards the liability to the Crown under the account, therefore, I think the donee ought to pay the duty.

Solicitors for the plaintiff, *Hunters & Haynes.*

Solicitors for the defendant, *Fladgates.*

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 19, 29.

BRETT v. ROGERS. (a.)

Landlord and tenant—Lease—Covenant by lessee to pay all taxes, rates, and duties imposed in respect of the premises—Cost of new drainage—Liability of lessee.

By indenture of lease a tenant covenanted that he would "pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on, or in respect of, the said demised premises, or of the rent hereby reserved." The vestry of the parish having, under the provisions of the Public Health (London) Act, 1891, *required the landlord to lay down new drainage on the demised premises, the latter executed the necessary works.*

Held, that the landlord was entitled under the covenant to recover from the tenant the expenses the landlord had incurred in complying with the order of the vestry.

This was an appeal by the defendant from the judgment of his Honour Judge Bacon at the Bloomsbury County Court.

The plaintiff was the landlord of a house in York-terrace, Regent's Park, which, by a lease dated the 24th of April, 1896, he demised to the defendant for 25 years. In the lease the defendant covenanted that he would "pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, and otherwise, which now are or shall at any time during this demise be assessed or imposed on, or in respect of, the said demised premises, or of the rent hereby reserved."

The plaintiff, by notice served upon him by the vestry under the powers conferred upon them by the Public Health (London) Act, 1891, was required to abate a nuisance arising from the defective state of the drains of the demised house, by putting in a new and proper system of drainage. The plaintiff did the work as required by the vestry, and in so doing incurred an expense of £43 18s. He then brought this action to recover this sum from the defendant on the ground that the latter was liable under the aforesaid covenant.

The county court judge held the defendant was so liable, and gave judgment for the plaintiff.

The defendant now appealed.

Archibald Brown, for the appellant.—The tenant is not liable under the covenant. The word "duties" in the covenant does not impose an obligation on the tenant to lay down a new drainage. That is a duty imposed by statute upon the landlord. The word "duties" has no wider meaning than "rates and taxes." The tenant is not liable to lay down new drains unless words are used in the covenant that imply a much larger obligation than the words employed here do. This case differs from *Budd* v. *Marshall*, 29 W. R. 148, 5 C. P. D. 481. In that case the covenant contained the words "bear, pay, and discharge." In the present case the covenant only says "pay." The same words as in *Budd* v. *Marshall* are found in *Smith* v. *Robinson*, 41 W. R. 588, [1893] 2 Q. B. 53. In both those cases the words "whether upon the landlord or tenant" also occur; but not so in the present case. Those words are also used in *Sweet* v. *Seager*, 5 W. R. 560, 2 C. B. N. S. 119; *Crosse* v. *Raw*, 26 W. R. 6, L. R. 9 Ex. 209; *Clayton* v. *Smith*, 11 Times L. R. 374; and *Aldridge* v. *Ferne*, 34 W. R. 578, 17 Q. B. D. 212. In the case of *Tidswell* v. *Whitworth*, 15 W. R. 427, L. R. 2 C. P. 326, the words "on landlord or tenant" do not occur, and in that case the judgment was for the tenant.

He also cited *Hill* v. *Edward*, 1 Times L. R. 253, and *Payne* v. *Burridge*, 12 M. & W. 727.

Haldinstein, for the respondent.—The covenant in this case renders the tenant liable. It is similar to the covenants in *Budd* v. *Marshall* and *Thompson* v. *Lapworth*, 16 W. R. 312, L. R. 3 C. P. 149. *Hartley* v. *Hudson*, 4 C. P. D. 367, 28 W. R. Dig. 119, is also a case in point.

Brown replied.

Cur. adv. vult.

Jan. 29.—BRUCE, J., read the following judgment of the court: In this case I am of opinion that the decision of the learned county court judge must be upheld. [His lordship stated the facts, and read the covenant above stated, and continued:] I think that the obligation imposed upon the landlord to take up the defective drain and lay a new one was a duty imposed on him in respect of the demised premises, and so is within the words of the covenant.

I cannot distinguish this case from the case of *Payne* v. *Burridge*, where the words of the covenant were almost precisely the same as the words in the covenant in the present case. *Payne* v. *Burridge* was followed in *Sweet* v. *Seager*. That was a case in which the question arose respecting the expense of drainage works under the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), the

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

provisions of which very closely resemble the enactments by virtue of which the plaintiff in the present case was compelled to pay the money now in question.

The covenant in that case contained the words, "charges, impositions, contributions, burthens, duties, and services." The covenant in the present case does not contain the words, "charges, contributions, burthens," but it does contain what I think is the governing word—namely, "duties," and I think that the case of *Sweet* v. *Seager* applies.

In *Thompson* v. *Lapworth*, where the vestry of a parish compelled the landlord of premises to pay his proportion of the expense of paving the street upon which the premises abutted, it was held that he was entitled to recover the amount from his tenant, who had entered into a covenant to pay all taxes, rates, duties, and assessments which, during the continuance of the demise, should be taxed, assessed, or imposed on the tenant or landlord of the premises in respect thereof. The words of the covenant in that case, so far as the description of the assessments or duties imposed are concerned, contain no words that are not to be found in the present case; but it was contended by the defendant's counsel that the words "imposed on the tenant or landlord," which were in the covenant in that case and are not in the covenant in the present case, distinguished that case from the present. I cannot attach any importance to the omission of those words in the present case. The expenses in question in the present case were incurred by virtue of a duty imposed in respect of the premises. If the words had been inserted, "assessed or imposed upon any person or persons in respect of the premises," the added words would not, as it seems to me, have given any greater scope to the covenant. The words "in respect of the premises" are used in contradistinction to the words "on the premises," and an assessment or duty made or imposed not on the premises but in respect of the premises, and an assessment duly made or imposed upon any person in respect of the premises, seems to me to come within the meaning of the covenant. This, I think, is sufficiently clear from the judgment of the court in *Thompson* v. *Lapworth*. The court in that case proceeded upon the authority of the case of *Payne* v. *Burridge*. In the covenant in *Payne* v. *Burridge* the phrase "imposed on the tenant or landlord" did not occur, and yet Willes, J., in his judgment (in *Thompson* v. *Lapworth*) says: "I cannot, without carping at words, point out any distinction between that case" (referring to *Payne* v. *Burridge*) "and the case now before us." It is quite true in the later part of his judgment in *Thompson* v. *Lapworth*, Willes, J., when speaking of *Tidswell* v. *Whitworth*, said that the covenant in that case did not contain the language which the covenant in *Thompson* v. *Lapworth* contained—viz., "duties and assessments assessed or imposed on the landlord in respect of the premises." But the observation was made with reference to the decision in *Tidswell* v. *Whitworth*, which was a decision upon the terms of the Local Improvement Act, and was in effect that the payment made by the plaintiff, the landlord, was not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for a breach of duty imposed upon the landlord and not within the words of the tenant's covenant. In *Tidswell* v. *Whitworth* the word "duties" does not occur in the covenant, and it is clear from the judgment of Bovill, C.J., that the absence of that word was relied upon by the court. The observations of Willes, J., in *Thompson* v. *Lapworth* upon *Tidswell* v. *Whitworth* may go to show that in the absence of the word "duties," such words as "assessed or imposed upon the landlord" might give a wider scope to the covenant, but certainly cannot, I think, be taken to imply that when the covenant contains the word "duties" the absence of such words as "assessed or imposed upon the landlord" can be taken to narrow the force of the phrase "duties imposed in respect of the premises."

In *Rawlins* v. *Briggs*, 27 W. R. 138, 3 C. P. D. 368, the covenant was held not to apply, because the money the landlord sought to recover did not come within the words "rates, charges, assessments, and impositions charged, assessed, or imposed on the premises demised, or in respect thereof." Following the case of *Tidswell* v. *Whitworth*, it was held that the Public Health Act imposed upon the landlord (the plaintiff) the duty of removing the nuisance, and that the performance of that which was imposed as a duty cannot become a charge upon the tenant without express words. But had the covenant in that case contained the word "duties," it is quite consistent with the reasoning of the judgment that the covenant would have been held to cover a duty imposed in respect of the premises. Indeed, Lindley, J., in distinguishing the case from *Thompson* v. *Lapworth*, points out that in *Thompson* v. *Lapworth* the covenant contained the word "duties."

In the case of *Budd* v. *Marshall* the majority of the Court of Appeal approved of the decision in *Thompson* v. *Lapworth*, and held that a tenant who had covenanted with the landlord "to bear, pay, and discharge all taxes, rates, duties, and assessments" was liable on that covenant to make good to the landlord the expenses of sewage works which the landlord had been compelled to execute under the Public Health Act, 1875.

Allum v. *Dickinson*, 30 W. R. 930, 9 Q. B. D. 632, was decided upon the ground that the sum sought to be recovered was not a charge upon the premises, but was a charge imposed upon the owner, and there were no words in the covenant rendering the tenant liable for charges or duties imposed upon the owner; and in *Wilkinson* v. *Collyer*, 32 W. R. 614, 13 Q. B. D. 1, Manisty, J., in giving judgment in favour of the tenant, expressly distinguishes the case from *Thompson* v. *Lapworth* and *Budd* v. *Marshall*, on the ground that the word "duties" was not contained in the covenant. In *Aldridge* v. *Ferne*, where the tenant was held liable, the covenant contained the word "outgoings," which Grove, J., said was at least as strong as "duties," which had been relied upon in some of the cases.

The cases are very numerous. I have not reviewed the whole of them, but I have, I think, referred to most of the important decisions, and I think we should be going contrary to the current of the decisions if we were to hold that the words in the covenant—"duties imposed in respect of the premises"—are not wide enough in scope to entitle the plaintiff to recover in the present action.

Appeal dismissed.

Solicitors for the appellant, *Steavenson & Couldwell.*

Solicitors for the respondent, *Smith & Rydon.*

Q. B. Div. (Wright and Bruce, JJ.) — Jan. 20.

REG. v. CAMBERWELL VESTRY. (*a*.)

Metropolis management—Sewer—Drain—Liability to

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

repair—Vestry—Writ of mandamus—*Alternative remedy—Action for declaration of right—Ord.* 25, *r.* 5.

The owner of premises in the metropolis alleged that a defective drainage pipe on his premises was a sewer within the Metropolis Management Act, 1855, *and therefore repairable by the vestry. The vestry denied that the pipe was a sewer.*

Held, that a prerogative writ of mandamus *ought not to be issued to the vestry directing them to repair the pipe. The proper proceeding was for the owner of the premises to bring an action against the vestry for a declaration of right and for a* mandamus.

Rule *nisi* for a *mandamus*.

The Property and Estates Co. (Limited) were the owners of certain premises at Camberwell. A drainage pipe on the premises became defective.

The company alleged that this pipe drained other premises as well as those of the company, and that therefore, by reason of the definition of "drain" in section 250 of the Metropolis Management Act, 1855, the pipe in question was not a "drain" but was a "sewer," for the repair of which the vestry of Camberwell were liable.

Under these circumstances the company obtained a rule *nisi* calling upon the vestry of Camberwell to show cause why a writ of *mandamus* should not issue, directed to them commanding them forthwith to take such steps and to execute such works as might be necessary to abate a certain nuisance at the applicants' premises and to repair and maintain in an efficient and proper state a sewer existing upon the said premises.

In answer to the rule, affidavits had been filed on behalf of the vestry alleging that the pipe in question drained the company's premises only, and that it was therefore a "drain," and repairable by the company.

Robson, Q.C., and *S. G. Lushington*, showed cause against the rule. This is not a case in which the court will grant a *mandamus*, for there is an alternative and sufficient remedy open to the applicants—viz., an action for a *mandamus* to the vestry to repair the pipe, and for a declaration of right: *Appleyard* v. *Lambeth Vestry, ante*, p. 173; *Reg.* v. *Lambourn Valley Railway Co.*, 22 Q. B. D. 463, 37 W. R. Dig. 116.

Macmorran, Q.C., and *R. C. Glen*, in support of the rule.—In order to oust the prerogative writ of *mandamus* it must be clear that an action will lie. It is doubtful whether any action will lie in this case, and it is certain that an action for damages will not lie: *Robinson* v. *Mayor of Workington*, 102 L. T. Newsp. 243; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 41 W. R. Dig. 85.

WRIGHT, J.—This is an attempt to use the writ of *mandamus* as the machinery for remedying a private grievance. I have never before seen such a rule *nisi* as has been granted in this case. If the applicants have any personal right against the vestry, their remedy is by an action for a declaration of that right. Such an action can be brought under ord. 25, r. 5, and in that action a *mandamus* might be granted. If, on the other hand, the applicants have no personal right against the vestry, then *a fortiori*, it is not a for a writ of *mandamus*.

BRUCE, J.—I agree. I think the rule *nisi* which has been granted in this case is far too general. It seems to me, if the applicants have any such right as would entitle them to the *mandamus* which they ask for, they have a sufficient personal right to found an action for a declaration of that right.

Rule discharged.

Solicitors for the vestry, *Marsden & Co.*

Solicitors for the applicants, *Oldfield, Bartrum, & Oldfield.*

Q. B. Div.
(Wright and Bruce, JJ.) } Jan. 12, 13.

REG. v. THE CHARITY COMMISSIONERS. (*a*.)

*Charity—Commissioners—Scheme under Endowed Schools Acts—Recommendation of woman as almoner—Refusal of Commissioners to appoint—*Mandamus*—Discretionary power of court to grant prerogative writ—Alternative remedy—Christ's Hospital Foundation Administration Scheme,* 1890, *clauses* 19 *and* 143.

An application by the London School Board for a mandamus *directing the Charity Commissioners to determine under clause* 43 *of Christ's Hospital Administration Scheme,* 1890, *the validity of the proceedings of the governors of the hospital in refusing to appoint as almoner a lady nominated by the applicants, was refused, the court being of opinion that* mandamus *was not the only and more convenient means of remedy open to the applicants.*

In this case cause was shown against a rule *nisi* for a *mandamus* obtained at the instance of the School Board for London calling upon the Charity Commissioners to show cause why a writ of *mandamus* should not issue commanding them to determine, under clause 143 of the Scheme for the Administration of the Foundation of Christ's Hospital, the question whether or not the governors were bound to accept the nomination of the School Board for London, and appoint Miss Eve as an almoner of the institution.

By virtue of the scheme which came into force the 15th of August, 1890, the School Board for London had the right to nominate six representative members on the governing board of the hospital, the same to be "competent persons duly qualified to discharge the duties of the office."

When the scheme came into operation the School Board nominated, and the governors duly appointed six almoners. In January, 1896, the Hon. E. Lyulph Stanley, one of those appointed, resigned, and the School Board nominated Miss Eve to fill the vacancy. The governors refused to appoint Miss Eve on two grounds—(1) that she was a woman, and therefore not qualified to be an almoner; and (2) that they had a discretion to refuse to appoint a competent person even though duly qualified and recommended. The School Board thereupon appealed to the Charity Commissioners under clause 143 of the scheme to determine the question. The Commissioners, however, refused to determine the question, being of opinion that "regard being had to the nature and importance as to the possible contentious character of the question raised by the School for London, it was undesirable that they should decide this matter under clause 143." That clause provided "that any question affecting the regularity or validity of any proceeding under the scheme should be determined conclusively by the Charity Commissioners upon such application made to them for the purpose as they thought sufficient."

Sir R. E. Webster, A.G., and *Dibdin*, on behalf

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the Charity Commissioners (with them *Warrington*, *Q.C.*, and *Vaughan Hawkins*, for the Governors of the Hospital), showed cause against the rule. The question was an important one and ought to be decided in a court of law, and not referred to the Charity Commissioners to decide under the powers vested in them by clause 143 of the scheme. *Mandamus* was not the proper proceeding for the School Board to take in order to raise this question upon, and the rule ought therefore to be discharged. Moreover, the recommendation of the School Board was not a "proceeding under the scheme" within the true meaning of that clause.

The following cases were referred to: *Hodgson's School*, 3 App. Cas. 857, 26 W. R. Dig. 207; *Reg.* v. *The Registrar of Joint-Stock Companies*, 36 W. R. 695, 21 Q. B. D. 131. [*Per* BRUCE, J.: *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, L. R. 16 Eq. 433, 22 W. R. Dig. 118. On this authority I see no reason why an action should not be brought for a declaration of right by the School Board.]

Ram, for the School Board, contended that the nomination of an almoner by the Board was a "proceeding under the scheme." The scheme had the force of an Act of Parliament. The Commissioners were the proper persons to decide the question raised, and a *mandamus* ought therefore to be granted.

WRIGHT, J.—It seems to me that the rule ought to be discharged on two grounds—firstly, on the true construction of the 143rd clause of the scheme; and secondly, that the remedy by *mandamus* is not applicable to this case. In my opinion the 143rd clause has reference only to internal matters, and I think it is impossible to suppose that it was ever the intention of those who framed the scheme that outsiders, such, for example, as the London School Board, should submit themselves to be bound by the extraordinary tribunal therein constituted, which is neither a legal tribunal nor one from which any appeal lies. Moreover, it is a tribunal which has power to decide any matter referred to it without hearing evidence or argument if they so think fit. But there is a second ground upon which I think the rule ought to be discharged even if we are wrong in discharging it on the first ground. There is no doubt that on an application for a *mandamus* this court has always discretion to refuse that remedy to any applicant, unless such refusal would deprive him of his legal right by leaving him without any other remedy. In the present case that is not so, for those who obtained the rule have another and more convenient course open to them under the 28th section of the Charitable Trusts Act, 1853. Also I see no reason why the question should not be raised by way of ordinary injunction or in an action for a declaration of statutory right.

BRUCE, J.—I am of the same opinion. I am satisfied that the question may be very much more conveniently tried in some other way than by *mandamus*, and therefore I think the rule ought on that ground, at any rate, to be discharged.

Rule discharged with costs.

Solicitor for the Charity Commissioners, *J. M. Rubon.*

Solicitors for Christ's Hospital, *Beachcroft, Thompson, & Co.*

Solicitor for the School Board, *C. E. Mortimer.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), March 4.

KOOSEN *v.* ROSE. (*a.*)

Practice—Costs—Order as to costs made by judge at chambers—Power of judge at trial to interfere—Ord. 14, *r.* 9.

Where on an application under order 14 *the judge at chambers has made an order as to costs, the judge at the trial has no jurisdiction to interfere with those costs.*

Appeal from the judgment of Wright, J., at the trial of an action without a jury.

The action was brought to recover the sum of £150, the price of a motor carriage. The plaintiff having taken out a summons for judgment under order 14, Day, J., at chambers, gave the defendant leave to defend, and ordered that the costs of the application should be costs in the cause, and further directed that the case should be put into the short cause list.

Wright, J., at the trial, gave judgment for the plaintiff with costs, less the amount of the costs of the proceedings under order 14. He said that in his opinion the case was not one fit to be tried under order 14, and that in all probability if the facts had been fully known to Day, J., he would have made the plaintiff pay his own costs.

The plaintiff appealed from so much of the judgment as deprived him of his costs of the application at chambers.

Wheeler, Q.C. (*W. H. Nash* with him), for the plaintiff.—Ord. 65, r. 1, says that the costs of all proceedings shall be in the discretion of the judge, "subject to the provisions of the Acts and these rules." Rule 9 of order 14 expressly provides that the costs of all applications under that order shall be dealt with by the judge at chambers, unless he refers them to the judge at the trial. Wright, J., therefore had no jurisdiction to interfere with the costs of the application at chambers, which had been dealt with by Day, J.

C. W. Mathews, for the defendant.—Ord. 14, r. 9 (*b*), provides that, if the plaintiff makes an application under that order when the case is not within the order, the application shall be dismissed, with costs to be paid forthwith by the plaintiff. And by ord. 65, r. 27 (20), the court or judge may, at the hearing of any cause or matter, direct the costs of any proceeding which is improper or unnecessary to be disallowed.

Lord ESHER, M.R.—Wright, J., at the trial assumed to himself the power of altering a decision which had been come to by Day, J., at chambers with regard to the costs of an application under order 14. This appeal is brought on the ground that he had no jurisdiction to interfere with that order as to costs. The rule must be this, that a judge cannot interfere with an order of a judge of co-ordinate jurisdiction by way of appeal or otherwise, unless some statute has expressly given him the power to do so. In my opinion that part of the judgment which deprived the plaintiff of his costs of the application under order 14 was without jurisdiction and void, and must be overruled.

LOPES, L.J.—The question is, had Wright, J., any jurisdiction to interfere with the costs of the proceedings at chambers? In my opinion he had not. The

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

costs of applications under order 14 are provided for by rule 9 (*a*) of that order. They are to be "dealt with by the judge on the hearing of the application, who shall order by and to whom and when the same shall be paid, or may refer them to the judge at the trial." In this case Day, J., did not refer the costs to the judge at the trial, but dealt with them himself. In my opinion Wright, J., had no power to interfere with these costs at the trial. The defendant relied on rule 9 (*b*) of order 14, but that relates to the proceedings at chambers and not to what takes place at the trial.

CHITTY, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *H. Percy Becher.*

Solicitor for the defendant, *A. W. Mills*, for *T. A. Bramsdon*, Portsmouth.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Feb. 18, 19, 23.

THE MINNA CRAIG STEAMSHIP CO. (LIMITED) (*Appellants*) *v.* THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA (*Respondents*). (*a*.)

Ship—Bill of lading—Proceedings in foreign court—Sale of ship in foreign port—Judgment in rem.

A ship, the property of an English company sailed to Bombay. Whilst at Bombay for the purpose of taking in cargo, her master, by the fraud of the company's manager there, was induced to sign bills of lading for goods which had not been placed on board. These bills were indorsed for value to an English bank. The ship sailed for Hamburg, but in the meantime a petition to wind up the company was presented in England, and a winding-up order was made on the very day, but a few hours before, the ship arrived at Hamburg. On her arrival there she was arrested by the Court of Hamburg on the information of the bank, and that court held that by German law the bills of lading were conclusive as against the company, and ordered the ship to be sold. The ship was sold for a sum less than the amount of the bank's claim, and the Court of Hamburg paid over the proceeds of the sale to the bank. The company then brought an action in the Queen's Bench Division against the bank, claiming that the money paid to the bank by the German court was money had and received by the bank to the use of the company for distribution amongst their creditors.

Held, affirming the judgment of Collins, J., *that the proceedings in the German court were proceedings* in rem, *and that the judgment of that court was therefore good against the world; that the money received by the bank was not subject to any trust in favour of the creditors of the company, and that therefore the company could not recover.*

This was an appeal from the judgment of Collins, J., dated the 10th of November, 1896, in an action without a jury. (See [1897] 1 Q. B. 55.)

The appellant company were the owners of a single steamship, *The Minna Craig.*

The respondents were an incorporated company, whose registered place of business was in London.

The appellant company was in liquidation, and the action was brought by the liquidator to recover from the respondents the sum of £10,944 as money had and received to the use of the appellant company.

The circumstances were as follows:

One James Laing, one of the plaintiffs in the court below, but who did not appear in the prosecution of this appeal, was mortgagee of *The Minna Craig* under a statutory deed of mortgage, dated August, 1891.

In June, 1892, the ship was at Bombay, for the purpose of being loaded with cargo for Hamburg. Through the fraud of the manager of the appellants' business in Bombay, the master of the ship was induced to sign certain bills of lading for goods which were never in fact put on board.

The respondents purchased the said false bills of lading for value without notice of the fraud.

On the 23rd of June, 1892, the ship sailed for Hamburg, and early in the following month the fraud was discovered.

On the 20th of July a petition was presented for winding up the appellant company; the petition was duly advertised, and on the 11th of August a winding-up order was made and a liquidator appointed. On that same day, but a few hours subsequent to the winding-up order, the ship arrived at Hamburg. On her arrival, the respondents' agents took proceedings on their behalf in the German court at that town in the nature of an action *in rem* against the ship and her freight in respect of all the cargo which by the said bills of lading purported to have been shipped on board.

Other creditors of the ship also made claim.

The several claims on the ship amounted to £76,000.

According to the German Commercial Code the rights of a ship's creditor are acquired by virtue of claims for non-delivery of or damage to goods forming part of the cargo and ship's creditors have a legal lien on the vessel, and according to German law statements in a bill of lading as to the shipment of goods are conclusive, not only against the master, but also against the owners of the vessel and all others having any interest in her.

On the 7th of December the ship was condemned by the Hamburg court and ordered to be sold, and Laing, the mortgagee, became the purchaser for the sum of £43,206, and the court published a scheme for the division of the proceeds. The respondents put forward their claim under the bills of lading, and the court gave priority to their claim over the claims of the mortgagee and other English creditors. This decision was affirmed on appeal both by the Appeal Court and the Supreme Court of Appeal at Leipzig.

On the 13th of June, 1894, the respondents' agents received on their behalf from the German court the sum of £10,944, which amount they paid over to the respondents. The appellants thereupon brought this action in the Queen's Bench Division against the respondents, claiming the above amount as money had and received by the respondents to their use, and also that the said sum should be handed over to the liquidator for distribution amongst the appellants' creditors generally. The action was tried without a jury before Collins, J., who held that the judgment of the German court, being a judgment *in rem*, was conclusive, and that the money received by the respondents under it was therefore not subject to any trust in favour of the general body of the appellants' creditors, and that neither the appellants nor the mortgagee, Laing could recover.

From this judgment the Minna Craig Steamship Co. now appealed.

Joseph Walton, Q.C., and *Boyd, Q.C.*, for the appellants.—The judgment in the court below is wrong, and cannot be supported. Firstly, the respondent bank cannot retain this money, but must hand it over to the liquidator for distribution amongst the

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

creditors of the appellant company. The title of the creditors accrued prior to any lien declared by the German courts. The only lien which those courts did declare was a lien in respect of non-delivery of goods at Hamburg. Secondly, the judgment of the German court was not a judgment *in rem*. The German court no doubt may sell the ship and give a good title to the purchaser, but in so far as that court divided the proceeds of the sale, that is only binding on the parties privy to the sale, and does not affect other parties, except in the case of a judgment *in rem*, when, of course, it would be binding on the whole world. But this is not a judgment *in rem*, and there is no maritime lien here. The words "*in rem*" used in the case of *Castrique* v. *Imrie*, 19 W. R. 1, L. R. 4 H. L. 414, are ambiguous. A trust was created for the benefit of the creditors when the winding-up proceedings were taken, and therefore the respondents should hand over the money paid to them for distribution amongst the creditors. Even if the judgment of the German court was a judgment *in rem*, here that would not amount to more than a charge on the property: *In re Oriental Inland Steam Co., Ex parte Scinde Railway Co.*, 22 W. R. 810, L. R. 9 Ch. App. 557. The holders of the bill of lading had no right of action until the ship arrived at Hamburg, and that arrival was long after the petition was filed. There was, therefore, no antecedent lien. Anyone getting a declaration of a right or share in the ship would only hold that share in trust for the creditors. The judgment in favour of the respondents was no doubt good, but they only held money under it that was subject to a trust. A creditor cannot, by an action *in rem* or other proceeding subsequent to a liquidation, put himself in the position of a prefential creditor: *Hunter* v. *Potts*, 4 T. R. 182; *Sill* v. *Worswick*, 1 H. Bl. 665.

They also referred to *The Dictator*, [1892] P. 304, and *The Heinrich Bjorn*, 33 W. R. 719, 10 P. 44, and the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 84, 85, 163.

Sir R. Reid, Q.C., and *English Harrison*, for the respondents.—The judgment in the court below was right, and must be upheld. The appellants have been defeated in the German courts, and now they try in the English courts to obtain what they could not get in Germany. Such a proceeding is without precedent. The action in the German court was *in rem* against the ship herself, and the judgment, therefore, is good as against the whole world. No ship, by being placed in liquidation, can escape maritime lien.

Boyd, Q.C., replied.

Cur. adv. vult.

Lord ESHER, M.R.—In this case the liquidator of the plaintiff company, which is being wound up, has in the name of the company sued the defendants for money had and received—that is to say, he has sued them in that form of action which at common law asserts that the defendants have money in their hands which either in law or equity they ought to hold for the plaintiff.

Now, the circumstances which give rise to that question are that the company was the owner of a ship which sailed abroad to Bombay. At Bombay she was plying for a cargo, and the captain of the ship, by fraudulent misrepresentations, was induced to do that which here he would have no authority to do, if the matter had been tried by English law, whether he was induced by fraud or not—namely, be signed bills of lading as if goods were put on board his ship, when there were none on board his ship. If the matter had been tried in England the shipowners would not have been bound by such a signature of the captain on a bill of lading. The captain has no authority to sign a bill of lading in England unless there are goods on board.

The defendants in this case became the holders of the bills of lading for value. The ship sailed from Bombay to Hamburg, and at Hamburg a law-suit ensued. Now what was that law-suit? It was suggested here that it was not an action *in rem*, and that is the first question which we have to determine.

The ship was seized in the way and the manner that actions *in rem* are commenced. It was by fastening a chain on board instead of nailing a document to the mast as is done in England when a ship is seized. The ship, therefore, was seized by a Hamburg court, and afterwards proceedings went on with regard to that ship, and no doubt the supposed owners of that ship were cited, but they had nothing to do with the law-suit. The ship was seized, evidence was given, and the evidence was that the captain of that ship had signed the bills of lading which the present defendants held. It was upon his suggestion that the ship had been seized. The Hamburg court held, according to the law of that country, that if the master had signed bills of lading the owners of that ship could not deny in court but that there had been a cargo on board, and the claim made as against the ship was that the ship had not delivered that cargo, which they could not say was not on board, to the holders of the bills of lading in Hamburg. Upon that the Hamburg court, still proceeding in the way that all actions *in rem*, wherever they are, are proceeded with, condemned the ship, and ordered the ship to be sold. Now, every step of that proceeding is unlike an action *in personam*, but is the regular course of an action *in rem*. The proceeds of the sale was, of course, paid into the court, and the ship not being sold for a greater amount than would satisfy the claim of the informant there, the present defendants, the court ordered the money, the proceeds of that sale, to be paid to the present defendants.

Now, inasmuch as every part of that proceeding was according to the proceedings in an action *in rem*, and not according to the proceedings in an action *in personam*, it is obvious that the Hamburg court assumed itself to be a court acting *in rem*. It is said that for such a complaint as non-delivery or short delivery of cargo there is not a maritime lien according to the international rules of a maritime lien; but the Hamburg court held, by virtue of a statute in their country binding them, that they had the power to proceed against this ship *in rem*, and that they did so. Their decision was carried to two Courts of Appeal, and the Courts of Appeal agreed with the Hamburg tribunal. Then by the comity of law with regard to courts, no court here can say that the Hamburg court had not jurisdiction to do what it did. It was suggested that the statute did not authorize them to do what they have done, but no court here can construe the statute; it is for the Hamburg court to construe their own statute as well as to give a decision. We, therefore, are bound to hold that that ship was condemned by an action *in rem* and as if there had been a maritime lien attached to her.

Now, what is the result of an action *in rem* against a ship of that kind? The moment the decision *in rem* is given, it dates back to the time when the cause of her condemnation came into existence. I think it was suggested here that the cause of her condemnation came into existence when the ship left Bombay. I do not accept that. I think the cause of action for non-delivery of cargo arises when the

ship arrives in the port of destination, where she ought to deliver. I should say, therefore, that this condemnation reverted back to the time when the ship arrived at Hamburg. But when a ship is condemned by a court which has jurisdiction to condemn her *in rem*, the ship is taken out of being the property of the person to whom she originally belonged, and becomes the ship of the person, the complainant, upon whose information the decision *in rem* has occurred. It becomes his ship, but he has not possession of the ship, the ship is in hands of the court. He cannot sell the ship, he does not convey the ship when she is sold; it is the court who orders the sale and gives the title to the purchaser of the ship, and the person who buys the ship under an Admiralty order, or a court *in rem* sale, does not pay the money to the original owner of the ship, he pays it into court, and the court, treating the money as replacing the ship, orders the money to be paid to the informant or complainant who has caused the condemnation of the ship. The money, therefore, for which the defendants are now sued was the proceeds of a sale by the court, was money which was paid into that court for the court to deal with, and the court paid that money to the defendants, and they did that at Hamburg.

But then it is said on behalf of the plaintiff that before the cause of the condemnation of the ship arose—namely, before her arrival at Hamburg, and the bills arriving there signed by the captain, this company was ordered in England to be wound up, and that the liquidator who is now suing in the name of the company had become the liquidator, and therefore that he was trustee of the ship for the creditors of the company the ship belonged to, and it is said that the present defendants were one amongst other creditors of the company, and that the ship which is the subject-matter of this condemnation was an asset of the company which is being wound up, and that therefore the money which they obtained, was to be held for the liquidator as the trustee for the other creditors. Now, if there had not been a decision *in rem* with regard to this ship, that might be true, but this ship after she was seized by the court was condemned, and that condemnation reverted back to the time when she arrived at Hamburg, although that was after the liquidator's title in England accrued.

The present defendants did not obtain anything from that ship as creditors of the company. They obtained this money solely for themselves in their own personal right by reason of the facts which had been proved, and by reason of the condemnation of the ship by the court; they did not receive this money as creditors of the company at all, but as the persons to whom it was given by the decree of the court acting *in rem*. The money which was the proceeds of the sale never was in their possession until it was given to them by the decree of the court acting *in rem*.

It is impossible, therefore, in my opinion, to say that they ever held that money as creditors of the company; they held it as the proceeds of the sale of a ship which at the time of the sale belonged to them and to them alone. If there had been a surplus beyond their claim—that is to say—if the ship had been sold for more, they would not have got that surplus, the whole proceeds of the sale would not have been paid to them for them to hold the surplus for anybody. They never would have had a penny of the surplus. The court acting *in rem*, would have given them so much of the proceeds as covered their claim, and would have held the surplus in its own hands, and then if anybody claimed that surplus they would have applied to the court *in rem*, and the court if applied to would have listened to the application and would have done what it thought right. In all probability the court would have paid the surplus money to the liquidator, but that surplus money never would have been in the hands of the defendants, they never would have been the trustees of it for anybody, they never would have had anything but the amount of their claim against the ship given to them by the court as the proceeds of a sale of a ship which the court had declared to be theirs. It seems to me, therefore, that the claim of the present plaintiffs bringing this suit here in the name of the company wholly fails, and neither in law nor in equity can it be said that the defendants hold this money for the plaintiffs.

The appeal, therefore, will be dismissed.

LOPES, L.J.—The ship *Minna Craig* was at Bombay, and by a fraud perpetrated by persons who have since been imprisoned for that fraud, the captain was induced to sign bills of lading for a cargo which never in fact was put on board. The defendants were indorsees of the bills of lading for value in respect of those goods. The ship sailed from Bombay to Hamburg, and the defendants indorsed the bills of lading to their agents at Hamburg. These agents took proceedings to arrest the ship. Judgment was given, and was successively affirmed in two Courts of Appeal in Germany, and by that judgment the ship was ordered to be sold. The rights of the different parties against that ship were ascertained, and the agents of the defendants were declared to have a right to the proceedings in priority to everyone except the crew, who sued for wages, and some persons who had supplied necessaries for the voyage. They were held to have priority over Laing, the English mortgagee, who was added as one of the plaintiffs, and who had become mortgagee long before the ship went to Bombay.

This action is brought by the liquidator of the English company owning this one ship, *The Minna Craig*, to recover back from the defendant bank the sum of £10,944, which had been paid to them out of the proceeds of the sale.

On the very day on which the proceedings against the ship were commenced in Germany—namely, the 11th of August—a winding-up order was made in England, and the petition upon which the winding-up order was made was filed as far back as the 20th of July, and all the necessary advertisements were duly published in the newspapers. It would follow, therefore, that the defendants had notice of the proceedings which in England, in the circumstances stated, would have debarred them from asserting any claim against *The Minna Craig*. The goods in respect of which the bills of lading were given never having been on board, the defendants, according to English law, never acquired any right to these goods, or any claim upon them against the owners of the ship. According to English law, therefore, the defendants would have been prevented from making any valid claim against the ship or her owners.

In these circumstances, can the defendants retain this sum of £10,944? The defendants say that the proceedings in Germany were proceedings *in rem*, and that the distribution and determination of priorities which followed upon it were all parts of a judgment *in rem*, and consequently are binding upon all persons, whether they were parties to the suit or not. The plaintiffs contended, but only faintly, that the judgment was not a judgment *in rem*; but even if it were, they said the ship herself, being the property of a company in liquidation, was affected with a trust, and that anybody, whether claiming under a judgment *in rem* or not, who had notice of that trust, if he acquired any lien upon it by that

judgment, must take it subject to the equity of recouping everything he got under it, to the proper person—namely, the liquidator of the company. It may be observed that the liquidator, or rather the company by their liquidator, did not appear in the German proceedings at all. The mortgagee, James Laing, did appear, and was a party to taking the case through all the stages to the final Courts of Appeal in Leipzig. But the plaintiff company did not appear, although the court in Germany, so far as it could, secured their appearance, and appointed counsel to appear and argue for them. The learned judge in the court below has found that the judgment in Germany was a judgment *in rem*, and that it was binding on all the world. I agree with him. Repeatedly in the judgments of the German courts the right of the plaintiffs is referred to as a lien. The judgment has declared that there was a lien or charge created by the act of the master in signing for the goods as he did. They asserted that that lien existed, and they have given effect to it by a judgment *in rem* as a conclusive judgment binding upon all the world, declaring that the persons through whom or on whose behalf the plaintiffs in the German suit claimed, had such a lien. It is a declaration as to the *status* of the ship binding upon everybody, and no English court can impeach it. It is a judgment declaring an absolute and antecedent lien in the person in whose favour the German court has decided, and we cannot say the defendants, on account of anything that has happened, are bound to give up to the liquidator of the company, or to anybody else, that which has been given to them by the courts of Germany as the fruits of that lien. The appeal, therefore, must be dismissed with costs.

CHITTY, L.J.—The first question relates to the ship and the distribution of the proceeds of the sale. The ship at the time of her arrest was in the territorial waters of the Empire of Germany. The court, or courts, which ordered the arrest and sold the ship were duly constituted courts of competent jurisdiction to deal with the ship and to determine its status. The proceedings were against the ship herself. It was admitted by Mr. Boyd, who argued this point of the case, that the proceedings were *in rem* and that the purchaser of the ship acquired a good title to her as against all the world. An attempt was made by him to draw a line at this point. The contention was that the proceedings subsequent to the sale, including the distribution of the moneys that arose from the sale, were not *in rem*, but *in personam* merely. The line cannot be drawn here. There is no authority for it. Circumstances which would have given rise to such a question must have arisen over and over again.

The distribution of the sale moneys was an essential part of the proceedings against the ship. The ground and object of the sale was to turn the ship into money, and the money as well as the ship herself was subject to the jurisdiction of the German courts. You cannot reasonably or conveniently divide or apportion the ship among the persons having maritime liens. The sale money becomes necessarily the substituted "*res*." The German court applied the German law. Under English law the defendants, as holders of the bills of lading, could not have succeeded against the owners of the ship, much less against the ship herself. Their claim against the owners would have at once been defeated by showing, as the facts were, that the goods had never been put on board. But by the German law the shipowners were bound conclusively by the bill of lading, and were not at liberty to deny that the goods were put on board. By the English law the holders of a bill of lading have no lien on the ship, but by the German law, declared in these proceedings, the holders of the bill of lading had a lien in the nature of a maritime lien on the ship. In the scheme of division the German courts placed the defendants, as such holders, in the category of "Ship's Creditors" carrying with it the right to be paid by the ship or out of the proceeds of sale, and gave them priority even over Laing, the mortgagee of the ship. The courts accordingly allotted £10,944, part of the sale money, to the defendants in their own individual right as creditors of the ship.

The second question relates to the effect of the English statute and the winding up of the plaintiff company, who were entitled to the ship, subject to the maritime liens and liens of that nature and to Laing's mortgage. The winding-up began on the 20th of July, 1892. The order to wind up was made on the 11th of August, 1892, and the ship arrived at Hamburg in the evening of that day after the winding-up order was made. The appellants relied on the 163rd section of the Act of 1862 (25 & 26 Vict. c. 89) and the decision of the Court of Appeal in the *Oriental Inland Steam Co.* It was contended by Mr. Walton, who argued this part of the case, that this authority applied, and that the assets of the company were bound by a trust for distribution among the creditors, and that accordingly the defendants were bound to hand over the £10,944, as part of the assets, to the liquidator for distribution among the creditors of the company. It was argued that no right of action or lien accrued to the defendants until after the arrival of the ship at Hamburg, and she was ready to discharge. But this is an attempt to introduce the English law into the judgment of the German court, and on that ground to question the binding effect of the judgment of the German court. It was said that the lien or right to be paid out of the proceeds of the sale of the ship as found by the German courts did not arise till after the commencement of the winding-up. But the German courts, applying their law, did not create the lien or right as on the 11th of August, 1892, but they ascertained and declared that it was then subsisting and bound the ship. The distinction between this case and the *Oriental case* is that in the *Oriental case* the proceedings were *in personam*, and not, as here, *in rem*. Collins, J., put this part of the case neatly and tersely when he said that the judgment of the German courts in favour of the defendants was an authoritative and final declaration of right under a judgment *in rem*.

There is also another view according to which the defendants would be equally entitled to succeed—namely, if they were secured creditors. The effect of the judgment of the German courts having jurisdiction over the ship was, to put it at the lowest, to hold them to be secured creditors, and to adjudge the £10,944 to them in that character. Consequently the £10,944 was not part of the assets of the company in the winding up. The mortgagee Laing is a co-plaintiff, but it is unnecessary to say anything about his claim. Counsel did not attempt to sustain the action on the ground of any right in him.

Appeal dismissed.

Solicitors for the appellants, *Botterell & Roche.*

Solicitors for the respondents, *Clarke, Rawlins, & Co.*

High Court of Justice.

Chan. Div. } Stirling, J. } March 3, 4.

In re SPURRIER'S SETTLEMENT.
DE HAYN *v.* GARLAND. (*a.*)

Lunatic—Payment out—Foreign subject—Lunatic ward of foreign court entitled to fund in court in this country—Jurisdiction.

An application was made on behalf of a lady who had been found a lunatic by the Royal Bavarian Court and had been made a ward of that court by her next friend, who was a judge of that court, that a fund standing to her credit in the Chancery Division might be paid out to the Deposit Commission of the Bavarian court. The lunatic was the daughter of a German father and an English mother, and she herself and her nearest living relatives were domiciled German subjects.

Held, that there was jurisdiction to make an order for such payment out, and that the order ought to be made.

In re Barlow's Will, 35 *W. R.* 737, 36 *Ch. D.* 287, *distinguished.*

This was an application on behalf of Baroness Virginie Aloyse Ernestine De Linden, of Baldingen, near Nördlingen, in the kingdom of Bavaria, spinster, a person of unsound mind and a ward of the Royal Bavarian Court of Justice, Nördlingen, by Hans Schütz, Royal Bavarian judge, her next friend, that a sum of £7,399 7s. standing in court to her credit, and representing the share to which she was entitled under the marriage settlement of her parents, might be sold, and that the proceeds after providing for the costs of this application might be paid to Hans Schütz and Zacharias Hoenning jointly as members of the Deposit Commission of the Royal Bavarian Court to the intent that the same might be disposed of according to Bavarian law.

In 1834 a marriage took place between Baron Ernst de Linden, a German, and Miss Amey Anne Spurrier, an Englishwoman, and upon the occasion of the marriage an English settlement was executed of the lady's fortune, whereby certain funds were settled after the death of the parents in trust for the children of the marriage absolutely.

There were several children of this marriage, of whom the applicant was one.

The applicant was born in Germany and resided in Germany, and she and all her brothers and sisters were domiciled German subjects.

In 1894 a judicial inquiry was held at Nördlingen as to the state of the applicant's mind, and upon that inquiry the chief judge of the Royal Bavarian Court, Nördlingen, adjudged that the applicant was of unsound mind, and made her a ward of the court on that ground.

In 1895 after the death of the surviving parent a petition was presented by the children for the distribution of the settled funds which had been paid into court under the Trustee Relief Act, 1847, and upon that occasion the share of the present applicant was carried to a separate account by reason of her being a person of unsound mind and a ward of the Bavarian Court.

It appeared from an affidavit of Gottfried Böhm, a Councillor of Law of Bavaria, filed in support of the present application that, according to Bavarian law, the court of justice as court of trusteeship was entitled to accept and receive the moneys of wards, and that the receipt, custody, and granting of receipts for such moneys appertained to the Deposit Commission of the court; and, further, that the Deposit Commission consisted of two members who at the present time were Hans Schütz, Royal Bavarian Judge, and Zacharias Hoenning, Royal Bavarian Secretary. It further appeared from an affidavit of a sister of the applicant in whose charge she was, the applicant had no means whatever beyond the fund now standing to her separate account.

It was intimated that the German court would not be satisfied with a mere order for the payment of the income of the lady, but desired to have the *corpus* remitted to its officials, and accordingly Herr Schütz submitted in writing a number of reasons why the fund should be remitted to that country—viz., "(*a*), That Baroness Virginie Von Linden is a German and has nothing to do with England; (*b*) that Baroness Linden is under the guardianship of a German court, and the power to dispose of and administer the property of Baroness Linden appertains solely to this court of guardianship in conjunction with the guardian; (*c*) that in the exercise of this power of administration the court of guardianship is entitled to make, and has made, the application for the handing over of the property of the ward; (*d*) that the withdrawing of the Linden capital in the face of this application would constitute an unjustifiable violation of the rights of third parties; (*e*) that no liability can possibly be cast upon the English court by reason of the handing over of the capital in view of the evidence produced."

This document was addressed to the solicitors for the applicant; it was signed by Herr Schütz, and it was under the seal of the court.

STIRLING, J., made an order in chambers for payment out of the income of the fund to the members of the Deposit Commission, but so far as the application related to the *corpus* of the fund he adjourned it into court for further argument.

Hastings, Q.C., and *W. C. Druce*, for the applicant.—There is here a finding by a foreign court of competent jurisdiction that the applicant is a lunatic and there is what practically amounts to the vesting of the lunatic's property in the court or the Deposit Commission of the court. The permanent arrangement for the charge and care of the lunatic's property is that it should come into the hands of the Deposit Commission, and the commission has power to give receipts. This fund ought therefore to be remitted to the Deposit Commission: *Scott* v. *Bentley*, 3 W. R. 280, 1 Kay & Jo. 281; *Hessing* v. *Sutherland*, 4 W. R. 820, 25 L. J. Ch. 687; *In re Elias*, 3 Mac. & G. 234; *In re Stark*, 2 Mac. & G. 174, though in that case the court in the exercise of its discretion ordered the payment out of the dividends only. *Newton* v. *Manning*, 1 Mac. & G. 362, shows that if a person invests himself abroad with full right to receive the property of a person found lunatic there, he may, by applying to the jurisdiction of this country, obtain the lunatic's property. The essential point is that he should be armed with the authority of the foreign jurisdiction. *In re Barlow's Will*, 35 W. R. 737, 36 Ch. D. 287, is distinguishable because that was a case of a colonial lunatic patient not so found by inquisition, and it was held that the colonial master in lunacy had no sufficient authority under the colonial law to require payment of the fund out of court. It did not turn on the point that there had been no formal vesting order, see per Lindley, L.J., in *In re Brown*, 44 W. R. 17, [1895] 2 Ch. 666. The application in this case is virtually a request by the Bavarian court itself.

STIRLING, J.—In this case a very considerable sum

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

of Consols was standing to the credit of a lady named the Baroness Virginie Aloyse Ernestine De Linden, a person of unsound mind so found by the Royal Bavarian Court at Nördlingen. An application is now made by her through her next friend, being a judge of that court, for the transfer to the Bavarian court of this fund. The lady is a daughter of an Englishwoman, but that is her sole connection with England; her father was a German, her nationality is German; her domicile is German, and her present residence is German—viz., in Bavaria; and, therefore, it is clear that in every point of view the tribunals of Germany are the proper courts to determine the legal *status* of this lady. Also, it is in evidence that the Royal Court of Bavaria at Nördlingen, being the proper tribunal for the purpose, has given a judgment by which the lady is made a ward of that court as being of unsound mind. There is, therefore, a finding by the Royal Court that this lady is of unsound mind and she has become a ward of that court, by which I understand that both her person and property are put under the charge of the court. It further appears that that court acts not merely in a judicial but also in an administrative capacity, very much in the same way as our own court; and it further appears that that court has full power to give receipts for all the property of the lunatic. Further, I understand that this sum of Consols is the sole property of this lady, and I have made an order in chambers directing payment of the interest to the two gentlemen who constitute the Deposit Commission, which is the administrative section of the court.

But as the fund is a large one I was desirous that with regard to the capital the matter should be fully argued in court in order that I might satisfy myself that this was a proper order to make.

The difficulty which I felt was occasioned by the case of *In re Barlow's Will*, and I am bound to say that there are some expressions used by the Court of Appeal in that case which would have presented some difficulty to my mind had it not been for the more recent case of *In re Brown*. The decision in the latter case is not in point because it was an appeal to the statutory jurisdiction of the court under the Lunacy Act, 1890. But the importance of the case is that it contains a full discussion by Lindley, L.J., of the previous cases, including *In re Barlow's Will*. He there says: "If now we turn to previous decisions, we find that orders have been made, transferring stocks, funds, and securities to curators of lunatics resident out of England—namely, in France, Holland, and Scotland, although the property of such lunatics was not vested in their curators in the strict technical sense of that expression," so that he recognizes the fact that a transfer may be made, although the property is not technically vested in the person to whom it will be transferred. Then, dealing with *In re Barlow's Will*, he says: [His lordship referred to the report in L. R. [1895] 2 Ch., at p. 671.] "The Master in Lunacy, appointed by the Supreme Court of New South Wales under the New South Wales Lunacy Act, applied for a transfer to him of a sum of £2,249, eighteen new 3 per cent. annuities belonging to the lunatic, and paid into court under the Trustee Relief Act. The lunatic there was not judicially declared lunatic, and the court held first that the colonial master had no absolute right to have the whole sum transferred to him, but an order was nevertheless made for the payment to him of part of the capital—viz., £803, and of the future dividends. The lunatic in that case was only a patient not judicially declared to be insane, and the court felt considerable difficulty in making any order at all for payment to the colonial master. But it is obvious from the judgments that if the lunatic had been judicially declared lunatic, so that his legal *status* had been altered, the court would not have felt any difficulty in making any order which the court thought proper for transferring the annuities to the colonial master."

Now, what have we here? Really, in substance though not in form, a request from the court of Bavaria itself asking me to direct a transfer. There is in evidence a document signed by one of the members of the Deposit Commission who is himself a judge of the Royal Court of Bavaria, sealed with the seal of the court, authorizing the solicitors in the matter to make the application, and stating the grounds upon which the money ought to be remitted to the German court. It further appears that the lunatic has brothers and sisters who are presumably her next-of-kin living in Germany.

Looking at all the circumstances of the case, seeing that the lady's connection with England is of the slightest possible description, seeing that there has been a legal adjudication by a court of competent jurisdiction, by which the lady's legal *status* has been declared to be that of a lunatic, and that there is attached to that court a Deposit Commission which is appointed for the purpose of taking charge of the property of lunatics, and seeing that this fund is the only property of the lunatic and that her relatives are resident in Bavaria. I think that if I have jurisdiction, as I undoubtedly have, this is a case in which I ought to exercise it and make an order that the fund should be dealt with in the manner proposed by the summons.

Solicitors, *West, King, Adams, & Co.*

Chan. Div. } March 6.
Romer, J. }

In re JAMES COLMER. (*a*.)

Company—Capital—Reduction of capital — Different classes of shareholders—Reduction of capital affecting class prejudicially—Alteration of voting rights.

The court sanctioned a reduction of capital notwithstanding that the voting powers of a class of shareholders was thereby affected.

Semble, *now that* Hutton *v.* Scarborough Cliff Hotel Co. (No. 2), 13 *W. R.* 1059, 2 *Dr. & Sm.* 521, *has been overruled by* Andrews *v.* Gas Meter Co., ante, 321, In re Continental Union Gas Co., 7 *T. L. R.* 476, *is no longer an authority.*

Petition.

This was a petition for the sanction of the court to the reduction of the capital of the above company, which was a limited company carrying on business at Bath.

The capital of the company was originally divided into preference shares of £10 each, entitling the holders to a cumulative preferential dividend and to priority for return of capital, and ordinary shares of £10 each, the issued capital consisting of certain fully paid-up preference shares, and certain ordinary shares, on which £8 only was fully paid up, leaving a liability of £2 per share uncalled.

articles of association every member had one vote for every share held by him.

By clause 33 of the articles it was provided that "the company shall have power to reduce its capital, whether paid up or uncalled, and whether by can-

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

celling unallotted shares or otherwise, and to consolidate and also subdivide its shares, or any of them, into shares of a larger or smaller denomination. Upon a reduction of capital capital shall be written off in inverse order to that of its priority in repayment of capital."

Article 51 empowered the holders of any class of shares, by a resolution passed by such majority as therein mentioned, at a meeting of such holders convened as therein mentioned, to consent on behalf of all the holders of shares of the class to (among other things) any scheme for the reduction of capital affecting prejudicially the class of shares, and provided that a resolution so passed should be binding upon all the holders of shares of the class.

Article 58 (so far as is material) was as follows: "Every member shall have one vote for every share held by him."

In 1896 special resolutions of the company were duly passed and confirmed for reduction of the capital, the reduction to be effected by reducing the nominal amount of the ordinary shares from £10 to £8 each and extinguishing the liability in respect of uncalled capital on the ordinary shares to the extent of £2 per share. The resolutions were passed with a view of subsequently subdividing the capital into shares of £1 each, fully paid up, and with this object in view the company at the same time passed and confirmed a special resolution altering the articles by giving every member one vote for every £1 of the issued capital for the time being.

Immediately after the passing of these resolutions separate meetings of the holders of the preference and ordinary shares were held, at which resolutions consenting to the reduction and proposed alteration of the articles were duly passed by the requisite majority of each of the classes of shareholders.

Levett, Q.C., and *Wace*, in support of the petition.—By the proposed reduction the voting power of the ordinary shareholders is diminished, and that, according to the decision of Chitty, J., in *In re Continental Union Gas Co.*, 7 T. L. R. 476, is a fatal blot; but that decision was founded on *Hutton* v. *Scarborough Cliff Hotel Co.* (No. 2), 13 W. R. 1059, 2 Dr. & Sm. 521, which was recently overruled by the Court of Appeal in *Andrews* v. *Gas Meter Co.*, *ante*, p. 321; and it was also dissented from by Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, at p. 417. In any case article 51 removes any objection there may be to the reduction on the ground of the ordinary shareholders being prejudicially affected: *In re Pinkney & Sons Steamship Co.*, 40 W. R. 698, [1892] 3 Ch. 125.

ROMER, J.—In my opinion the fact that by the resolutions the voting powers of the two classes of shareholders are somewhat altered is not of necessity fatal to those resolutions.

In the case before me there are special provisions in the articles enabling a majority of each class to bind their class in certain matters, which would, I think, cover an alteration in voting power consequent on a reduction of capital; and meetings of each class of shareholders have been duly held, and resolutions passed so as to bind the class.

I cannot help thinking that the decision of Chitty, J., in the case of *In re Continental Union Gas Co.* was based on the principle supposed to be established by *Hutton* v. *Scarborough Cliff Hotel Co.*, and would not have been given if, at the time, the last-mentioned case had been overruled (as it has since been) by *Andrews* v. *Gas Meter Co.*

I think that in a proper case the court has power to confirm a reduction of capital, notwithstanding the voting powers may thereby be affected. I therefore sanction the reduction.

Petition allowed.

Solicitors, *Routh, Stacey, & Castle*, for *Adam & Thring*, Bath.

Chan. Div. } Romer, J. } Feb. 18; March 6.

In re HUNTER.

HOOD *v.* ATTORNEY-GENERAL. (*a.*)

Charity—Will—Gift to purchase advowsons.

A testator, who died in 1896, *gave his residuary real and personal estate to trustees on trust to convert and pay the proceeds to special trustees to be applied at their discretion among one or more of three objects, to two of which certain conditions attached which were directed to upholding certain religious doctrines. These conditions did not in terms apply to the first object which was for "grants for or towards the purchase of advowsons or presentations."*

Held, that no general charitable intent could be discovered from the whole will, and that, as the first of the specified objects was not charitable, the principle of In re Macduff, 44 *W. R.* 344, ante, *p.* 154, [1896] 2 *Ch.* 451, *applied, and the whole gift was bad as a charitable gift and void.*

Adjourned summons.

This was a summons for the determination of questions arising under the will of Edward Hunter, late of Blackheath and County Wicklow, Ireland.

The testator died in July, 1896. By his will made in May, 1877, after various specific bequests and a gift to his wife if she should survive him, which did not happen, and subject in certain events which did not happen to the respective life interests each in one moiety of his residuary estate of a sister and and brother-in-law, the testator gave the whole of his estate, which was about £90,000 in personalty and some real estate, as follows:

"And I delare that on the death of such of them my said sister and brother-in-law the moiety in which she or he shall have had a life interest as aforesaid or so much thereof as shall be legally applicable for charitable purposes shall be paid or transferred by my general trustees for the time being to special trustees to be held and applied by them upon the trusts and in manner following, that is to say—

"The special trustees may retain or invest such part of my residuary estate as shall come to or devolve upon them in or upon any stocks, funds, shares, or securities which they may think proper and whether of the class herein before prescribed by me or not, and they may apply the income or any portion of the capital in grants (*a*) for or towards the purchase of advowsons or presentations; or (*b*) in creating or contributing to the erection, improvement, or endowment of churches, chapels, or schools; or (*c*) in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers, but upon the following conditions:

"(1) That only such churches or chapels shall be subscribed or contributed to wherein the service shall, in the opinion of the special trustees, be conducted upon pure Protestant and Church of England principles, by which I mean the principles of the Church of England as held and inculcated by those of her divines, clergy, and members who are distinguished

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

as Evangelical and loyal to the work and fruits of the Reformation and as holding doctrines and principles free from all Popish or Roman Catholic tendency and opposed thereto.

"(2) That only such schools shall be subscribed or contributed to wherein true Protestant and Church of England principles are distinctly taught and inculcated with preference to those established for children of the poorer classes.

"(3) That only such masters and teachers receive grants who best show forth by their teaching and example true Protestant and Church of England principles.

"(4) That no payment shall be made directly or indirectly to or for the benefit of any rector, vicar, or incumbent unless upon condition that he shall if not prohibited in law at the principal Sunday morning service in his church, selecting a time and state of weather when the congregation is supposed to be greatest, read the Thirty-nine Articles of the Church of England, and which I recommend he should make the subject of his discourse from time to time, and upon further condition that he shall on the first Sunday of every month at the chief morning service preach a sermon on love from a text taken from the Gospel, Epistles, or Revelations of St. John.

"And I declare that if the special trustees shall find or consider that any rector, vicar or incumbent, master or teacher, shall preach, teach, publish, inculcate, encourage, adopt, or follow any doctrines or practices which shall be contrary to or at variance with true Protestant and Church of England principles, he or she shall be disqualified from receiving any benefit under this my will; and it being my wish that as much as possible of my residuary estate shall be applicable and available for administration by special trustees in manner aforesaid, I declare that all my debts, funeral, and testamentary expenses, and the duty on all legacies under this my will or any codicil not payable by the legatees, shall be raised and paid out of such parts of my residuary estate as are not legally applicable to charitable purposes to the exoneration of the residue thereof, and that no part of my residuary estate which shall be so legally applicable shall be invested or dealt with so as to make the same inapplicable or unavailable for these purposes."

The testator further declared "that on the death of each of them my said sister and brother-in-law the moiety in which she or he shall have had a life interest as aforesaid, as shall not be legally applicable to charitable purposes, shall be held by my general trustees for the time being upon trust for my nieces Marion Edwards, Eliza Evelyn Edwards, Rachel Edwards, and Mary Ann Cooke, or such of them as shall survive me in equal shares."

The first question for decision was whether the objects of the residuary gift were of a charitable nature.

The second question was whether there was in the event of the failure of the charitable gift a valid gift to the testator's nieces or an intestacy.

It was contended by the heir-at-law and next-of-kin that there was a complete intestacy in respect of the residue as the gift to the nieces was a gift only of what could not be left for charitable purposes, and that since the Mortmain Act, 1891, all property can be so given.

W. C. Druce, for the plaintiff, the surviving trustee and executor of the testator.

Sir R. Webster, A.G., Ingle Joyce, and *Dibdin*, for the Attorney-General.—The gift for grants for or towards the purchase of advowsons, &c., is a good charitable gift. Advowsons can be the subject of charitable trusts: *In re St. Stephen, Coleman-street*, 36 W. R. 837, [1888] 39 Ch. D. 492. The purpose of this and similar trusts is to ensure greater care in the selection of incumbents. Further, the conditions in the will are applicable to this gift, and show the testator's object to be the promotion of "evangelical" doctrine—a good charitable purpose. Advowson trusts, even if not "charitable," are valid as exceptions to the rule against perpetuities: *Attorney-General* v. *Webster*, 1875, L. R. 20 Eq. 483, p. 491, 24 W R. Dig. 48; Lewis on Perpetuities, p. 694. Even if this particular purpose should be invalid, the whole gift will not fail, as there is a clear general charitable intent shown by the will: *In re Douglas, Obert* v. *Barrow*, 1887, 35 W. R. 740, 35 Ch. D. 472.

Levett, Q.C., and *G. Lawrence*, for the heir and next-of-kin of the testator.—The first object is bad for indefiniteness, and the whole gift fails. There is no general charitable intent expressed in the will.

Farwell, Q.C., and *Ashworth James*, for the nieces.—No general charitable intent. The gift for purchasing advowsons and presentions in order to present to vacancies only clergymen holding Evangelical views is uncharitable rather than charitable.

ROMER, J.—Further consideration of this case has not enabled me to see my way to support this gift. The first object mentioned by the testator upon which his special trustees are to be at liberty to expend the income or any portion of the capital of the trust fund is "in grants for or towards the purchase of advowsons or presentations." Now, if this is not a charitable purpose it appears to me the whole gift fails. It fails on the general principle, shown by a series of authorities, amongst the last of which is *In re Macduff, ante*, p. 154, [1896] 2 Ch. 451, that a gift by a will of the class I am dealing with is not a good charitable gift if the trustees may (speaking of substantial matters) apply the property to some purpose which is not charitable.

Now, in considering in this case whether the abovementioned object is or is not charitable, I must look to the whole will. But when I do so I am still unable to hold that the object is charitable. It may be conceded that the testator thought the objects he indicated in his will were all charitable—and some are undoubtedly charitable—but the testator's opinion, of course, will not make the gift good if his first object specified is really not charitable. And I can find nothing in the will that I can properly lay hold of which enables me to declare the first object to be charitable. None of the conditions mentioned by the testator apply in terms to the first object. At most, all I can gather from these conditions and from the will as a whole, is that the testator hoped and expected that the person or persons who might purchase the advowsons or presentations by means of grants from the trust fund would on vacancies occurring present fit Protestant clergymen of the class which (to use in an abbreviated form the language of the testator) is distinguished as Evangelical. The testator has not limited his special trustees to the purchase of advowsons or presentations in their own names. The words of the gift are "in grants for or towards the purchase," and I can see nothing in the will to enable me to hold that if a grant is made to some third person or persons to purchase an advowson or presentation such person or persons is or are to hold it when purchased upon any trust, still less upon any charitable trust. And even if the special trustees bought in their own names I cannot see upon what trust (if any) they were to hold. And, further, assuming that they were to hold upon trust to pre-

sent Evangelical clergymen as vacancies occur I cannot see that this is a charitable trust. Indeed, in one sense, so far as it would tend to narrow down the number of fit and proper clergymen of the Church of England from whom to select for the vacancies and to prevent the parishioners in which the livings were given ever having any clergymen in the parish except of the Evangelical type, whether they wished it or not, it might be said to be decidedly uncharitable. Whoever holds an advowson or presentation is bound on a vacancy to present a fit and proper clergyman of the Church of England, and I cannot see what charity it can be to try and get advowsons or presentations in the hands of particular persons or in the hands of persons likely only to select from a special class of the clergymen of the Church of England. Reference was made to the case of *In re Douglas*. But that case in no wise conflicts with the cases above referred to, of which *In re Macduff* is one, and which, in my opinion, govern this. All that *In re Douglas* really decided I will state. In that case you could gather from the will that the testator intended to give his property to charitable societies to be selected by a person he had named, and that he thought certain societies he named were charitable, and indicated them as being within the power of selection by his nominee. But his nominee in making the selection did not include in such selection any of the societies the objects of which were disputed as not being charitable. In that state of things the court held that the gift intended for the benefit of charities was not rendered bad merely because the societies named by the testator might prove on investigation to be uncharitable. *In re Douglas* clearly does not apply to the case before me. For these reasons I hold the gift bad as a charitable gift, and void.

With respect to the second question, his lordship held that the declaration in favour of the nieces did not amount to a gift over of the residue, but was in terms limited to property which could not be legally applied by the testator to charity. As there was no such property, there was nothing which passed to the nieces. The result was that, with respect to the whole property in question, it must be declared that the testator died intestate.

It was stated that the nieces were among the next-of-kin.

Solicitors, *West, King, Adams, & Co.; Hare & Co.; Hollams & Co.*

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 15.

REG. v. THE GUARDIANS OF LEWISHAM UNION. (*a*.)

Practice—Mandamus—*Vaccination Acts—Refusal of guardians to enforce—Application by urban sanitary authority—No legal right to performance of the duty sought to be enforced.*

The District Board of Works for L. as the urban sanitary authority applied for a mandamus *to compel the guardians of the poor of that district to put in force the provisions of the Vaccination Acts.*

Held, that, as the urban sanitary authority had no specific legal right to the enforcement of any statutory duty by the guardians, the remedy sought was inapplicable and must be refused, because it had always been held that a clear legal or equitable right to the performance of the duty which it was desired should be enforced was necessary to support an application for a mandamus.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Rule *nisi* for a *mandamus*.

The Lewisham District Board of Works had obtained a rule, calling upon the Guardians of the Lewisham Union to show cause why a writ of *mandamus* should not issue commanding them to enforce the Vaccination Acts, 1867 and 1871, by instructing their vaccination officer to take proceedings before the justices, both in regard to special cases and also in general, against persons contravening the provisions of those Acts.

Lord Coleridge, Q.C. (with him *Schultess Young*), showed cause against the rule being made absolute. Both the district board and the board of the Lewisham Guardians were under the control of the Local Government Board. To the latter the district board had already applied on the same subject, but their requisition had not been complied with. The present proceedings are misconceived. [He was stopped.]

[WRIGHT, J.—The present application is quite contrary to my knowledge of the law of *mandamus*. No doubt the board of works have an obligation to see that the Acts are enforced, but I doubt if they have any legal interest in that sense which would enable them to proceed by *mandamus* against the guardians. We should like to hear counsel in support of the rule on that point.]

Macmorran, Q.C. (with him *Poyser*), in support of the rule.—By the Metropolitan Management Acts and the Public Health (London) Act, the district board of works were entrusted with the whole of the sanitary administration of their district. In the event of an outbreak of small-pox, the responsibility of dealing with it would fall upon them, and therefore they had the greatest possible interest in seeing that the guardians performed their duties and guarded against such an outbreak by properly enforcing the Vaccination Acts. The board of works therefore had a substantial interest in the performance of the duty which was the subject-matter of the rule. [WRIGHT, J.—That may be, but they have no specific legal right.] *Reg.* v. *The Guardians of Keighley Union*, 39 J. P. 360. [WRIGHT, J.—The guardians in that case did not think proper to show cause, and thereupon the rule was made absolute. It does not appear to be recognized as an authority by any text-book.] *Ex parte Macmahon*, 48 J. P. 70. The powers to enforce the Vaccination Acts which were given to the Local Government Board against private persons were not applicable against the guardians, and the district board of works had no remedy against that body other than by *mandamus*. The court, therefore, had no discretionary power, because the refusal to grant a *mandamus* would leave the board of works without remedy, since they had already petitioned the Local Government Board and that authority had refused to move in the matter.

WRIGHT, J.—The question raised by this case is one of very great importance, but the point we have first to decide is whether under the circumstances we have the power at all to grant the *mandamus* asked for. I think not. Certainly as long as I have had anything to do with applications for writs of *mandamus* I have always understood it to be the law that the applicant for the writ must show that he has a personal specific legal right to the performance of the duty which he asks the court to direct the performance of. That is a rule which has repeatedly been laid down in text-books. In Tapping on Mandamus (1848), p. 27, there is this passage: "The prosecutor must be clothed with a clear legal and equitable right to something which is properly the subject of the writ, as a legal right by virtue of

an Act of Parliament." If this court were to take upon itself to enforce by *mandamus* the performance by public bodies of all their duties without ascertaining whether the person applying for the rule had a legal right to the enforcement of such duty, we should be assuming to ourselves a jurisdiction which these courts certainly have never had since the days of Coke. It seems to me also that this application ought to be discharged on another ground—namely, that, under the Vaccination Acts of 1871 and 1874 the Local Government Board has quite sufficient power to see to this matter and to make the local authority perform their duties by means of the machinery provided by those Acts.

BRUCE, J.—I also recognize the great importance of the question, and I regret that on a technical point this application must be refused. But the practice is well established. This court has never had a general power to compel acts by *mandamus* except in those cases where it has been satisfied that the person applying for the rule has a legal right which was about to be infringed.

Rule discharged.

Solicitors for the appellants, *W. W. Young & Sons.*

Solicitors for the respondents, *Newton & Newton.*

Q. B. Div.
(Hawkins, Cave, Wills, Wright, and Kennedy, JJ.) Dec. 19.

BRADFORD, COMMISSIONER OF POLICE (*Appellant*) *v.* DAWSON AND PARKER (*Respondents*). (*a.*)

Gaming—Betting—House used for payment of bets made elsewhere—Betting House Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The use of a house by a person for the payment of bets made by him previously and elsewhere, is not the using of the house for the purpose of betting with persons resorting thereto within the meaning of section 3 *of the Betting House Act*, 1853, *as the payment of such a bet does not constitute the Act of "betting" within the meaning of that statute.*

This was a case stated by E. Fenwick, Esq., one of the metropolitan police court magistrates.

"1. On the 27th and 29th of June and the 13th and 18th of July, 1896, the respondents, Harry Dawson (senior) and Thomas Bishop Parker, appeared before me to answer respectively the charges in the following summonses under 16 & 17 Vict. c. 119.

"Harry Dawson (senior), for that he, on the 8th, 9th, 12th, 13th, 14th, 15th, and 16th of May, 1896, being a person using the 'Duke's Head' beer-house, Pocock-street, Blackfriars-road, did use the same for the purposes of betting with persons resorting thereto, contrary to section 3 of 16 & 17 Vict. c. 119 (the Betting House Act of 1853). And Thomas Bishop Parker, for that he, on the 8th, 9th, 12th, 13th, 14th, 15th, and 16th of May, 1896, being the occupier of the 'Duke's Head' beer-house aforesaid, did knowingly and wilfully permit the same to be used by Harry Dawson (senior) for the purpose of betting with persons resorting thereto, contrary to the same section of the Betting House Act aforesaid.

"The following facts were, I find, proved in evidence before me:

"2. The defendant Thomas Bishop Parker was, at the date of the offences alleged against him, the licensed and rated occupier of the 'Duke's Head' beer-house, Pocock-street, Blackfriars-road, and had been since the 8th of November, 1893. The said Thomas Bishop Parker resided on the said premises, and, with the assistance of his wife, carried on the business of the beer-house. Prior to the 8th of November, 1893, the defendant Harry Dawson (senior) was the licensee of the house.

"3. The defendant, Harry Dawson (senior) carries on the business of a professional bookmaker.

"4. It was proved to my satisfaction that on the seven days mentioned in the summonses the defendant Harry Dawson (senior) was at the 'Duke's Head' beer-house aforesaid between the hours of 8 and 9 p.m. for the purpose of paying out to a number of persons who resorted to and came into the said house for the purpose, sums of money which they had won from Harry Dawson (senior) on bets made by such persons with Harry Dawson (senior) on the result of horse-races.

"The defendant Harry Dawson, with the cognizance and connivance of the defendant Thomas Bishop Parker always located himself in the private part of the bar at the corner of the counter close to a back room or parlour, which he was permitted by the defendant Parker to make use of at will.

"The habitual practice (which I find to have existed on the days mentioned in the summons) was for the persons who had won bets, and who resorted to the house in considerable numbers for the purpose of obtaining payment of their bets, to present a slip of paper to the defendant Dawson, which they usually placed on the counter. Dawson would then look at the slip, step into the back room above referred to, come out again with another slip, and, after comparing the two, pay over to the person who had originally handed him the slip the sum of money which appeared to be due to such person. It was proved to my satisfaction that the defendant Parker had full knowledge of the nature of the transactions carried out by the defendant Dawson.

"5. No evidence was adduced before me on the part of the prosecution showing the receipt by Harry Dawson (senior) at the 'Duke's Head' beer-house of any slips of paper or money at the initial stage of the betting, neither was there any evidence to show when or where the agreements or contracts in pursuance of which the said sums of money mentioned in paragraph 4 and paid over by Harry Dawson (senior) as therein stated, had been entered into and made. But I was satisfied that Harry Dawson (senior) carried on the material part, as above set forth, of his business as a professional bookmaker in the said 'Duke's Head' beer-house, and used the house to that extent for the purpose of his said business.

"6. It was contended before me for the prosecution that the habitual user of the house by a professional bookmaker for the purpose of meeting customers with whom he had betting transactions, by settling up with them any bets with regard to which they were winners, amounted to a user of the house contrary to the Betting House Act of 1853. It was submitted that the paying out of bets was a most substantial and essential part of the transaction of betting, and in support of this contention the case of the *Queen* v. *Worton*, reported in [1895] 1 Q. B. 227, 64 L. J. M. C. 74, 43 W. R. Dig. 69, was referred to.

"On the part of the defendant it was argued that the transactions which it had been proved the defendant Dawson was a party to could in no way be said to come within the section of the Act in question, and for the defence the case, amongst others, of *Davis*

(a.) Reported by E. G. STILLWELL, Esq., Barrister at-Law.

v. *Stephenson*, 38 W. R. 492, 24 Q. B. D. 529, was quoted.

"7. I was of opinion that the facts above stated, as proved before me, did not, in point of law constitute the commission by H. Dawson (senior) of an offence against the Betting House Act, 1853, and, being of this opinion I dismissed the summons against him. With regard to the defendant Parker, it was admitted by the prosecution that if the user by Dawson was not illegal the case against the licensee of the house failed also, and I therefore dismissed the summons against him.

"The question for the opinion of the court was whether such decision was right."

By section 1 of the Betting House Act, 1853, it is provided that "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . betting with persons resorting thereto."

Section 3 provides that "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who, being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used, by any other person for the purposes aforesaid, or either of them . . . shall, on summary conviction thereof," be liable to a penalty.

Danckwerts, for the appellant.—The magistrate's decision was wrong. It is not necessary that the bet should be actually made in the house in order to bring it within the scope of section 3. If it were to be held that that was necessary the area of the Act would be very much narrowed and great abuse would arise; betting men would use public-houses as regular places of meeting, and the object of the Act would be defeated. The word "betting" means both the entering into the agreement to pay and the actual payment or performance of the agreement.

Bigham, Q.C. (*Grain* with him), for the respondent Dawson.—What took place here did not amount to an act of betting within the meaning of the Act. What the Act aimed at was the making of a bet in the house.

L. W. Kershaw, for the respondent Parker.

HAWKINS, J.—I am of opinion that this appeal must be dismissed. The Act was passed to prevent the demoralization of improvident persons. The offence with which the respondent Dawson was charged is said to have been committed under section 3 of the Betting Act, 1853. [The learned judge read the section.] Bets were made with him by a number of persons who frequented the "Duke's Head," and Dawson used the house in question, of which the respondent Parker was the occupier, for the purpose of paying bets which he had already made and which he had lost. The question we have to decide is whether such payment of bets constitutes an offence within the meaning of the Act. I unhesitatingly come to the conclusion that paying a bet is not "making" a bet. To my mind it is impossible to read sections 1 and 3 of the Act without coming to that conclusion. The object of the Act was to prevent betting in a house. It is quite true that in every fair contract of wagering there is implied an honourable obligation that the loser shall pay his losses, but the making of the bets and the payment of the losses, sometimes many months afterwards, are two totally different things. In this case the bets, having been made out of the house, the mere fact of paying them in it, does not come within the Act.

CAVE, J.—I am of the same opinion. When a person pays a bet which he has made on a previous occasion it cannot be said that he is thereby betting, any more than it could be said that a person who has purchased an article on credit is buying it when he subsequently pays for it.

WILLS, J.—I entirely agree.

WRIGHT, J.—I confess I feel some doubt in this case. The object of the Act was to prevent persons from carrying on the business of betting, and it seems to me that the payment of bets is a very important part of that business, for if bets were not paid they would not be made. However, as this is a penal statute and must be construed strictly, and as I do not feel sufficient confidence in my own opinion to dissent, I agree with the judgments that have been given.

KENNEDY, J.—I also agree.

Appeal dismissed.

Solicitors for the appellant, *Wontner & Sons.*

Solicitor for the respondent, *C. Butcher.*

Q. B. Div. (Wills and Wright, JJ.) — Dec. 15, 17.

THE RIBBLE JOINT COMMITTEE v. THE CROSTON URBAN DISTRICT COUNCIL. (a.)

River—Pollution—Consent order—Non-compliance—Tidal waters—Jurisdiction of county court—Estoppel—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10, 20.

In 1893 *an order was made in a county court, under the Rivers Pollution Prevention Act,* 1876, *by consent between the plaintiffs and the defendants, restraining the defendants from permitting sewage to flow into a river, and ordering the defendants to construct certain sewage works. In* 1896 *the defendants, having not complied with the order, proceedings were taken for the recovery of penalties. The defendants desired to show that the river in question was a tidal river, and that therefore there was no jurisdiction to make the order.*

Held, that, the order having been made by consent and being good on the face of it, the defendants were not entitled to show in answer to the claim for penalties that the river was one as to which a valid restraining order could not be made. If a mistake had been made proceedings should be taken to set the order aside.

Appeal of the defendants from a judgment of the Preston County Court in an action for penalties under the Rivers Pollution Prevention Act, 1876.

In 1893 an order was made by consent under sections 3 and 10 of the Rivers Pollution Prevention Act, 1876, in the Preston County Court in proceedings to which the present plaintiffs and the Croston Local Board (the predecessors of the present defendants) were parties.

By that order it was declared that the defendants had committed an offence against the Act by permitting sewage to flow through channels under their control into the River Yarrow, and thence into the Rivers Douglas and Ribble; and that the defendants had made default in not using the best practicable means to render harmless the sewage which they had permitted so to flow; and the defendants were

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ordered to abstain from the commission of the offences and to forthwith construct the necessary works to prevent the further pollution of the River Yarrow and the River Douglas.

The proceeding under the order were stayed pending the construction of the sewage works. Owing, it was said, to the poverty of the district, these works had not by July, 1896, been constructed.

It was then alleged by the defendants that they had ascertained that the greater part of the River Yarrow was tidal, and that, therefore, the Rivers Pollution Prevention Act, 1876, did not apply.

Thereupon the plaintiffs brought this action for penalties for non-compliance with the order of 1893.

At the trial of the action the defendants contended that, in so far as the River Yarrow was tidal, the order had no application.

The county court judge gave judgment for the plaintiffs for penalties to the amount of £114.

The Rivers Pollution Prevention Act, 1876, s. 3, provides that "every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act."

Section 10 provides that offences against the Act may be restrained by summary order of a county court, and that a penalty not exceeding £50 a day shall be imposed for non-compliance with an order.

Section 20 defines a "stream," which does not include the sea or tidal waters unless the Local Government Board so order after local inquiry.

Macmorran, Q.C. (with him *Firth*), for the defendants.—The county court had no jurisdiction to make an order as to the tidal part of the river, and therefore the order was to that extent not binding on the defendants. The order was made under a mistake of both parties, for it was assumed that the whole of the river was non-tidal. The order is good on the face of it, but the defendants are not estopped from proving that the order only applies to a part of the river, and that as to that part no offence has been committed. A judgment is not an estoppel, if the court which gave the judgment exceeded its jurisdiction in doing so.

E. Sutton (with him *F. H. Mellor*), for the plaintiffs.—When the order was made in 1893 the defendants consented to a certain state of facts without which the order could not have been made. By so doing the defendants induced the plaintiffs to stand by during all this interval of time, and to abstain from taking the necessary steps, if any were necessary, to bring these waters within their jurisdiction by application to the Local Government Board under section 20 of the Act. Under these circumstances, even if the order is not in itself an estoppel, the defendants are now estopped from alleging that there was no jurisdiction to make the order as to the whole of the river.

He referred to *In re South American and Mexican Co., Ex parte Bank of England*, 43 W. R. 131, [1895] Ch. 37.

Macmorran replied.

Cur. adv. vult.

Dec. 17.—WILLS, J.—The facts in this case are that in the year 1893 the Joint Committee of the River Ribble made a complaint against the defendants, the Croston Urban District Council, for pouring sewage matter into the streams which were within the jurisdiction of the joint committee, and the defendants submitted to a consent order in the county court made under the Rivers Pollution Prevention Act, 1876, s. 10. By this order the court declared that the defendants have committed an offence against the Act by permitting to fall or flow, or be carried through channels under their control into the River Yarrow, and thence into the River Douglas, and into the River Ribble, sewage matter contrary to the provisions of section 3 of the said Act. The defendants also submitted to a declaration that they had failed in their duty by not using the best practicable and available means to render harmless the sewage matter which they permitted to fall or flow, or to be carried as aforesaid into the said River Yarrow, and into the River Douglas, and into the River Ribble, contrary to the provisions of the Act. The present action was brought in the county court to recover penalties in respect of the breach of the injunction that was founded upon these declarations.

The defendants set up this defence. Although they admitted on the former occasion that it was an offence to allow sewage to flow out of the River Yarrow into the Rivers Douglas and Ribble, and therefore admitted that the parts of the Rivers Douglas and Ribble into which the sewage flowed were non-tidal waters, they seek now to show that they are tidal waters, and that, therefore, any order made with respect to them was beyond the jurisdiction of the county court. I am of the opinion that no such contention as that can be set up in answer to an action for penalties for not obeying the order to which they submitted.. The order is perfectly good on the face of it, and could only be shown to be beyond the jurisdiction of the county court upon proof of that which no doubt would be controverted matter, and which must have been controverted matter, but which at the time this order was submitted to was given up by the defendants and admitted by them to be incapable of settlement in their favour. It seems to me that it would never do to allow an order, which is at present a valid order of the court, to be disregarded, or to allow the defendants now to set up circumstances, which they might have urged at the time, as reasons why the order should not have been made, in answer to a complaint that they have disobeyed the order to which they so consented. I think it would be contrary to all principle and to all practice to allow that. This order of 1893 at the present time, and under the present circumstances—under the circumstances on which reliance is sought to be placed—either is or is not capable of being set right. If it cannot be set right then it must remain. But on the face of it there is no reason why it should not be acted upon. If it can be set right, an action for the purpose of setting it right on the ground on which such a claim can be made, is the proper remedy. The proper remedy is certainly not to refuse to obey the order which upon due consideration the parties submitted to at the time it was made. I am therefore of opinion that this appeal must fail.

WRIGHT, J.—I am of the same opinion. The original order might have been appealed from on the the merits, but it was not. It can now be appealed from, if at all, only by leave being obtained to withdraw the consent to the original order on the ground of mistake.

Then as to the rest of the case I do not think any merits are shown here. I think there ought at least to have been an affidavit showing what evidence could have been given if the county court would have listened to it. We have had no indication of any such evidence. Having regard to the conduct of

the urban district council, I do not think we ought to interfere.

Appeal dismissed.

Solicitors for the plaintiffs, *Ridsdale & Sons*, for *W. H. Wilson*, Preston.

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *W. & R. Ashcroft*, Preston.

Q. B. Div. (Pollock, B., and Wills, J.) — Dec. 4, 5.

The London and North-Western Railway Co. (*Appellants*) v. The Llandudno Improvement Commissioners (*Respondents*). (*a*.)

Railway—Rating—Station buildings—Roof, platforms, and adjuncts of station—Rating of "land used as a railway"—Llandudno Improvement Act, 1854 (17 & 18 *Vict. c. cii.*), *ss.* 67, 68, 79.

Under an Improvement Act commissioners were empowered to make annually a general improvement rate, and a section of the Act provided that the owners and occupiers of houses, buildings, and all other property should be rated at the full net annual value, with an exception in favour of (inter alia) "*land used as a railway constructed under the powers of an Act of Parliament for public conveyance,*" *which was to be rated at one-fourth only of the net annual value. A railway having been constructed under an Act of Parliament for public conveyance,*

Held, that, in the rating of the station buildings—the roof covering the railway, platforms, and sidings, and the platforms themselves came within the exemption "land used as a railway," and were to be rated at one-fourth only of the full net annual value; but that the roof covering the cab-drive and buildings, the cab-drive, horse and cattle landings, and pens and crane in goods yard did not come within the exemption, and were to be rated at the full annual value.

Appeal against a general improvement rate made by the respondents.

By consent and by order of a judge, the facts were stated in the form of a special case for the opinion of the court.

The appellants were the owners and occupiers of a branch railway from Llandudno Junction to Llandudno, with its appurtenances and a terminal station at Llandudno, which were constructed partly on land acquired under the powers of an Act of Parliament (the St. George's Harbour Act, 1853, 16 & 17 Vict c. cxxiii.), and partly on land acquired under subsequent Acts relating to the London and North-Western Railway Co.; and this railway was constructed, and was being used for public conveyance.

For the purposes of the present argument, but for no other purpose, it was agreed that items 1 to 9 hereinafter mentioned were to be taken as being on land formerly used and occupied by the St. George's Harbour Co. and used for the purposes of their undertaking. Those numbered 10, 11, and part of No. 12, were not so owned or occupied, but had been constructed on land acquired for public conveyance under the Railway Acts above referred to. No. 14 consisted of land (with sidings placed thereon) coming as to one-half under the former, and as to the other half under the latter, of the above descriptions.

(*a*.) Reported by Sir Sherston Baker, Bart., Barrister-at-Law.

The respondents were commissioners incorporated by the Llandudno Improvement Act, 1854 (17 & 18 Vict. c. cii.), and the said railway and Llandudno station were within the limits of this Act.

By section 67 of the Llandudno Improvement Act, 1854, the respondents were empowered to make annually a rate or assessment to be called "the general improvement rate" upon all lands, estates, and property of every sort, kind, or description, for the time being liable to be rated to the relief of the poor within the limits of the Act, according to the annual value of the same; and by sections 68 and 79 of the Act it was enacted as follows:

Section 68.—"That the owners and occupiers of houses, buildings, courtyards, and gardens, and all other property shall be rated at the full net annual value of the same, provided always that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall so far as respects the said general improvement rate be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

Section 79.—"And whereas the said St. George's Harbour Co. are or are about to become the owners and occupiers of land within the limits of this Act to be used for the purposes of their undertaking: Be it enacted that nothing in this Act contained shall prejudice, lessen, or defeat the rights or interests of the said St. George's Harbour Co. otherwise than by this Act expressly provided, and that the said company shall in respect of the railway works and property of the said company within the limits aforesaid be rated as follows: The line of railway (when constructed) for rating purposes shall be considered as agricultural and shall be valued and rated in the same manner and proportion as the land abutting on each side of the line within the limits of the Act, and the station buildings and other hereditaments shall be rated in the same manner as other houses, buildings, and hereditaments within the limits of this Act are to be rated for the purposes of the Act."

Under the St. George's Harbour Act, 1853, the St. George's Harbour Co. were empowered to construct a harbour and certain jetties, landing places, buildings, and other works, and a line of railway.

At the time when the Llandudno Improvement Act was passed the railway in question had been authorized by the St. George's Harbour Act of the previous year, but had not been actually constructed.

In July, 1894, the respondents made a general improvement rate, in which the property occupied by the appellants was rated as set out in the rate-book, the property the rating of which was now in dispute was described as "Land occupied by Llandudno station buildings, sidings, and appurtenances," and this comprised (*a*) the station buildings described in the first schedule to the case, as to which there was no dispute and the full net annual value of which was £240; (*b*) the roof, platform, sidings, and other matters and things described in the 2nd schedule to this case and numbered 1 to 14, the improved or full net annual value of which was £1,060.

The appellants' property comprised in the fourteen items set out in the 2nd schedule was as follows: (1) that part of the station roof which covered a portion of the length of the line of railway; (2) that part of the station roof which covered a portion of the station platforms; (3) that part of the station roof which covered a portion of the length of the cab-drive; (4) that part of the station roof which covered

a portion of the sidings; (5) that part of the station roof which covered portion of the station buildings; (6) portion of the station platforms under roof; (7) portions of the station platforms which are not covered by the station roof; (8) cab-drive under the roof; (9) portion of cab-drive and horse-landing uncovered by station roof; (10) cattle-landing and pens beyond the limits of roof and uncovered by roof; (11) crane in goods yard; (12) signal-boxes and appurtenances; (13) engine turntable; (14) sidings and land.

The parties agreed that the net annual values of the property described in the above schedule, were, first, as agricultural land (total £66); and secondly, in its present condition—that is, its full net annual value (total £1,060).

The appellants contended that upon the true construction of the Improvement Act, and in accordance with the principle laid down in *The South Wales Railway Co.* v. *The Swansea Local Board*, 4 E. & B. 189, 24 L. J. M. C. 30, and other cases, the appellants' property above described ought, for the purposes of the improvement rate, to have been valued as agricultural land, and rated in the proportion of one-fourth of such value, as being within section 79, as the "line of railway"; or alternatively at one-fourth of the improved or full net annual value, as being "land used for a railway" within section 68, and that the said improvement rate ought to be reduced accordingly.

The respondents contended that the appellants ought to be assessed and rated to the improvement rate in respect of items 1 to 11 at the full net annual value; but the respondents admitted, and now admit, that as to the items 12, 13, and 14, the appellants ought only to be assessed at one-fourth of the full net annual value.

The questions for the opinion of the court were whether the appellants are liable to be assessed and rated in respect of the above properties in the proportion of one-fourth of the agricultural value, or in the proportion of one-fourth of the full net annual value, or in respect of items 1 to 11 at the full net annual value, and in respect of items 12 to 14 at one-fourth of the full net annual value.

If the court should be of opinion that all the portions of the appellants' property ought to be assessed at the full net annual value, the appeal to quarter sessions was to be dismissed; if the court should be of opinion that any of the items ought to be assessed at one-fourth of the agricultural value, or at one-fourth of the full net annual value, the rate was to be reduced accordingly, and the appeal to quarter sessions to be allowed.

William Graham, for the appellants.

Marshall, Q.C., and *E. H. Lloyd*, for the respondents.

In support of the above contentions the following cases were referred to: *The South Wales Railway Co.* v. *The Swansea Local Board*, 4 E. & B. 189, 24 L. J. M. C. 30; *Doe d. Payne* v. *The Bristol and Exeter Railway Co.*, 6 M. & W. 320; *Doe d. Armistead* v. *North Staffordshire Railway Co.*, 16 Q. B. 526; *Midland Railway Co.* v. *The Council of the Borough of Birmingham*, 13 L. T. N. S. 404; *North-Eastern Railway Co.* v. *The Scarborough Local Board*, 17 W. R. 574, 33 J. P. 244; *Purser* v. *The Worthing Local Board*, 35 W. R. 519; *Reg.* v. *The Eastern Counties Railway Co.*, 4 B. & S. 58; *London and North-Western Railway Co.* v. *The Wigan Union*, 2 Ex. & Mac. 240; *Adamson* v. *The Edinburgh and Glasgow Railway Co.*, 2 Macq. 331.

Pollock, B.—This case is stated for our opinion in respect of certain particular portions of the railway property which are designated in schedule 2 of the case, being numbered from 1 to 14. With regard to 12, 13, and 14 the question whether those are to be assessed at one-fourth of the full net value or at the full net value is concluded by an admission by the respondents that the appellants ought only to be assessed at one-fourth of the full net annual value, and therefore with regard to 12, 13, and 14 no question arises upon this part of the case.

The substantial question argued before us is one of considerable importance, and but for the decisions which have already passed upon the subject I should have taken time to consider what would be the true and sound rule of dealing with the different Acts of Parliament that provide for the rating of railways and adjuncts to railways, as in the present case. But it seems to me for the purposes of this case and of this court that the matter is already established by decision. The question arises under section 68 of the Llandudno Improvement Act. That section, by the specific mention of houses and buildings, would include all houses and buildings that are part of a railway station, because there is there a distinct denomination of the particular property which is rated, and that must be taken to govern—although in a minor sense those buildings may be said to be a part of the station. Therefore, so far as those buildings are concerned, no question can arise. But then comes the proviso in the section: "Provided always that the occupation of any land . . . as a railway constructed under the powers of any Act of Parliament for public conveyance shall, so far as respects the said general improvement rate, be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." Then comes the question whether the different specified lands, and things built upon the land, numbered 1 to 11, are within the provision as part of a railway constructed under the powers of the Act of Parliament. I think the first decision in point of date upon this subject is in the year 1854 in the case of *The South Wales Railway Co.* v. *The Swansea Local Board*. In that case the court seems to have come to a conclusion which to my mind is perfectly clear when you are dealing with a road station, as it is commonly called—that is to say, where a railway is made upon an embankment or made in a cutting, so that there is at the side the embankment in the one case, and the bank of the cutting in the other, and upon that a station is built. Whatever be the length of the platform, that station, is obviously not only built for the purposes of the railway, and is of such a nature that without it the railway could not be properly used, but it is actually built upon land occupied by the railway and without which the rails themselves could not be properly maintained. The court there, clearly to my mind, could only come to the conclusion that because the company added to that embankment, or to that bank of a cutting some further accommodation in the nature of a station and platform, you could not rate that which was built upon land which already was freed from rating as being a necessary part of the railway. But that case was not in respect of a terminus, and it is quite clear that the same ground of decision would hold in the case of a terminus with regard to the actual lines of railway and the platforms on either side of those lines of railway that were built upon land of the same character as that which I have just designated. But if the decision stopped there, there would be a manifest inconvenience, because the question whether the platforms of a terminus station should be rated or not would depend upon whether the lines came into the par-

ticular station upon an embankment or in a cutting, or upon a dead level. If they came in upon a level, a great part at any rate of the grounds of argument upon which the judgment of the court in that case rested would not apply. I cannot but think that, supposing that had been the case of a dead level, still the court would have come to the same conclusion, though not exactly upon the same grounds. But it is unnecessary to decide that, because it is quite clear that by a decision which was given in the next year by the House of Lords in *Adamson* v. *The Edinburgh and Glasgow Railway Co.*, any court dealing with the construction of an Act of Parliament for rating purposes in which the words "a railway" were used, would be entitled to go beyond the mere physical rails and the lands that those rails immediately rest upon. I think it is quite clear that this court should obey the forcible reasoning which is indicated by the two learned lords (Lords Cranworth and Brougham) in that decision. Beyond that I do not desire to give undue weight to that case, because there are many reasons why, when you come to apply it to the purpose of this case, you find that it is not a case *in pari materiâ*. Therefore I only cite it for the general ground of decision to be found in it. But there is another decision, which is one I think we are bound loyally to obey, and one which is based, to my mind, on somewhat broader, and I cannot help thinking sounder, reasons, perhaps, than the case of *The South Wales Railway Co.* v. *The Swansea Local Board;* I refer to the case of *The North-Eastern Railway Co.* v. *The Scarborough Local Board*, which arose upon a question as to how far this rule was applicable to the area occupied by the Scarborough railway station. There three learned judges (Lush, Hayes, and Hannen, JJ.), having the *Swansea case* before them, went further, and they decided the general doctrine that the word "railway" was not confined to the rails themselves and the land beneath them, but was to be applied in a case where there were platforms which it was not shown were built absolutely upon land which was necessary for the support of the railway. They used broader words, words which, to my mind, are of more general purpose and use in construing Acts of this kind than any language that is to be found in the judgments in the *Swansea case*; for they say that so much of the strip of land as is necessary to the use of the railway should be included as a part of the railway. That, of course, must be construed strictly. You must not go from step to step and say it is necessary to have a booking-office, and such-like things, for many reasons. I think the first reason I gave is the right one, that directly a thing becomes a building it comes under another distinct category, and is therefore disposed of and dealt with in another way. It does, to my mind, apply to land which is not only parallel with and ends with the rails themselves, but it applies to land which is beyond the buffers, between the buffers and the street or public place with which the railway station communicates. That must all be subject to this qualification, that there must always be, in all cases, this question of degree—namely, how much is necessary for the use of the railway, and how much is necessary merely for the convenience of passengers and for other purposes. If a railway company sought to take any more land than was directly necessary for the convenience and use of the lines, then, as a matter of fact, that portion which was not necessary ought to be excluded from the exemption by any court or arbitrator before whom the case came. The result is this: 1st, the roof covering railway; 2nd, the roof covering platform; 4th, the roof covering the sidings; 6th, the platform under the roof; and 7th, the platforms uncovered; all these are included in the principle which I have mentioned, and which I consider to be decided by these cases. But as to the 3rd, the roof covering the cab-drive, and the 5th, the roof covering the buildings, *a fortiori*, and the 8th, the cab-drive under roof, and 9th, the cab-drive and horse landing uncovered, and 10th, the cattle landing and pens, 11th, the crane in goods yard, these are all cases to which, it seems to me, those decisions and the principle of them do not apply, and therefore they are properly rated upon a full value With regard to the other part of the case—namely, the application of the section (section 79) of the Act whereby the London and North-Western Railway Co. acquired the property and the works of the St. George's Harbour Co., I have very little to say, because it is clear to my mind that wherever the railway company acquired a portion of the line of railway under that Act they would have the same benefit as the St. Georges's Harbour Co.; but wherever the railway company created new works upon land which they had acquired since the passing of that Act they would not have that benefit. That becomes much less important seeing what our judgment is with regard to the other part of the case.

Wills, J.—I am of the same opinion. I will deal with the two questions in the inverse order, because I think a person who had to rate here would begin by considering what land is to be treated as agricultural land, and what is to be rated on another principle, and would then apply section 68 relating to the assessment of certain lands and certain property at one-fourth of the net annual value. It seems to me with regard to the application of section 79, that the subject is really free from doubt.

It is quite clear that that section means to refer to the fact that the St George's Harbour Co. had then obtained an Act of Parliament for carrying out their undertaking, but that the works remained to be constructed and completed, and it meant to give the benefits, which it does confer upon the undertaking, to such works as should be constructed under that Act of Parliament and no other. That disposes of the question as between the two classes of lands. Then another question arises—namely, what is to be included under "line of railway." It seems to me that "line of railway" is a very definite and explicit expression, and that the use of the words "line of railway" means to show that the advantage of being rated as agricultural land is confined to such land as is occupied by the rails of the undertaking. I do not mean to say to the distance merely between the two rails, but it would include whatever reasonably belongs to them—namely, that which is necessary for the use of those rails as a line of railway; I mean their physical use as rails. That would include the engine, turntable, and the sidings mentioned in Nos. 13 and 14, and nothing else. It seems to me that those are the only subjects which are entitled to the benefit of this rating as agricultural land. None of the other matters (Nos. 1 to 13) can by any possibility be designated as part of the line of railway. That disposes completely of section 79, and its applicability. Then comes the question how much of this property is to be rated at one-fourth under section 68? Section 68 is in the Act which was passed in 1854, but the legislation upon those lines is found in a general public Act of 1848, and I suppose that is the first time it appeared except in local Acts, but from 1848 this legislation has been general. The question has arisen upon exactly the same words in the two cases referred to by my brother Pollock. I certainly find a difficulty in understanding the *Swansea case;* and it seems to me that the *ratio decidendi*—how much of the ground is necessary for

the support of the rails—is a very unsatisfactory test. If that were the test I cannot understand why the platform, because it happens to be above such land, has anything to do with it, as in rating matters you may rate entirely different strata of property according as it is above or below the ground with reference to occupation, and they may be treated as different subjects of rating. But this much is quite clear, that it is in accordance with *The South Wales Railway Co.* v. *The Swansea Local Board*, that whatever is absolutely necessary for the physical use of the railway is to be treated as railway.

As regards the use of the word "only" in the section (section 68) its use is not quite clear, but the interpretation put upon the section is "land used as a railway only," and it is quite clear that the expression "land used as a railway only" is a very different expression from "line of railway"; and if the intention had been to confine the exemption to "line of railway" it would have said so in unmistakable terms. "Used as a railway" means the physical use as a railway. It does not mean those adjuncts to a railway which are necessary for convenient business purposes; but it means those things whatever they be, without which the railway could not be used as a highway, as the theory was that a railway was a highway, like a turnpike road, to be used by the public on certain terms. For railways as they are now managed there must be stopping places, and at these there must be platforms for the physical convenience of people getting into and out of the carriages.

It seems to me that a platform is reasonably included under the expression "land used as a railway"; but it is a question of degree, and in many great railway stations there are parts of the platform which are not at all necessary for that purpose, or for the purposes of the physical use of the railway, but are used to make the whole place more attractive. But in the present case there is no finding that the platforms are beyond what is reasonably necessary, and it would seem from the plan that they are confined within the narrowest possible limits within which the work of the railway could possibly be carried on.

Therefore we are acting consistently with the principle of the *Swansea case* in holding that these platforms are part of the land used for the purposes of a railway. The other case—the case of *The North-Eastern Railway Co.* v. *The Local Board of Scarborough*—is certainly a definite decision in the same direction. The court there say plainly that the local board was wrong in having claimed to treat those platforms (amongst other things) and sidings as exposed to the rating on the full net annual value.

I think therefore that we could not decide otherwise than as we are deciding without flying in the face of a decision of a court of co-ordinate jurisdiction. I think the decision is right, and I agree entirely in the application of that principle to the particular items in the schedule with which my brother Pollock has dealt in his judgment.

Judgment accordingly.

Solicitor for the appellants, *C. H. Mason.*

Solicitors for the respondents, *Chamberlain & Johnson*, Llandudno.

CORRECTION.—Erase the words, "articles of association every member had one vote for every share held by him," in the 4th and 5th lines from the end of the second column, *ante*, p. 343.

House of Lords.

From C. A. (England). Dec. 10.

THE GOVERNMENT STOCK INVESTMENT CO. v. THE MANILA RAILWAY CO. (*a.*)

Company—Debentures—Floating security—Condition allowing company to carry on business until default for certain period—Subsequent issue of bonds—Priority.

A company issued debentures "by way of floating security," and subject to conditions, one of which was that, notwithstanding the charge, the company should be at liberty, for the purposes of its business, to deal with any part of its property until default should be made in payment of any interest thereby secured for a period of three months, or until the company should be wound up. After interest had been more than three months in arrear, but before the debenture-holders had taken any step to enforce their security, the company issued bonds covered by a trust deed, which recited the issue of the debentures and that default had been made in the payment of interest.

Held, that, although the three months' period of grace had elapsed before the issue of the bonds, yet the debentures then still remained a floating security only; and, consequently, that the bonds had priority over the debentures.

Decision of the Court of Appeal, 44 *W. R.* 166, [1895] 2 *Ch.* 551, *affirmed.*

This was an appeal by the Government Stock Investment Co. from an order of the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.) reported 44 W. R. 166, [1895] 2 Ch. 551, which had reversed a decision of North, J.

The respondents were an English company formed in 1888. In 1889 they issued debentures to the extent of £730,000 as a floating security.

The words of charge were: "And the company hereby charges, by way of floating securities, all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being."

Indorsed on these debentures were certain conditions, one of which (condition 2) was that "Notwithstanding the said charge the company shall be at liberty, in the course and for the purposes of its business, to use, employ, sell, lease, exchange, or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due, or until an order of some court of competent jurisdiction shall have been made, or a special or extraordinary resolution shall have been duly passed for the winding-up of the company."

After default had been made in payment of interest on the debentures for more than three months, but before the debenture-holders had taken any active steps to enforce their security, the respondent company issued bonds, covered by a trust deed, which recited the issue of the debentures and that default had been made in the payment of interest on such debentures.

The debenture-holders claimed priority, and North, J., held that the debentures ceased to be a floating security on the expiration of three months after default had been made in the payment of interest on the debentures, and that they were entitled to priority.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

This decision was reversed by the Court of Appeal.

Farwell, Q.C., and *Disturnal*, for the appellants.—The debentures must be read with condition 2, so that the charge ceases to be a floating one after three months' default.

They referred to *Holroyd* v. *Marshall*, 11 W. R. 171, 10 H. L. Cas. 191; *In re Florence Land and Public Works Co.*, 27 W. R. 236, 10 Ch. D. 530, 540; *Driver* v. *Broad*, 41 W. R. 744, [1893] 1 Q. B. 744; *In re Horne* v. *Hellard*, 29 Ch. D. 736, 744, 33 W. R. Dig. 234.

Levett, Q.C., and *P. A. Abraham*, for the Manila Railway Co.—[They were stopped.]

A. R. Kirby, E. Beaumont, and *C. E. E. Jenkins*, for other parties, were not heard.

Lord HALSBURY, C.—This is a question turning on a very small point, the construction of the terms of the second condition endorsed on the instrument in question. It seems to me that it is impossible in the construction of any human language to exclude the situation of the parties, and the meaning that the transaction in which they themselves are at the moment engaged will present to the mind of either of the contracting parties. Now, what is this instrument? It is a debenture, upon which it is intended that money should be lent to a company which makes its money by trade, and I am asked to suppose that it was the intention of this condition that, upon default being made in the additional period of grace given, from that moment the whole of the commercial career of this trading company was to come to an end. I entirely repudiate the idea that Mr. Farwell has suggested as to standing by and not interfering, and so on. The parties contemplated that the thing might go on and not be wrecked by mere lapse of time, because there would be a power of standing by, and things might be done which were not strictly within the meaning of what both the parties contemplated by these debentures. That, therefore, is the security which they had in their minds. The effect of Mr. Farwell's construction would be not such a security as was agreed to. I must construe the document as it is, and, looking at the document as it is, it appears to me that it would be so absolutely unworkable in its operation that I do not think that the parties could have contemplated such a condition of things as this, that the moment the period of grace has elapsed, at that moment the power of the company to do anything with the property of the company ceased. How could that be the meaning? As a matter of business I should have thought it was impossible. I quite agree that mere absurdity of the conclusion will not necessarily govern the language used, unless it is not susceptible of another interpretation. Is the language susceptible of another interpretation? I think it is. I quite agree with Mr. Farwell that in some cases, looking at the nature of the transaction and the thing that is being dealt with, if you use the phrase that you may do so and so until a certain time, you may imply what, if you are reading it at large, you must supply in terms, "and no longer." One is familiar with a great many cases in which those words have actually occurred, where that negation is actually given to the words, but until one knows the concrete case in respect of which the language is so to be construed, I deny that it is true to say that in every case where you give some power or some liberty to deal with some matter up to a given time you must necessarily imply the words "and no longer." Here, when I come to look at the thing to be done, the object of the parties, the interest to both that the commercial power of the company should continue until it was absolutely brought to an end by course of law or the contingencies contemplated by the parties themselves, I deny that I am bound to put in the words by construction "and no longer." If the words, therefore, are at all susceptible of the meaning which has been attributed to them by the Court of Appeal, it appears to me, looking at the nature of the document and the nature of the transaction in which the parties were engaged, that it is much more reasonable to suppose that there was to be no interference with the power of the company to treat this as a floating security until the intervention of those things, which were familiar to both parties, might and could at the option of the parties, put an end to any such transaction at all. Under these circumstances it appears to me that the judgment of the Court of Appeal ought to be affirmed, and that this appeal should be dismissed with costs.

Lord MACNAGHTEN.—I also think that the judgment of the Court of Appeal is quite right. A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. But it is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement, but if there is no agreement for suspension, he may exercise his right whenever he pleases after default. In the present case, it was intended that the right of intervention on the part of the debenture-holders should be suspended for a time after default. That is what the second condition points to, and I do not think that it was meant to do more. The condition no doubt is awkwardly expressed. If the condition had said "Notwithstanding the said charge, the debenture-holders shall not be entitled to enforce their security during the prescribed period of grace," there would have been no difficulty. What it does say is "notwithstanding the said charge," that is, as I understand it, "notwithstanding the right of the debenture-holders under the said charge." And then it goes on to say the company shall be at liberty to carry on their business for the prescribed period, or until a winding-up order. During the period of grace, or until there is a winding-up order, the company are to be free to carry on their business, and they are to carry it on as of right. When that period comes to an end the charge is to have its ordinary effect. Thenceforward the business is to be carried on not as of right, but by the sufferance of the debenture-holders, and at their mercy. That, I think, is all that was really meant. Any other construction would obviously lead to consequences which it is impossible to suppose the parties could have intended. It is impossible to suppose that they could have meant that at the end of the period of grace the floating security should be turned into a fixed and binding charge, and that the business, without being stopped, should be allowed to drag on in a paralysed and helpless condition. For these reasons I think that this appeal should be dismissed.

Lord SHAND.—I am also of opinion that this appeal should be dismissed. I confess that upon reading the words contained in the second condition indorsed on the debentures, I was impressed, as others have been before whom the case has come for decision, with the view that the appellants' interpretation was sound; but upon further consideration, and after careful examination of the language, I

have come to a different opinion. The inconveniences which would result from the construction maintained by the appellants are obviously so great that I think the court should scrutinize the language in order to see whether that is the only construction that can be adopted, or whether it is a reasonable construction, and I do not think it is either necessary or reasonable. The result of the argument presented by Mr. Farwell appeared to be this, that the company going on with its business after default for upwards of three months in the payment of interest on its debentures, there might be two classes of persons in different situations; one class of persons, in ignorance of the terms of the debentures, would be safe in dealing with the company, while another class, with a knowledge of the terms of the debentures, would be unsafe in dealing with the company. I should have very great difficulty in any case, even upon the construction of the instrument which has been presented, in holding that if the creditors on these debentures lay by and took no step whatever to arrest the business, or to put a receiver in charge of the business, they could affect anyone in the transaction of business with the company. But I have come to be of opinion with your lordships, and with the Court of Appeal, that the true construction of this deed is that contended for by the respondents, to which effect has been given in the judgment complained of. The purpose and effect of the condition which was added—the condition which was appended to the debenture, and must be regarded as part of the debenture—was simply, as it appears to me, to secure that the company, for three months after default, in any case should have the power to go on with the business, unless, of course, there was a receiver appointed in the meantime. The deed gives the company that power of going on, but it does not say that at the expiration of three months after default they shall not go on with the business. It does not use any words such as the words "and no longer," which I think one would have expected to be used there considering the inconveniences that would result in the transaction of the business from the construction put upon the words by the appellants. It appears to me that the company were entitled to go on with the business longer, and until something would be done in the way of active interference on the part of the debenture-holders to make it known to all concerned that they acted on the power which they had in respect of default in payment of interest. And in the absence of any application for a receiver, or of any order of the court to bring the company to an end, I am of opinion that the debenture-holders' security remained as it was, and that it cannot be said that the company was paralysed as from the moment when the default occurred.

Lord DAVEY.—I am not afraid to say that I have had very considerable doubt about the true construction of this instrument. I think it is susceptible of both constructions which have been put forward, but I am bound to say that, if I merely confined myself to trying to put a meaning on the words that are used, I should come to the conclusion to which North, J., came and agree with Mr. Farwell's argument. But, on the other hand, one sees that these are conditions and terms inserted in an instrument regulating the rights of the mortgagees of the company relatively to the company, and of the company relatively to its mortgagees; and, like Lindley, L.J., when I look to the way in which Mr. Farwell's construction would work, and when I see that it would work somewhat, I will not say unjustly, but in the direction of bringing about a resul. which could hardly have been within the contemplation of the parties—or perhaps it might be sufficient to say that when, as it appears to me, Mr. Levett's construction is conceivably more likely to have been the meaning — I think it is a reason when two considerations so evenly balanced are presented to you for preferring Mr. Levett's construction to the other. Both constructions present great difficulties. I think that the words "notwithstanding the said charge" present difficulties in the way of both the learned counsel who have argued the case before your lordships. Mr. Farwell has to read the words "notwithstanding the charge" as if the words "floating security" were left out, but then he has to face the difficulty that the charge is only given as a floating security. On the other hand, Mr. Levett has a difficulty to meet in those words, I think, because certainly the expression "notwithstanding the floating security the security shall float for a certain time" is an unnatural one. At one time I thought that the latter words of the condition relating to a winding-up order or resolution were rather in favour of Mr. Farwell's construction, but I see now that those words are capable of a construction which would make them fit in with the view of Mr. Levett, and they do not import, as I thought they did at first, that this reference to this unhappy condition of things was intended to be a definition, for the purpose of this deed, of what was intended by a floating security. I think that they may be construed, as I think Lindley, L.J., intended to construe them, as meaning "unless in the meantime a winding-up order is made or a winding-up resolution is passed." On the whole, therefore, while admitting that the matter is one of very considerable difficulty of construction, I think that the better course is to agree with the opinion of the Court of Appeal.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Davidson & Morriss.*

Solicitors for the respondents, *Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — March 16.

DUNN v. MACDONALD. (*a.*)

Principal and agent—Liability of agent—Warranty of authority—Contract by public servant on behalf of Crown.

A public servant of the Crown who makes a contract on behalf of the Crown is not personally liable upon an implied warranty of authority to make such a contract.

Appeal from the judgment of Charles, J., [1897] 1 Q. B. 401.

The statement of claim alleged that the defendant, Sir Claude Macdonald, who was her Majesty's Commissioner and Consul-General for the Oil Rivers Protectorate (now known as the Niger Coast Protectorate), untruly represented and warranted to the plaintiff that as her Majesty's Commissioner for the Protectorate he was duly authorized and empowered to engage the plaintiff for the service and on behalf

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

of her Majesty in the Protectorate for the term of three years certain, and thereby induced the plaintiff to accept an engagement to serve in the said Protectorate, whereas he was not so authorized, and the engagement was determined before the expiration of the three years. The plaintiff claimed damages for breach of the warranty of authority.

The plaintiff had previously presented a petition of right against the Crown claiming damages for wrongful dismissal, in which judgment was entered for the Crown: see *Dunn* v. *Regina*, 44 W. R. 243, [1896] 1 Q. B. 116.

Charles, J., held that doctrine as to implied warranty of authority by an agent was not applicable to a public servant of the Crown when contracting in his public character. He accordingly gave judgment for the defendant.

The plaintiff appealed.

W. H. Stevenson, for the plaintiff, contended that the doctrine of *Collen* v. *Wright*, 6 W. R. 123, 8 E. & B. 647, as to an agent being liable upon an implied warranty of authority, was applicable to a servant of the Crown entering into a contract on behalf of the Crown.

He referred to *Macbeath* v. *Haldimand*, 1 T. R. 172; *Gidley* v. *Lord Palmerston*, 3 Brod. & B. 275.

Sir R. B. Finlay, S.G., and *H. Sutton*, for the defendant, were not called upon.

LORD ESHER, M.R.—I entirely agree with the ground upon which Charles, J., rested his judgment. There is another ground, however, upon which the judgment might be put. The cause of action alleged is that the defendant impliedly warranted that he had authority to engage the plaintiff for three years, whereas he had no such authority. The plain answer to that is that the defendant had authority in the name of the Crown to engage the plaintiff for three years, subject to the inherent right of the Crown to dismiss the plaintiff before the expiration of the term. Hence the alleged warranty must be put as high as this, that the defendant promised the plaintiff that he would be kept in his employment for three years certain, whereas he had no authority to promise that. Charles, J., assuming that the defendant did so engage the plaintiff for three years certain, held that, as the defendant in engaging the plaintiff acted in his capacity of a public servant of the Crown, no action would lie against him, and therefore he could not be made liable upon an alleged implied stipulation in the contract that he had authority. There was no question of any express warranty of authority here. I am of opinion that that decision is right. It is in accordance with a series of decisions extending back over 100 years. The appeal, must, therefore, be dismissed.

LOPES, L.J.—There is one insuperable obstacle in the way of the plaintiff's claim—namely, that the defendant had in fact authority to make the contract which he made. But there is a wider ground of objection, that a public servant entering into a contract on behalf of the Crown is not personally liable upon such contract, though a liability would be imposed upon him if the contract were made by him in his private capacity. That rule is well established by a long series of authorities, and is applicable to this case, inasmuch as the contract with the plaintiff was made by the defendant in his character as a public servant of the Crown.

CHITTY, L.J.—It is well established that a public servant of the Crown is not liable upon a contract entered into by him on behalf of the Crown. If the contention of the plaintiff were correct, that exemption from liability would be at an end, inasmuch as a public servant could be made liable for breach of warranty of authority. It is said that there is an implied warranty of authority by the defendant. Now, it is clear that the defendant in entering into this contract with the plaintiff was acting as the agent of the Crown, and in no other character. It would be contrary to the truth to draw an inference from that circumstance alone that the defendant warranted in his private capacity that he had authority to make such a contract.

Appeal dismissed.

Solicitors for the plaintiff, *Dunn & Hilliard.*

Solicitor for the defendant, *Solicitor to the Treasury.*

From Chan. Div. (Lord Russell of Killowen, C.J., and Lindley and A. L. Smith, L.JJ.) — Dec. 10, 11, 19.

HOBSON v. GORRINGE. (a.)

Fixtures—Mortgagor and mortgagee—Gas-engine fixed to the soil—Intention of affixers, how far material—Right of owner, by contract with mortgagor, to remove engine—Mortgagee taking possession without notice of contract.

A gas-engine which, for the purpose of convenient working, is fixed to a concrete bed by means of screws and bolts, becomes by such attachment a fixture and part of the soil. A mortgagee of the land is therefore entitled, on taking possession of the land, to take possession also of the engine, notwithstanding that the latter is the property of a third person, and that by an agreement in writing between that third person and the mortgagor (of which the mortgagee had no notice) the engine is not to become the property of the mortgagor.

Cumberland Union Banking Co. *v.* Maryport Hematite Iron Co., 40 *W. R.* 280, [1892] 1 *Ch.* 415, *questioned.*

Wood *v.* Hewett, 8 *Q. B.* 913, *and* Lancaster *v.* Eve, 7 *W. R.* 260, 5 *C. B. N. S.* 717, *discussed.*

Appeal by the plaintiff from Kekewich, J., who had refused to restrain the defendant from selling and and disposing of, otherwise than to the plaintiff, a certain gas-engine erected upon land lately in the occupation of one King.

The facts are fully stated in the judgment.

Joseph Walton, Q.C., and *Curtis Price*, for the appeal.—The engine was fixed to the soil only to enable it to be worked, and it continued a chattel. To make it a fixture, it must have been annexed to the soil with the intention that it should become a part thereof: *Holland* v. *Hodgson*, 20 W. R. 990, L. R. 7 C. P. 328; *Lancaster* v. *Eve*, 7 W. R. 260, 5 C. B. N. S. 717; *Wood* v. *Hewett*, 8 Q. B. 913; *Wake* v. *Hall*, 31 W. R. 585, 8 App. Cas. 195, 204. Here of course the burden is upon the plaintiff of showing that the engine was not intended to become part of the soil; but that he can show. The agreement between the plaintiff and King is merely a hiring agreement, and is governed by *Helby* v. *Matthews*, 43 W. R. 561, [1895] A. C. 471, not by *Lee* v. *Butler*, 42 W. R. 88, [1893] 2 Q. B. 318. It is common knowledge that gas-engines are very often let out on such hire-purchase agreements. The engine, if a fixture at all, is a trade fixture, and therefore may be removed: *Sanders* v. *Davis*, 33 W. R. 655, 15 Q. B. D. 218; *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*,

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

40 W. R. 280, [1892] 1 Ch. 415; *Gough* v. *Wood*, 42 W. R. 469, [1894] 1 Q. B. 713; *Huddersfield Banking Co.* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273, 282, 286.

They also cited *In re Peel, Ex parte Crossley Bros.*, [1894] 1 I. R. 235; in H. L., [1895] A. C. 457.

Warrington, Q.C., and *Willoughby Williams*, for the defendant, were directed to argue only the question whether the engine had become a fixture. —All the cases show that the intention to be regarded is to be inferred from the degree and the apparent object of the annexation to the soil. The cases relied on by the other side were cases of landlord and tenant, not cases between a mortgagee and the owner of something which had been affixed to the mortgaged land. *Lee* v. *Butler*, rather than *Helby* v. *Matthews*, covers this case.

Joseph Walton, Q.C., replied.

[*Cur. adv. vult.*

Dec. 19.—A. L. SMITH, L.J., read the judgment of the court as follows: This case, though small as to amount, raises a considerable question; which is, whether a mortgagee of land in fee, when he enters upon the mortgaged premises, can take possession of an engine which is attached to the soil thereof by means of bolts and screws, although the engine did not and never had belonged to the mortgagor, but to a third party. Upon the 7th of January, 1895, the plaintiff Hobson, by a contract in writing not under seal, let to a builder named King a gas-engine, upon what is known as the hire and purchase system, for the purpose of being fixed on King's land at Worthing, of which King was owner in fee. By the contract it was agreed that King was to pay Hobson for the engine £18 in cash before delivery, and the sum of £3 10s. per month after delivery for the period of ten months, at the expiration of which time the gas-engine was to become the absolute property of King upon the further payment of £3. It was also agreed that if, during the continuance of the hiring, King should fail to pay the hire or any part thereof, Hobson should be at liberty to repossess himself of and to remove the gas-engine, and that King should have no claim whatever against Hobson, either for money he had paid for the gas-engine or for any damage sustained by reason of the retaking thereof. It was further agreed that the contract should not be construed to operate in any way as a contract for the sale of the gas-engine, but only as an arrangement for the hire thereof, unless and until King should have paid the instalments before mentioned. It was known to Hobson that this gas-engine was required by King in order to drive a saw-mill which he had upon his land at Worthing, and that the way it was to be erected (and in fact was erected) for this purpose was as follows: In the first place a bed of concrete was prepared, in which were embedded two iron plates, out of each of the four outside corners of which an iron bolt projected upwards in a vertical position, having a screw at its uppermost end. The base plate of the gas-engine was fitted with four holes, one at each outside corner, so that when the engine was placed in position upon the concrete bed the four bolts projected through the four holes in the base of the engine, and nuts were then screwed down tightly upon the tops of the bolts, and thus the engine was kept in position and prevented from rocking or shifting, as it would have done if merely placed upon the concrete foundation, without the aid of the projecting bolts. An exhaust pipe and exhaust boxes and a pulsometer were also let on hire and purchase to King by the plaintiff, together with the gas-engine, which were more or less affixed to the building in which the engine stood, but we do not consider that these have any material bearing upon the case, for if the affixing of the gas-engine in the manner above described did not convert it into a fixture, and thus part of the freehold, we do not think that the other attachments, upon the conflicting evidence relating thereto, should be held to do so.

The above statement of fact shows what was the ostensible annexation of the gas-engine to the soil of King's land, as also the object for which it was so annexed. King made some of the monthly payments of £3 10s. to Hobson, and then fell into arrear, and he has never made the contracted payments so as to become the owner of the gas-engine as a chattel. Upon the 24th of July, 1895 (we omit a former mortgage of the 26th of March, 1894, for it is not relevant to the point under consideration), King, for valuable consideration, conveyed by way of mortgage to the Rev. Mr. Gorringe his land at Worthing (together with the saw-mill, engine-house, warehouses, and other buildings erected thereon, and the fixed machinery and fixtures) in fee simple, subject to the usual proviso for redemption. On the 17th of January, 1896, King was adjudicated a bankrupt, and in March of that year the mortgagee, Mr. Gorringe, lawfully entered and took possession of the mortgaged premises, together with the gas-engine, which he found in its place as before mentioned.

The question is whether Mr. Gorringe is entitled, under the above circumstances, to the gas-engine. It is not disputed that he is entitled to the land; but the plaintiff, Hobson, denies that he is entitled to the gas-engine, upon the ground that it had never become King's property, and had always remained a chattel belonging to him, Hobson. There can be no doubt, on a mortgage in fee of land, that as between the mortgagor and mortgagee the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. If North, J., in the passage in his judgment which has been referred to in *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.*, 40 W. R. 280, [1892] 1 Ch. 415, at p. 425, meant to hold otherwise, in our opinion he was in error, but we doubt if he intended so to hold. The case of *Gough* v. *Wood*, decided in this court, in no way assists the plaintiff in this case, and has no application to the present case. That case was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. For additional confirmation of the *ratio decidendi* of this case, what was said by Lindley, L.J., at p. 282, and by Kay, L.J., at p. 286 in the case of *The Huddersfield Banking Co.* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273, may be referred to. Even if in the present case a licence had been granted by Gorringe to King to remove the gas-engine during the continuance of a term (neither of which in fact existed), Gorringe by entering and taking possession of the land and engine would have determined such licence.

We now come to the real point made on behalf of the plaintiff Hobson. It is this. It is said that this gas-engine never was a fixture, but always remained a chattel, and consequently never passed to Gorringe as mortgagee of the land. It obviously did not pass to him as a chattel under the mortgage of "fixed machinery," for if a chattel, it ever remained Hobson's, and never was the property of King, and unless Mr. Gorringe takes the engine as being part of the land mortgaged to him, he does not take it at all. Now, leaving out of consideration for the present the hire and purchase agreement of the 7th of January, 1895, there is a sequence of authorities which estab-

lish that the gas-engine, affixed as it was, and for the purpose for which it was, to King's freehold, ceased to be a chattel, and became part of the freehold. Take, first of all, the case, in 1853, of *Wiltshear* v. *Cottrell*, 1 El. & Bl. 674, 688. There the court of Queen's Bench, held that a threshing-machine fixed by bolts and screws to posts which were let into the ground, and which machine could not be got out without disturbing some of the soil, would clearly pass under a conveyance of land and all fixtures. In the case, three years afterwards (in 1856), of *Mather* v. *Fraser*, 4 W. R. 387, 2 K. & J. 536, which was a case between the assignees of a mortgagor and mortgagees, Page Wood, V.C., held that machinery fixed to the land, whether by screws, solder, or other permanent means, passed to the mortgagees. Again, in *Walmsley* v. *Milne*, 8 W. R. 138, 7 C. B. N. S. 115, which was a case beween a mortgagor and mortgagee in fee, the Court of Common Pleas held that a steam-engine and boiler and other implements secured by bolts and nuts to the walls, though they were all capable of being removed without injury either to the machinery or to the premises, were fixtures, and passed to the mortgagee as part of the freehold. In *Climie* v. *Wood*, L. R. 3 Ex. 257, 16 W. R. C. L. Dig. 72, which was a case between mortgagor and mortgagee in fee, the jury found that an engine and boiler which were used for sawing purposes (the engine being screwed down to planks upon the ground, and the boiler being fixed in the brickwork) were trade fixtures, and had been so fixed for their better use and not to improve the inheritance, and that they were removable without any appreciable damage to the freehold. The Court of Exchequer, nevertheless, held that the engine and boiler passed to the mortgagee, and this judgment was affirmed by the Court of Exchequer Chamber (reported L. R. 4 Ex. 328, 17 W. R. C. L. Dig. 88), Willes, J., who delivered the judgment of the court, stating that the reasons for a tenant with a limited interest being allowed to remove trade fixtures were not applicable to the owner of the fee. In *Longbottom* v. *Berry*, L. R. 5 Q. B. 123, 18 W. R. C. L. Dig. 43, which was a case between assignees of a mortgagor and mortgagees, it was also held that machinery annexed to the floor of a building in a "*quasi* permanent manner" by means of bolts and screws passed to the mortgagees, and in 1872 the Exchequer Chamber in *Holland* v. *Hodgson*, 20 W. R. 990, L. R. 7 C. P. 328, affirmed *Mather* v. *Fraser* and *Longbottam* v. *Berry*, and held that looms attached by means of nails driven through holes in the feet of the looms into the floors, which attachment was necessary to keep the looms steady when at work, and which nails could be drawn easily and without any serious damage to the flooring, formed part of the realty, and passed to the mortgagee in fee. If there had been in this case nothing but the existing visible degree of annexation of the gas-engine to King's freehold and the known object for which such annexation had taken place, the authorities conclusively establish that the gas-engine had ceased to be a chattel, and had become part of the freehold.

But it was argued that the terms of the hiring and purchase agreement caused this engine to remain a chattel, notwithstanding its annexation to the soil, for it was said that the intention of the parties who placed it where it was must be considered, and, if this consideration showed that the intention was that the chattel was not to be a fixture, though actually fixed to the freehold, it still remained a chattel. In support of this argument a passage in the judgment of Lord Blackburn (then Blackburn, J.), when delivering the judgment of the Exchequer Chamber in *Holland* v. *Hodgson* was vouched. That learned judge, when dealing with what were or were not fixtures, says: "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying upon those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. The question in each case is whether the circumstances are sufficient to satisfy the onus." It is said on behalf of the plaintiff that the hire and purchase agreement shows an intention on Hobson's part, as also on King's part, that the gas-engine should remain a chattel until King had paid the contracted instalments, which he never did. Now, if the engine had been a trade fixture erected by King, as tenant with a limited interest, we apprehend that when affixed to the soil as it was it would have become a fixture—*i.e.*, part of the soil, and would immediately have vested in the owner of the soil, subject to the right of King to remove it during his term. "Such," says Lord Chelmsford in *Bain* v. *Brand*, 1 App. Cas. 762, 772, 25 W. R. Dig. 246, "is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power, as between himself and his landlord, of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed."

It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—*i.e.*, part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the contracted monthly instalments. In our opinion the engine became a fixture—*i.e.*, part of the soil—subject to this right of Hobson which was given him by contract. But the right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right; and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound, either at law or in equity, by King's contract. The plaintiff's remedy for the price, or for damages for the loss of the chattel, is by action against King, or, he being bankrupt, by proof against his estate.

This, in our judgment, is sufficient to determine this case in favour of the defendant. But as another point has been stoutly argued on behalf of the plaintiff we will deal with it. It is said that the intention that the gas-engine was not to become a fixture might be got out of the hire and purchase agreement, and that if so, it never became a fixture and part of the soil; and it was said that the case of *Holland* v. *Hodgson* had so decided. For this point it must be assumed that such intention is manifested by the hiring and purchase agreement, though, as before

stated, we think it is not. Now, in *Holland* v. *Hodgson* Lord Blackburn, when dealing with the "circumstances to show intention," was contemplating and referring to circumstances which showed the degree of annexation and the object of such annexation, which were patent for all to see, and not to the circumstance of a chance agreement, which might or might not exist, between the owner of a chattel and a hirer thereof. This is made clear by the examples which Lord Blackburn alludes to to show his meaning. He takes as instances (*a*) blocks of stone placed in position as a dry stone wall or stacked in a builder's yard; (*b*) a ship anchor affixed to the soil, whether to hold a ship riding thereto or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to show intention is the degree and object of the annexation, which is in itself apparent, and thus manifests the intention. Lord Blackburn in his proposed rule was not contemplating a hire and purchase agreement between the owner of a chattel and a hirer, or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration is to be entertained, in our judgment, is not well founded.

It was further argued on behalf of the plaintiff that the cases of *Wood* v. *Hewett*, and *Lancaster* v. *Eve* showed that the intention of the parties affixing a chattel to the soil must be ascertained when considering whether a chattel is or is not a fixture and part of the soil. In our opinion these cases do not show this; and indeed, if they did, as before stated, if the hire and purchase agreement is considered it does not show what the plaintiff says it does. In the first case, *Wood* v. *Hewett*, the plaintiff, a miller, had put up a movable hatch which worked up and down a groove in some immovable masonry and brickwork upon the defendant's land, and had so used it for years, the complaint against the defendant being that he had pulled up and taken away the hatch. The question was whether this movable hatch remained the plaintiff's or had become the property of the defendant. The jury found that the property remained the property of the plaintiff, and the court *in banco* held, as we read the case, that the jury were well warranted in finding that, as between the plaintiff and the defendant, the former had become entitled to have the hatch, which was his own property, standing in the soil of the defendant; in other words, that it might be inferred that the plaintiff had acquired an easement of having his hatch on the defendant's land, and could therefore sue for interference therewith. There was no question in that case between a mortgagee and a third party. In the second case, *Lancaster* v. *Eve*, the plaintiff, who was a wharfinger, many years before action brought, had driven a pile into the bed of the Thames, which was the property of the Crown, for the purpose of carrying on the necessary business of his wharf, and for years and years had used this pile without interruption by anyone, until the defendant's barge, by reason of the negligence of the defendant's servant, ran against it and carried it away. The point taken by the defendant was that the pile had been affixed to and formed part of the bed of the river, which was not the property of the plaintiff, and that, therefore, he could maintain no action for injury thereto; but the court held that as between the plaintiff and the Crown it ought to be inferred that although the pile had been affixed in the soil of the river, yet it was so affixed by agreement between the plaintiff and the Crown that the former should have an easement over the Crown's property so as to be able to use the pile necessary for carrying on the business of the plaintiff's wharf. This is the point decided, though there are, as has been pointed out, some isolated passages as to the intention of persons when affixing a chattel to the soil. That the plaintiff had a cause of action in some form or other against the defendant cannot be denied, but if the case decided, as it is argued it did, that the pile remained a chattel, we do not agree with it. That a person can agree to affix a chattel to the soil of another, so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to retake possession, we do not doubt. But how a *de facto* fixture becomes not a fixture, or is not a fixture as regards a purchaser of land for value without notice, by reason of some bargain between the affixers, we do not understand; nor has any authority to support this contention been adduced.

For the reasons above, in our judgment the gas-engine became affixed to and was part of King's freehold, and thus passed to Mr. Gorringe as mortgagee in fee of King's land. The point made upon the plate on the gas-engine when delivered comes to nothing, for it is no more than an indication of what the agreement was as between Hobson and King, and as there is no evidence whatever that Mr. Gorringe was ever made aware of it it cannot affect his right as mortgagee in fee of King's land. In our judgment Kekewich, J., was right when he gave judgment, as he did, for the defendant, and we think that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *C. W. & H. B. Taylor*; *E. H. Quicke*, for *H. M. Williams*, Brighton.

High Court of Justice.

Q. B. Div. (Hawkins, Cave, Wills, Wright, and Kennedy, JJ.) — March 13.

HAWKE v. DUNN. (*a*.)

Gaming—Betting—"Other place"—Tattersall's Ring—User—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

By the Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3, "*Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes" of betting with persons resorting thereto is liable to a penalty.*

The respondent, a professional betting man, was present in an enclosure known as Tattersall's Ring at Hurst Park Racecourse on the occasion of a race-meeting and by calling out the odds on horses invited other persons to make bets with him, and did in fact make bets with other persons in the enclosure. The enclosure was about 40 *yards long and* 30 *yards wide, and was bounded on three sides by iron railings and on the fourth by a building which formed part of the enclosure. The respondent moved about within the enclosure, and did not confine himself to any particular spot. Upon an information preferred under section* 3 *of the Betting Houses Act*, 1853,

Held, that the enclosure was a "place" used by the respondent for the purpose of betting with persons resorting thereto, and that the respondent was liable to a penalty under that section.

Case stated by justices of Kingston-on-Thames.

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Upon the hearing of an information preferred by the appellant against the respondent under 16 & 17 Vict. c. 119, s. 3, for that he, on the 4th day of July, 1896, unlawfully used a certain place—to wit, an enclosure known as the "One Pound Enclosure" or "Tattersall's Ring," for the purpose of betting with persons resorting thereto upon certain events and contingencies of, and relating to, horse-races—the justices dismissed the information.

A case was stated for the opinion of the court, the question being whether the enclosure was a "place" within the meaning of the Act, and whether the respondent used it for the purpose of betting with persons resorting thereto.

The facts are fully stated in the judgment.

Section 3 of the Betting Houses Act, 1853 (16 & 17 Vict. c. 119), imposes a penalty on "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes" of betting with persons resorting thereto, or for the purpose of any money being received as consideration for any promise to pay money upon a contingency of, and relating to, any horse-race.

Asquith, Q.C. (*Reginald Brown* with him), for the appellant.—The question is whether a person, not confining himself to any fixed spot in an enclosure, can be guilty of an offence under the Act. The word "place" in the Act has been construed in several cases as having a wider application than the doctrine of *ejusdem generis* would warrant. A distinction is drawn in the Act between "using" and "resorting to" a place. The man who "uses" a place is the man who goes there for the purpose of conducting the business of betting, while "resorting to" a place is the mere chance going there: *Reg.* v. *Preedy*, 17 Cox C. C. 433. That is a necessary expansion of the Act. It is therefore the business of betting, and not mere betting, that is prohibited. So that where you have a defined space to which anyone may resort, and a person using that space for the purpose of conducting the business of betting with those who resort to it, you have a state of things contemplated by the Act. All that is required to constitute a "place" is that there should be some kind of circumscription. The authorities all point to something defined. The umbrella, stool, or box are mere illustrations showing that there was evidence from which the magistrate might hold that the place was defined. In the present case there being an area fenced off, it was not necessary to show that the respondent confined himself to a particular spot. The owner of the enclosure could have been proceeded against for permitting it to be used for the purpose of betting with persons resorting thereto: *Eastwood* v. *Miller*, 22 W. R. 799, L. R. 9 Q. B. 440; *Haigh* v. *Town Council of Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 102. It follows that the persons he permitted so to use the enclosure are also within the purview of the Act.

Bigham, Q.C. (*Stutfield* with him), for the respondent.—The Act is a penal Act. Therefore expansions are not justifiable. The user of which the Act speaks is exclusive user. The preamble shows that the Act was designed to put down betting houses, and things *ejusdem generis* with betting houses. This is also clear from the terms of section 12 which empowers the Commissioner of Police to break into betting houses and offices.

Asquith, Q.C., in reply.—The preamble cannot interfere with the words of the Act. Besides, the preamble really indicates that it is ready-money betting which is the mischief the Legislature had in view.

The judgment of the court was read by

HAWKINS, J.—An information preferred by John Hawke, the appellant, against Richard Dunn, the respondent, charging that the respondent on the 4th day of July, 1896, unlawfully used a certain place, to wit, an enclosure known as "the One Pound Enclosure" or "Tattersall's Ring," situated upon the Hurst Park Racecourse, for the purpose of betting with persons resorting thereto, upon certain contingencies relating to horse-races, contrary to the statute 16 & 17 Vict. c. 119, s. 3, came on for hearing by a bench of magistrates at Kingston-on-Thames on the 23rd of July last, when they dismissed it, but on the application of the appellant stated this case for the opinion of this court.

The material facts are as follows: The respondent is a bookmaker and professional betting man. The Hurst Park Club, a limited company, is the owner of many acres of land on Moulsey Hurst, Surrey, enclosed by a tall fence with gates at different points for ingress and egress. Within this enclosure the company has for some years past held a series of meetings for horse-races, and upon the ground comprised within it a racecourse with the usual accessories has been formed, and admittance to the interior of this, which I will call the main enclosure, is obtained on payment of 1s. for each person. Within this enclosure are three stands, each with a smaller enclosure attached to and communicating with it; the charges for entry to these stands respectively are £1, 10s., and half-a-crown. All the entrance moneys are received by the company. The £1 stand, generally known as Tattersall's ring, is roofed over and contains rows of seats rising from the ground in tiers; the enclosure attached to it is about 40 yards long and 30 yards wide, and is bounded on one side by the stand and on the remaining sides by an open iron fence about breast high. Adjoining thereto are the 10s. and the half-crown stands and enclosures similarly constructed and fenced. At a race meeting held on the day named in the information many thousand persons were admitted to the main enclosure. Of these about 1,000, including the respondent and fourteen other bookmakers, each accompanied by his clerk, were admitted within Tattersall's ring. Each of these bookmakers shouted out the odds against the different horses about to run and so invited all the other persons about them to bet with them. Many did so, each backing the horse he fancied; but before his bet was booked he was required to pay in advance to the bookmaker a deposit of the money for which he backed the horse, and the bookmaker in exchange handed to him a ticket or voucher bearing upon its face the names of both the bookmaker and the horse and the odds laid by the bookmaker against it. It was not suggested that the respondent had any control over or interest in the company other than that he held shares it. The respondent did not in Tattersall's ring confine himself to any one fixed spot or locality; he had no stool, box, umbrella, or anything of a similar character to denote the precise spot upon which from time to time he was carrying on his betting operations; but he moved about in the ring at his will, shouting out the odds and making his bets in various parts of it. As soon after each race as the winning jockey had weighed in and passed the scales "all right," the fact was publicly signalled by the hoisting of a flag, and then the bookmakers, upon production of the vouchers, paid to the backers the bets they had won.

The magistrates determined that the case before them was governed by the case of *Snow* v. *Hill*, (1885) 33 W. R. 475, 14 Q. B. D. 588, hereafter considered, which they treated as deciding that the respondent "could not be convicted unless he had

a certain fixed place from which he never moved, such as a stool, umbrella, &c.," and they therefore thought that the enclosure could not be considered a fixed place, for, if so, every person who resorted to and used the enclosure and made a bet therein would be liable to conviction for using the enclosure for betting purposes. They accordingly dismissed the information. The question submitted to us is whether the magistrates came to a correct decision in point of law, and, if not, what should be done in the premisses.

Before the passing of the statute above mentioned (the Betting Houses Act, 1853) much betting and wagering on horse-races had been no doubt carried on without legislative interference. It is clear from the preamble of the Act now in question that in the year 1853 a new system of betting had then recently sprung up by the establishment of houses and offices for the carrying on in them of betting businesses of a kind which, in the opinion of the Legislature, tended to the injury and demoralization of improvident persons, and it is equally clear that one of the practices deemed to be objectionable and injurious was that which is known as ready-money betting—viz., that the person making the bet deposited with the bookmaker the money which he was disposed to adventure. It is true that the preamble has been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), by which it is provided that such preamble may be omitted from any revised edition of the statutes; but the same Act provides (section 1) that the repeal shall not affect the operation or construction of the statute, and it is therefore legitimately to be referred to as affording information of the circumstances under which the Act came to be passed and, in so far as it directly throws light upon the question, of the object which the Legislature had in view. It expressly declares that one object at least proposed by the Legislature was the suppression of this kind of gaming. It was therefore, not merely to prevent its being carried on in houses or offices that the Act of 1853 for the suppression of betting houses (16 & 17 Vict. c. 119) was passed. Now to pass an Act simply to forbid such gaming in houses or offices would have been comparatively useless; it would have been to leave open a host of places not falling within the description of houses or offices and impossible to describe by anticipation, where, with equal facility and equally demoralizing effect such obnoxious betting might be carried on with impunity. (See Lush, J., in *Haigh v. Town Council of Sheffield*, (1874) L. R. 10 Q. B. p. 109.) If I have correctly interpreted the object and intention of the Legislature I must say, with all respect to the views of those who in some of the cases hereafter mentioned have intimated a different opinion, it seems to me it would be frittering away the provisions of the Act to hold that a well-defined enclosure known by a particular name and noted to be used as a betting ring could not be treated as a place within the meaning of the Act unless the person charged with using it for the particular forbidden purposes confined himself to a single spot indicated by some such thing as a stool or a box to stand on, or an umbrella stuck in the ground spread over his head; and that by changing his position from time to time by walking about and making his bets upon different spots in the same ring he could avoid the penalties because he was not using a "place." To me this view is unintelligible, and it becomes more so when we find, as we shall when I discuss the authorities, that for permitting several bookmakers to wander about in and use the whole enclosure generally for the forbidden kind of betting the owner or occupier might be convicted of permitting an illegal use of a place, yet that none of such bookmakers could be convicted of actually using it, because each of them used every or any part of the enclosure at his pleasure, and did not confine himself to one fixed spot in it.

The Act, by section 1, forbids the opening, keeping, or using any house, office, room, or other place for the purpose of the owner, occupier, or keeper thereof, or any person using the same or conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any bet on any horse-race; and declares that every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, shall be a common nuisance: and by section 2 shall be taken and deemed to be a common gaming-house. It will be observed that the two sections I have just referred to have no other effect than to taint with illegality for the time being, any house, &c., or other place opened, kept, or used for the purposes mentioned. The third section is that which deals with the persons who open, keep, or use houses, &c., for such illegal purposes. It enacts that any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use, or permit the same to be opened, kept, or used, for the purposes mentioned in sections 1 and 2, or either of them, shall on summary conviction thereof be liable to a penalty not exceeding £100. It is under this section that the respondent was charged in the information. Undoubtedly this section is not quite so clearly framed as it might have been, and this defect has given rise to much discussion and confusion as to the proper interpretation to be put upon it.

For the respondent it is contended that the words "or other place" mean some other place *ejusdem generis* with a house, office, or room. I, of course, recognize the usual rule observed in the construction of Acts of Parliament—that general, following specific, words should be limited to things *ejusdem generis* with those before enumerated; but this rule of construction must be controlled by another equally general one, that Acts of Parliament ought like wills or other written documents to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed. See *Harrison* v. *Blackburn*, 13 W. R. 135, 17 C. B. N. S. at p. 689, *per* Erle, C.J., and Byles, J.; *Campbell* v. *Prescott*, 15 Ves. at p. 503, *per* Sir W. Grant, M.R. In my opinion to limit the meaning of the words "other place" to some other place *ejusdem generis* with a house or office would have the effect of defeating, not of forwarding, the object of the Legislature; and I cannot imagine that, with the desire to suppress that kind of betting mentioned in the preamble, it was in contemplation to afford it a sort of sanctuary in a betting ring or in any other place not *ejusdem generis* with a house and office. The interpretation to be given to a similar expression used in the statute 42 Geo. 3, c. 118, making it penal for any person to keep any office or place to exercise any lottery, is expressly declared by 4 Geo. 4, c. 60, s. 60, to be any place in or out of an enclosed building, whether upon land or water, where illegal practices shall be carried on. This confirms me in the view I have taken. I am further confirmed in this view by the authorities, hereafter cited, of each of the courts of common law.

Upon a careful consideration of these authorities, I cannot say that all are equally satisfactory; but there is not one of the judgments which, as distinguished from the *dicta* not material to the judgment, is

against the contention of the appellant in the present case.

The case of *Doggett* v. *Catterns*, (1864) 13 W. R. 160, 390, 17 C. B. N. S. 669, 34 L. J. C. P. 46, and (on appeal) in Ex. Ch., 19 C. B. N. S. 765, 34 L. J. C. P. 159, is that which has been most often cited in favour of the views of the respondent. The judgment itself, in that case, really decides nothing affecting the present question; but the *dicta* of the majority of the judges are in favour of the appellant's views. It was an action brought under section 5 of the statute of 1853 to recover back from the defendant money received by him from the plaintiff as a deposit on a bet contrary to section 4, which makes it a penal offence for any person, being the owner or occupier of any house, office, room, or place used for the purposes aforesaid, to receive such a deposit. The defendant, a bookmaker, was carrying on under a clump of trees in Hyde Park his betting operations with many persons who resorted thereto. The plaintiff was one of such persons, and he backed with the defendant for £5 10s. a horse about to run at the Lincoln races, and paid then and there a deposit of that sum. The defendant thereupon laid him odds against the horse. The horse did not win, and this action was then brought by the plaintiff against the defendant to recover back his deposit. The case was argued, first, in the Court of Common Pleas before Erle, C.J., and Keating, J., who gave judgment for the plaintiff. That judgment, however, was reversed in the Exchequer Chamber on the ground that the defendant was not the owner or occupier of the spot on which his betting took place within the meaning of section 4. This was quite right, for undoubtedly the defendant was neither owner or occupier of any part of Hyde Park. The question whether the spot under the trees was a place within the meaning of sections 1 and 3 was not judicially determined, nor was it, under the circumstances, essential to the judgment. In the Court of Common Pleas, however, in reference to its being a place, Erle, C.J., said: "The mischief is to my mind precisely the same, whether the party stands under the shelter of an oak tree or of a roof or covering of canvas." Later on, when speaking of the intention of the Legislature, the Chief Justice said: "It was intended to present every possible obstacle to the professed gamester using a place for exercising his vocation, and for that purpose to prohibit the keeping or using of any known place for the receipt of deposits, on the contingency of a particular horse running and winning at a horse-race." In the Exchequer Chamber the court, being composed of Pollock, C.B., Crompton, J., Blackburn, J., Bramwell, B., Channell, B., Mellor, J., and Pigott, B., all agreed that the judgment of the Common Pleas should be reversed upon the ground I have already mentioned. But Pollock, C.B., Crompton, J., Blackburn, J., and Channell, B., substantially agreed with Erle, C.J., and Keating, J., in thinking the spot was "a place" within the meaning of the Act, Bramwell, B., Mellor, J., and Pigott, B., holding an opposite view on the ground as stated by Bramwell, B., that it was "not a place capable of being used within the meaning of the Act," and Pollock, C.B., in his judgment, is reported to have said that the place had not the possibility of an owner or occupier. I cannot think that these reported expressions quite represent what the learned judges intended to convey. Bramwell, B., must have meant that it was not capable of being used within the meaning of section 4, because the man who used it was neither owner nor occupier, and Pollock, C.B., not that it was not possible for it to be owned or occupied by anybody, but that it could not be owned or occupied by the defendant. As a matter of fact it was used, and also as a matter of fact it was owned by the Crown and capable of occupation. Various spots in Hyde Park are used daily, and anybody visiting Hyde Park will find orators, preachers, singers, lecturers, reciters, agitators, and occasionally comic entertainers and orchestras, using various greater or smaller areas in it. Do none of these occupy places? Blackburn, J., to my mind put the decision in *Doggett* v. *Catterns* on its proper footing. These are his words: "I do not say that an open field is not a place which may come within the description of the term place in the statute, but it is necessary to show that the person against whom the action is brought under section 5 is either owner or occupier of the place, or acting on behalf of the owner." Thus it will be seen that of the nine judges before whom the case was argued, six expressed opinions that the spot under the trees was a place. *Doggett* v. *Catterns*, therefore, is in favour of and not against the appellant in this case. In *Shaw* v. *Morley*, (1868) 16 W. R. 763, L. R. 3 Ex. 137, the appellant, as clerk to a bookmaker, sat at a desk placed on, but not affixed to, the soil, in an uncovered enclosure close to the grand-stand at Doncaster, managing a deposit betting business there. Kelly, C.B., Martin, B., and Pigott, B., held it was both an office and a place, and that the business carried on was the very thing the Act intended to prevent. In *Eastwood* v. *Miller*, (1874) 22 W. R. 799, L. R. 9 Q. B. 440, the appellant was charged with permitting a certain place, "to wit, a field," to be used for the purpose of betting. The field referred to was an enclosure in extent nearly four acres, and known as the "Dewsbury Borough Park Ground." On the day named a pigeon-shooting match was was about to take place, a number of people were admitted to the ground, of which the appellant was in fact the sole occupier, and he received entrance money. Inside the enclosure, among the persons assembled, were two bookmakers with books shouting out the odds on the match, and betting with those disposed to bet, and receiving money by way of deposit from their customers. The appellant stood by and could see what was going on, but said and did nothing. The justices found that the ground was a place within the meaning of the Act, and that the appellant permitted it to be used for the purposes forbidden by sections 1 and 3, and convicted him. On appeal against this conviction, Lush, J., in his judgment, said: "First, was it a place? It could hardly be contended that grounds uncovered cannot be a place within the meaning of the Act. I see no reason whatever, from the framing of the Act, to hold that there cannot be a 'place' within the meaning of the Act, unless it is a structure of some kind, a building or a tent. An enclosed area, though uncovered, might as well be a 'place' within the Act, as a place either covered with canvass, as a tent, or a light structure, as a building. It is an enclosed place occupied exclusively by the appellant, and is therefore within the language and the intent of the Act. The fact that it is alarge enclosure cannot affect the question if it is a place occupied and enclosed within the meaning of the Act, to which persons were admitted by the sufferance of the occupier." The fact that the appellant was the sole occupier only showed more clearly that he had the fullest power to check the use of it, otherwise it was immaterial. As to whether the place was used for the purpose of betting within the meaning of the Act, the same learned judge said: "It is objected that it was only shewn that on one occasion this was done; and, moreover, it was objected, that the primary object of keeping the place was not for the purpose of betting but for the purpose of pigeon shooting. I cannot take this view of the evidence." Archibald, J., concurred. They agreed that *Doggett* v. *Catterns*, which was cited for the appellant,

did not govern the case, and affirmed the conviction. In *Haigh* v. *The Town Council of Sheffield* (1874), the appellant was convicted of permitting the illegal use of an enclosure under very similar circumstances. On appeal, Blackburn, Mellor, and Lush, JJ., upheld the conviction. It would be inconvenient to set out the judgments at length, but each is well worthy of perusal. It is difficult to draw any satisfactory distinction between these two cases and the present one. Here the respondent used the enclosure himself; in those cases the appellants permitted the user by others: see also *Regina* v. *Cook*, (1884) 32 W. R. 796, 13 Q. B. D., at p. 385.

In *Bows* v. *Fenwick*, (1874) 24 W. R. 804, L. R. 9 C. P. 339, the appellant was convicted of using a place on the racecourse—the Roodee at Chester—for the purpose of betting. He stood on a stool in the Roodee over which was spread a large umbrella, open, and supported by a long stick or handle stuck in the ground by a spike. From this stool and under this umbrella the appellant called out the odds against the various horses, made bets, received deposits of money, and gave tickets. It was not disputed that this was a betting within the penal clauses of the Act. The only real question was whether it was an "other place" within the meaning of sections 1, 2, and 3. The court (Lord Coleridge, C.J., and Brett and Denman, JJ.) held that the spot used was such a place, saying that to constitute such a place it should be fixed and ascertained, and Lord Coleridge said there was, to use his own words, sufficient fixity of the structure by means of the spiked umbrella, and he distinguished that case from *Doggett* v. *Catterns* upon the ground that there was in the latter case no ascertained place within the ambit of the park in which the appellant, the defendant in that case, carried on his avocation. The conviction was affirmed. In the actual judgment I entirely agree, for the evidence to support it was overwhelming; but I am not prepared to adopt the *dicta* of the learned Chief Justice if he intended to suggest the necessity that to constitute a place the precise spot used by the appellant to carry on his betting should be indicated. Nor do I agree in the distinction he drew between *Doggett's case* and that which he was deciding. The "place" used by the appellant *Bows* v. *Fenwick* was the whole enclosure. He was entitled to use every part of it and to change his location within it as often as he thought fit; but however often he changed it he was still using the enclosure—a defined fixed locality—known by a name in which he could readily announce himself to all persons resorting thereto, and they could as readily find him. The fact that the appellant did actually indicate in the manner stated, the exact spot on which for the time being he was, merely added to the evidence of the user; but no case decides that it was essential. Supposing a well-known enclosure to be ten yards square, could it be said that that would not be a place unless the precise spot in it on which the person using it stood were indicated, and if the appellant in the case I am now describing had moved his stool twenty times to different spots within the enclosure, and at each spot had remounted his stool and resumed his betting, would he not still be using the one place he had paid for admission to, and not twenty different places?

The case of *Gallaway* v. *Maries*, (1881) 30 W. R. 151, 8 Q. B. D. 275, 51 L. J. M. C. 53, before Grove and Lopes, JJ., was very similar to that of *Bows* v. *Fenwick*. The respondent, Maries, was charged with using a place, the grand stand enclosure and the ring at Four Oaks Park for the purpose of betting, &c. The respondent and another man acting with him, paid for admission to the park and ring, and therein the respondent's companion stood on a wooden box in no way fixed to the ground and unsheltered by any umbrella, the respondent stood off the box on the ground by his side. They jointly carried on betting operations such as in the last case, one or the other off the box. The justices held that neither the enclosure nor the box nor the two combined constituted a place and dismissed the charge. The case is amusing. The respondent and the justices having evidently read the *dicta* of Lord Coleridge in *Bows* v. *Fenwick* thought that the stool and spiked umbrella fixed in the ground were essential to the constitution of a place, and accordingly both the bookmakers and the magistrates thought the statute could be successfully evaded by the bookmaker abandoning the stool and umbrella and by one of them using an unattached box to stand on and by his partner standing on the ground. The court defeated this ingenious attempt by reversing the decision of the justices. There, again, there was a superabundance of evidence to support a conviction, and the *dicta* were unnecessary for the judgment, which was clearly right. These two last cases establish nothing which goes beyond this—that if a fixed spot such as suggested be essential to be indicated, it was in fact indicated by the stool, umbrella, or box. But no case was cited in which a conviction had been quashed because of the absence of such indication. Such a case would have required more consideration.

The case of *Snow* v. *Hill*, (1885) which the magistrates read as governing the present case, does not, in my opinion, by any means do so. The appellant Snow was charged with using a place, to wit, a field at West Brompton, in Staffordshire, for the purpose of betting with persons resorting thereto. Dog races were held in an enclosed field about five acres in extent. The public were admitted on payment to a portion of the field, about 110 yards long by 7 yards deep, and roped off from that part of the field on which the races were run. Many hundreds of persons, including the appellant, were present. The appellant walked about and made bets, and received from, and paid money to, other persons who were there. He had no particular location on the reserved space, and carried no distinctive mark. It was not even proved that he was a bookmaker, or that he did anything to indicate that he was exercising such a calling. For aught that appeared he was only one of the persons resorting to the enclosure, and did no more than any one of them might innocently do, and there was no evidence that he received any money on deposit, or otherwise than in payment of bets he had won. The magistrates, however, erroneously thought the case governed by *Eastwood* v. *Miller*, and convicted him. An appeal against the conviction was heard by Lord Coleridge, C.J., and A. L. Smith, J., who reversed that decision. In so doing they were absolutely right. A. L. Smith, J., pointed out, in delivering the judgment of the court, that the mere fact of a person resorting to a place and betting with others he finds there is no offence under the Act. It is significant that the respondent did not even appear or make any attempt to support the conviction. *Snow* v. *Hill*, therefore, is no authority for the respondent in this case.

Two cases, *Whitehurst* v. *Fincher*, (1890) 17 Cox C. C. 70, 38 W. R. Dig. 82, and *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20, 17 Cox C. C. 428, were cited to us, the former as an authority in favour of the respondent, the latter as an authority for the appellant. They require a little close attention and consideration, for on a mere cursory glance at the headnote of the first of them, as reported, they appear to be a little contradictory. They are, however, not at all so when really understood. The first of them,

Whitehurst v. *Fincher*, was argued before Fry, L.J., and Mathew, J. Fincher, the defendant, was charged with using the bar-room of a public-house for the purpose of betting with persons resorting thereto. The facts were as follow: Fincher on three successive days went to the bar-room of the Dartmouth Hotel at West Bromwich for the purpose of betting on horse-races, and did there in fact bet with persons who resorted thereto. He occupied no specific part of the room, which was a public one, and he had no other interest of any kind in the house. There was no evidence that he was a professional betting man. For aught that appeared the defendant only resorted to the bar as one of the public, and when there did in fact make bets with persons whom he met. The magistrate took this view of the evidence, and held that this was not such a user of the room as was contemplated by the 3rd section of the statute. In his judgment supporting the magistrate's decision Mathew, J., is reported to have said that it was not sufficient merely to show that the defendant went to the bar-room and made bets, and he thought that on the facts proved *Snow* v. *Hill* governed the case. I recognize the soundness of that decision on the facts found, for there is no more illegality in making a casual bet in a room not wholly or partially devoted to betting than there is in making it in a field with a person who is casually found there. *Hornsby* v. *Raggett* was a very different case. There Raggett, the respondent, was himself the occupier of "The Chimes" licensed beer-house at Poplar. The magistrate found as facts that on four different days a professional bookmaker and his clerk were in the bar and tap-room for the purpose of betting; that they did bet with persons resorting thereto on horse-races and received deposits on the bets made, and that the respondent knew of and permitted such user. As a matter of fact neither the bookmaker nor his clerk used any part of the house except the bar and tap-room, and these only in common with the ordinary customers of the house. The magistrate dismissed the summons on the authority of *Whitehurst* v. *Fincher* and *Snow* v. *Hill*. On appeal the court (Mathew and A. L. Smith, JJ.) held the magistrate to be wrong, Mathew, J., holding that it was not necessary to a conviction that the room or place should be used exclusively for betting; that to render the bookmaker liable it would be enough to show that he was in a room for the purpose of inviting people to come and bet with him; and that the respondent, the occupier, was liable for permitting such user. In explaining his judgment in *Whitehurst* v. *Fincher*, as supporting the case then before him, that learned judge said: "In the present case the betting was not casual, but the room was constantly and systematically used by a professional bookmaker for the purpose of betting with persons resorting thereto." In this A. L. Smith, J., concurred. It is clear that the distinction between the two cases—whatever particular expressions may have been used or may appear in the report of *Whitehurst* v. *Fincher*—is, that in that case the use of the room was not for betting as a business, but that all that was done was that the defendant had casually betted there with three or four people, whereas in *Hornsby* v. *Raggett* the betting for which the room was used was that carried on as a business by a professed or professional bookmaker. In considering the question of user I can see no difference between a betting-ring and a room used for the same purpose. *McWilliam* v. *Dawson* 56 J. P. 182, was a charge against a bookmaker for using a place under section 3. The bookmaker was seated in the bar of a public-house on several days for nearly an hour—not always in the same spot—betting on horse-racing with a number of persons who frequented the house. Some paid to and others received from him money on account of bets. It was found that he used the bar for the purpose of betting with them, but that he had no exclusive use or occupation of the bar or any part of it. The magistrate refused to convict. On appeal, Mathew and A. L. Smith, JJ., held that the case could not be distinguished from *Hornsby* v. *Raggett*, and that the bookmaker was liable to be convicted of using a place for the purpose of betting under section 3, and that the same reasons applied to the license-holder.

In *Regina* v. *Worton*, [1895] 1 Q. B. 227, 43 W. R. Dig. 69, it was held that evidence that on three successive days the defendant was in a bar of a beer-house, that a number of persons came in, took slips of paper hanging on the wall, wrote on them the names of the horses they wished to back, wrapped up in them the money they wished to stake, and handed the slips with the money enclosed to the defendant, furnished sufficient evidence to go to the jury upon an indictment under section 3, and the jury rightly found that the defendant had used the bar for the purpose of betting with persons resorting thereto: per Lord Russell of Killowen, C.J., Pollock, B., and Hawkins, Lawrance, and Wright, JJ.

Liddell v. *Lofthouse*, 44 W. R. 349, [1896] 1 Q. B. 295, is the latest case to be found in the Law Reports on the Common Law Side bearing on the question as to what is an "other place." The respondent Lofthouse was charged at Stockton-on-Tees police-court with having used a place situated on the river side for the purpose of betting with persons resorting thereto. The place in question was called Hubbacks Quay, partly surrounded by a hoarding supported by wooden stays driven into the ground. On three consecutive days the respondent was found at the back of the hoarding between the same two stays calling out the odds on horses and betting with persons coming to him. The justices found that he went to the spot for the sole purpose of making a book on horse-races, and because he knew there would be a number of persons wanting to back horses there. The justices, however, doubting whether the spot was a place declined to convict. On appeal Lindley and Kay, L.JJ., sitting as a divisional court, held that it was a place, and that the justices were wrong in not convicting. That the decision on the facts stated was right, there can be no shadow of doubt; and it needed not the aid of the stays to support it.

I will not refer to my own judgment in *Reg.* v. *Preedy* (1888), in which I fully discussed the question now before us and to which I adhere. Nor do I think it would materially assist the solution of the question before us to cite any of those cases which have been decided upon charges under the Licensing Acts, for they stand on a different footing; nor those cases which are to be found forbidding any gaming in public streets, &c., for they depend on special enactments; nor the cases deciding what are public places under the Vagrant Act. I prefer to decide this case upon principle and upon authorities directly bearing upon it.

It is not possible to give so precise a definition of what is an "other place" as shall be applicable to every imaginable state of facts. Each case must of necessity depend and be decided upon its own particular circumstances; but after very careful consideration I have arrived at the conclusion that any area of enclosed ground—expressing no opinion as to unenclosed areas—covered or uncovered, which is known by a name or is capable of reasonably accurate description, to which persons from time to time or upon any particular occasions or occasion resort, and

who may very properly be described as resorting thereto—used by a professional betting man for the purpose of exercising his calling and betting with such persons, or for the purpose of carrying on a ready-money betting business, may be a place within the meaning of the statute. Metes and bounds are not essential, and it matters not, in my opinion, whether for his own convenience the bookmaker chooses to remain during his hours of attendance upon one particular spot within that area or whether he prefers to move about within that area from one spot to another as he is minded. The Act speaks of other "place," not a spot in a place. If to make it a place the bookmaker must fix himself on and use only one spot, he would always have it in his power to evade the Act by wandering over the whole area.

Assuming the ring in question was a place within the meaning of the statute, there was, in my opinion, abundant evidence of such user of it by the respondent as was forbidden by section 3. It was, indeed, suggested that there could be no illegal user of any place unless such place could be fairly described as then already opened, kept, or used, that is, appropriated wholly or in part for the illegal purposes mentioned in section 3. *Morley* v. *Greenhalgh*, 11 W. R. 263, 3 B. & S. 374, 32 L. J. M. C. 93, 1, was cited in support of this suggestion. That case, however, as also did *Clark* v. *Hague*, 8 W. R. 363, 8 Cox C. C. 327, turned upon the peculiar language of 12 and 13 Vict. c. 92, forbidding cock-fighting in a place used for that purpose, and does not assist in the present discussion. In my opinion, a person using a place, though it be for the first time, for the forbidden purposes, is liable to be convicted under section 3 (see per Blackburn, J., in *Haigh* v. *Town Council of Sheffield*, L. R. 10, Q. B. 108).

At one time it was looked upon as a doubtful question whether the Legislature intended the enactments to prohibit, and whether in fact they prohibited, anything more than that class or kind of gaming which consisted of receiving deposits of money as the consideration for bets on future events described in the now repealed preamble of the Act. I am of opinion that such restricted interpretation of the enacting clauses would be doing violence to the very plain unmistakeable words used in them. Moreover, the question was judicially set at rest by *Bond* v. *Plumb*, 42 W. R. 222, 17 Cox C. C. 749, where it was held by Lord Coleridge, C.J., and Collins, J., that betting with persons resorting to a place, and receiving deposits on bets were distinct offences. (See also *The Queen* v. *Brown*, 43 W. R. 222, [1895] 1 Q. B. 119; and *The Queen* v. *Worton*, [1895] *ibid* 227). In the case before us there was, in my opinion, abundant evidence that the respondent used the Tattersall's ring at Hurst Park for both purposes.

In dealing with the evidence in each particular case the magistrates should always bear in mind that the law does not forbid betting itself, nor is the business or avocation of a bookmaker necessarily illegal: *Thwaites* v. *Coulthwaite*, 44 W. R. 295, [1896] 1 Ch. 496. But what the Legislature has forbidden, and what it has pronounced to be illegal, is the use by those who make a trade and business of betting, of any place for the purpose of betting with persons resorting thereto, or for the purpose of receiving, either themselves or by any other person, any money or valuable thing as the consideration for a bet or bets on any event of any horse-race, &c. We are not called upon to do more than declare our opinions upon the law as applicable to cases like the present. Whether an individual charged with infringing the law has in fact been guilty of such infringement it is the duty of the magistrates to determine, bringing their best intelligence honestly to bear upon each particular case having regard to the facts before them.

In the present case we are of opinion that the justices took an erroneous view of the law, and the case must, therefore, be remitted back to them, with costs to be paid by the respondent.

Case remitted to the justices.

Solicitors for the appellant, *Malkin & Co.*

Solicitor for the respondent, *Theodore Allingham.*

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 25.

In re CHAFFERS.
Ex parte THE ATTORNEY-GENERAL. (*a*.)

Vexatious Actions Act, 1896 (59 & 60 *Vict. c.* 51)—*Vexatious proceedings instituted before the passing of the Act—"Reasonable ground."*

An order under the Vexatious Actions Act, 1896, *may be founded upon vexatious legal proceedings commenced before the passing of that Act. In dealing with an application for such an order the court will consider the number, general character, and results of the proceedings alleged to be vexatious, and may make the order although there may have been reasonable ground for the proceedings in each case considered by itself.*

Application made by the Attorney-General under the Vexatious Actions Act, 1896.

Section 1 of that Act is as follows: "It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other court unless he obtains the leave of the High Court or some judge thereof, and satisfies the court or judge that such legal proceeding is not an abuse of the process of the court, and that there is *primâ facie* ground for such proceeding."

It appeared from the affidavits that the respondent had during the past five years brought forty-eight different actions, some in the High Court and some in inferior courts. The defendants included several judges of the High Court and of county courts, the Speaker of the House of Commons, the Archbishop of Canterbury and other trustees of the British Museum, officials of the Houses of Parliament, and other persons occupying official positions. In one of the actions the respondent had recovered a small sum of money for work and labour done. In the other cases the causes of action included conspiracy by judges and others to defeat the ends of justice, assault, refusal to accept the respondent's petitions to Parliament, and refusal to allow him to use the reading-rooms in the British Museum. Some of these actions had been stayed as vexatious, some had been dismissed, and some were still pending. All the actions except one had been commenced before the

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

14th of August, 1896, the date of the passing of the Vexatious Actions Act, 1896.

Sir R. E. Webster, A.G. (*Henry Sutton* with him), for the application.

Corrie Grant, for the respondent.—The Act is not retrospective. Of the forty-eight actions forty-seven were instituted before the Act was passed, and an application under the Act cannot be founded upon proceedings instituted before the Act. Its effect is to impose a restriction upon the exercise of a right possessed by the subject, and it does not deal with procedure merely. It is therefore applicable only to vexatious proceedings commenced after the Act was passed: *Wright* v. *Hale*, 9 W. R. 157, 6 H. & N. 227; *Warner* v. *Murdoch*, 25 W. R. 207, 4 Ch. D. 750; *Kimbray* v. *Draper*, 16 W. R. 539, L. R. 3 Q. B. 161. [WRIGHT, J., referred to *Reg.* v. *Vine*, 23 W. R. 649, L. R. 10 Q. B. 195.] That case depended upon the consideration of the safety of the public. Further, the claims in these actions were well founded, and the respondent by bringing them has not habitually and persistently instituted vexatious legal proceedings without reasonable ground.

WRIGHT, J.—In this case two objections have been taken on behalf of the respondent. First, it is said that this Act is not retrospective; that is, that an application under it cannot be founded on proceedings instituted before it was passed. No such distinction is indicated in the Act itself; there is nothing in it to limit action taken under it by the Attorney-General to conduct occurring since the Act was passed. I think this case is even clearer than *Reg.* v. *Vine*, in which case it was held that the provision of the Wine and Beer Amendment Act, 1870, disqualifying persons convicted of felony from selling spirits applied to a person who actually held a licence when the Act came into operation. In making this order we are not in any true sense giving a retrospective operation to this Act; in so far as we do so we are following the plain language of the Act.

As to the second point argued before us, I think that the consideration of whether a person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground does not depend on a minute examination of whether in each particular action there was or was not a reasonable ground; we must consider the number of actions brought, their general character and their results. In this case I think that there has been a mass of litigation of a vexatious character, and that we ought to make the order.

BRUCE, J.—I am of the same opinion. We are not asked to say that this Act is retrospective. It is suggested that we should disregard all circumstances which happened before the Act was passed; but I think that this is not so. We must look at all the proceedings as a whole, and I cannot entertain a doubt that vexatious proceedings have been habitually and persistently instituted within the meaning of the Act.

Order in terms of the Act.

Solicitor for the Attorney-General, *The Solicitor to the Treasury*

Solicitor for the respondent, *The Official Solicitor.*

Q. B. Div.
(Wright and Bruce, JJ.) } Jan. 20.

BRAMBLE v. LOWE. (a.)

Vaccination — Proceedings against parent to enforce vaccination—Vaccination officer—Authority—Minute of appointment—Vaccination Act, 1867 (30 & 31 *Vict. c.* 84), *s.* 31 — *Local Government Board General Order*, 31*st of October*, 1874, *articles* 16, 17.

A vaccination officer appointed by a minute of the guardians has authority to institute proceedings under section 31 *of the Vaccination Act*, 1867, *against a parent for non-compliance with a notice requiring him to procure the vaccination of his child, without a special authority from the guardians.*

Special case stated by a justice of the peace for the borough of Ipswich.

An information was laid under section 31 of the Vaccination Act, 1867, by the respondent, who was a duly appointed vaccination officer, against the appellant for non-compliance with a notice requiring him to have his child vaccinated. At the hearing the clerk to the guardians produced a minute of the appointment of the respondent as vaccination officer, and the consent of the Local Government Board to the appointment, which was dated the 15th of February, 1892. This was the only evidence of authority to prosecute produced by the respondent; but it was admitted that the guardians had passed a resolution giving the respondent general instructions to prosecute except in cases in which an order had previously been obtained against the person in default.

The magistrate made an order against the appellant for the vaccination of the child, subject to this case, the question for the opinion of the court being whether the respondent had the requisite authority to institute these proceedings.

Local Government Board General Order.—Regulations under Vaccination Act (dated the 31st of October, 1874):

Article 16.—The guardians shall in all cases in which the provisions of the Vaccination Acts for enforcing vaccination have been neglected, cause proceedings to be taken against the persons in default, and for this purpose shall give directions authorizing the vaccination officer to institute and conduct such proceedings; but no directions shall authorize the vaccination officer to take further proceedings under section 31 of the Vaccination Act, 1867, in any case in which an order has already been obtained and summary proceedings taken under that section until he shall have brought the circumstances of the case under the notice of the guardians and received their special directions thereon.

Article 17.—The vaccination officers shall take such proceedings as may be necessary under the Vaccination Acts in any case in which the Local Government Board may direct him to do so.

Schultess Young, for the appellant.—The Vaccination Act, 1867, s. 27, required the vaccination officer to obtain the authority of the guardians in each particular case before instituting proceedings under section 31; but section 27 was repealed by the Act of 1871, and in 1874 it was decided in *Knight* v. *Halliwell*, 22 W. R. 689, L. R. 9 Q. B. 412, that proceedings could be instituted under section 31 of the Act of 1867 without any special authority. The article 16 of the General Order of the Local Government Board, October 31, 1874, was introduced, and under that article it is necessary for the officer

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

obtain authority in each case before instituting proceedings under section 31 of the Act of 1867. In *Robinson* v. *Lowe*, 13 Times L. R. 19, there is an observation of Wright, J., to the effect that it is most improper to give general instructions to vaccination officers to prosecute.

Guy Stephenson, for the respondent, was not called upon.

WRIGHT, J.—I am afraid that this case has come here owing to a misapprehension of what I said in *Robinson* v. *Lowe*. I did say in that case that a question might arise under article 16 as to the propriety of the guardians giving general instructions, but I had no intention of deciding the question.

Under the Act of 1867 authority had to be obtained in each case from the guardians before proceedings were instituted. The law was altered by the Act of 1871, which repealed section 27 of the Act of 1867, and now a vaccination officer is entitled to proceed without any special authority from the guardians. Moreover, under article 17 of the order of 1874 the officer must take proceedings if the Local Government Board direct him to do so, even without the approval of the guardians.

It is contended for the appellant that the effect of article 16 is to restore the law as it was prior to the Act of 1871. I do not agree with that argument. Article 16 is not very clearly expressed, but its meaning is, in my opinion, that before any default under the Acts has occurred, the guardians may give general instructions, under the authority of which proceedings can be instituted when the occasion arises. As I have already said, I do not think any general instructions are required, because, in my opinion, the officer can proceed of his own motion under section 31. It may be said then that article 16 is superfluous. I am inclined to think it is.

BRUCE, J.—I agree.

Appeal dismissed.

Solicitor for the appellant, *A. S. Leighton*, for *Valliamy*, Ipswich.

Solicitor for the respondent, *Rexworthy*.

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 18.

VALLANCEY *v.* FLETCHER. (*a.*)

Criminal law—Brawling in churchyard—"Any person"—Clergyman—23 & 24 Vict. c. 32, s. 2.

The preamble to 23 & 24 Vict. c. 32 recites that, "Whereas it is expedient to abolish the jurisdiction of the Ecclesiastical Courts of England and Ireland over persons not in holy orders in suits for brawling." Section 2 enacts that "any person who shall be guilty of riotous, violent, or indecent behaviour . . . in any churchyard" shall be liable to a penalty.

Held, that section 2 applies to persons in holy orders as well as to laymen.

Special case stated by justices of Derbyshire in petty sessions at Swadlincote.

The appellant was charged under 23 & 24 Vict. c. 32, s. 2, for that he on the 13th of June, 1896, was guilty of indecent and violent behaviour in the churchyard of the parish church of Rosliston.

The facts were as follows. The appellant was perpetual curate of Rosliston, and the respondent was churchwarden. Prior to the appellant's appointment a woman had died and been buried in the churchyard. Above her grave was a grass mound, but no tombstone. The appellant gave orders to the sexton to level the mound above the grave.

On the 13th of June, 1896, the sexton was engaged in doing so, the appellant being present. Several relatives of the deceased woman entered the churchyard, and expressed great resentment at finding that her grave was being interfered with. The appellant directed the sexton to proceed with the work of levelling, adding that he would protect him. One of the deceased's relatives advanced towards the appellant raising a stick in a threatening manner, whereupon the appellant pointed a revolver at the man, saying, "I'll shoot you." A scuffle ensued, and subsequently the police interfered.

It was contended before the justices first, that the statute 23 & 24 Vict. c. 32, s. 2, did not apply to persons in holy orders; secondly, that the appellant as perpetual curate had discretionary powers as to the keeping and management of the churchyard, and that he was acting in the exercise of his legal rights in levelling the mound, that the relatives of the deceased woman were guilty of a trespass, and that the facts showed a *bonâ fide* claim of right on the part of the appellant, whereby the jurisdiction of the justices was ousted.

The justices found as a fact that the appellant had been guilty of violent and indecent behaviour, and convicted the appellant.

The questions for the opinion of the court were (1) Does 23 & 24 Vict. c. 32, s. 2, apply to persons in holy orders; (2) had the justices jurisdiction to hear and determine the case, and to convict the appellant.

23 & 24 Vict. c. 32, s. 2, provides that "any person who shall be guilty of riotous, violent, and indecent behaviour . . . in any churchyard" shall be liable to a penalty.

Simpson, for the appellant, on the first point referred to the preamble of the statute, which is in the following terms: "Whereas it is expedient to abolish the jurisdiction of the Ecclesiastical Courts of England and Ireland over persons not in holy orders in suits for brawling." He contended that the proper course in the case of a person in holy orders being guilty of brawling in his own churchyard was to proceed against him in the Ecclesiastical Court. On the second point he cited *Bryan* v. *Whistler*, 8 B. & C. 288.

Appleton and *Borough*, for the respondent, were not called upon.

WRIGHT, J.—The magistrates have found as a fact that the appellant was guilty of violent and indecent behaviour in his churchyard. There was abundant evidence to support that finding irrespective of any question as to whether the appellant had or had not a right to level this grave. I am very far from saying that he had such a right, but whatever his rights may be he must exercise them in a decent manner. The only real question of law in the case is whether section 2 of 23 & 24 Vict. c. 32 applies to the incumbent or curate of the place where the offence is committed. It does, no doubt, appear from the preamble that the primary intention of the Act was to apply a different remedy in the case of persons not in holy orders from that which previously existed. The language of section 2 is, however, quite general, and I do not see any reason why its meaning is to be cut down and limited in the manner contended for by the appellant. I think this appeal must be dismissed.

BRUCE, J.—I am of the same opinion. I entertain

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

no doubt whatever that the word "person" in section 2 applies to all persons.

Appeal dismissed.

Solicitors for the appellant, *S. W. Johnson & Son*, for *Fisher, Jesson, & Wilkins*, Ashby-de-la-Zouch.

Solicitors for the respondents, *Warren, Murton, & Miller*, for *Ransom & Hutton*, Nottingham.

Prob. Div. & Adm. Div. Admiralty. } Dec. 1.

"THE PARKDALE." (*a.*)

Ship—Wages—Set-off—Advances of wages made by master for the purchase of slops by seamen deserters—Gratuities—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 167, 221, 232.

A shipowner defending an action of master's wages is not entitled to set off against the plaintiff's claim the amount of wages advanced by the master during the voyage for the purchase of slops, although it appears that the seamen to whom the advances were made have deserted, and thereby forfeited their wages, and the owners lay claim to the amount forfeited to reimburse the expenses caused by the desertion.

The owners of a ship cannot set off against the claim of the master of the ship for wages the amount of gratuities presented to the master by the consignees of cargo.

This was an appeal by the defendants from a decision of the Admiralty side of the County Court of Cumberland, holden at Whitehaven.

By the decree appealed from his Honour Judge Steavenson had given judgment for the plaintiff, confirming the report of the registrar of the county court in an action of master's wages instituted on behalf of J. Collins, master of the English barque *Parkdale* against *The Parkdale in rem*, in which action the plaintiff had claimed the sum of £145, made up of £18 7s. 5d., the balance of wages found due to him on settlement of *Parkdale* accounts for the voyage ending November, 1894, and retained by the defendants, the owners of *The Parkdale*, and of £126 13s. 4d., the balance of wages due to the plaintiff from the 1st of December, 1894, to the 25th of May, 1896, at £14 per month, after giving credit to the defendants for £123 cash advanced to the plaintiff's wife.

In the county court the defendants had set up against the plaintiff's claim a set-off, alleging that on an account being taken of all sums of money due to the plaintiff as master of *The Parkdale* for wages and all disbursements and payments made by the plaintiff on account or in respect of the said barque, and of all sums received by the plaintiff from or on behalf of the defendants, the claim of the plaintiff ought to be reduced by the total amount of £161 14s. 5d., made up of (1) the sum of £116 14s. 5d. debited in account by the plaintiff against the defendants in respect of wages earned by certain seamen of *The Parkdale* who had deserted before the end of the second voyage of *The Parkdale*, but after the plaintiff had supplied to such deserters slops charged against them at the total cost of £116 14s. 5d.; and (2) the several sums of £10, £15, and £20, alleged to have been received by the plaintiff from consignees of cargo as and for "gratuities," and retained by him for his own benefit.

The judge of the county court, by consent of the plaintiff and defendants, referred the accounts to the registrar assisted by one assessor, and on the 31st of August, 1896, the registrar reported that he found that there was due to the plaintiff as master of the barque *Parkdale* for wages the sum of £371 15s. 8d.; that the plaintiff had made disbursements and payments on account of or in respect of the said barque to the amount of £2,000 15s. 6d., and that the plaintiff had received from or on behalf of the defendants sums of money amounting to £2,177 2s. 3d.; thus, after charging against the defendants the above-mentioned sum of £116 14s. 5d., making the amount of wages due to the plaintiff to be the sum of £195 11s. 11d. In order to arrive at this report the registrar therefore came to the conclusion that the master had acted legally in retaining as payment for the slops supplied to the deserters the above sum of £116 14s. 5d. earned by them as wages, and also the amount of the gratuities presented to him by the consignees of cargo as above stated.

The county court judge confirmed the report of the registrar, and no objection having been raised as to his jurisdiction to pronounce for the amount of £195 11s. 11d. as the amount due to the plaintiff as wages and recoverable in the action, gave judgment for the plaintiff for that sum.

The defendants appealed.

The appeal was now heard before a Divisional Court of the Admiralty Division (the President and Barnes, J.).

Batten, for the appellants.—By section 232 of the Merchant Shipping Act, 1892, wages forfeited for desertion must be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and, subject to that reimbursement, must be paid over to the consolidated fund. No expenses were caused to the master by the desertion in this case within the meaning of this provision, and the amount of £116 14s. 5d. cannot therefore be claimed by the master as against the defendants, such amount being clearly forfeited wages within the Act. As to the gratuities, these are analogous to a secret commission paid to the plaintiff when acting as the defendants' agent, and must be accounted for by him to them. They are therefore right in charging them in account against him.

Aspinall, Q.C., and *Mansfield*, for the respondents were not called on to argue.

JEUNE, P.—The first point raised on this appeal is as to the so-called deduction with regard to the slops. It appears that certain sailors deserted. Thereupon their wages became forfeited, and the captain claims that what he gave to these seamen in the way of slops should be set against the amount of the wages forfeited; or, in other words, that he should be able to take payment out of the sum which otherwise would be due to the seamen if they had not deserted, and which would be forfeited if they did. The case appears to me to be of the simplest possible kind. The master is entitled to pay wages; nay, more, he is personally bound to the seamen for their wages. He is entitled, beyond all question, within the limits of the Merchant Shipping Act, to make advances. If he is entitled to make advances I can see no difference in his giving them slops to the value of such advances as he might have made, and all the more because when he comes ashore the master is obliged to produce accounts and an opportunity is given to the sailor of checking them in the presence of the proper officer. Consequently he can make advances in this way to the seamen, and that is what in this case he has done.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

can see no reason why he should not. If it could be pointed out that the Act forbade anything of the kind it would have made all the difference; but so far from doing that, it seems to me that the Act distinctly recognizes transactions of the kind. Section 132 of the Act provides for the form to be used, and the form in the schedule to the Act actually speaks of wages advanced and of stores supplied, it being common knowledge that the stores are supplied in this way by the captain. Therefore it appears to me impossible to say that the Act prevents transactions of this kind; and as the owners knew all about it, they cannot properly make any objection.

Then arises the question whether, if the deduction could be made in the ordinary course when a seaman claims the balance of his wages, the forfeiture makes any difference. I do not think it does. Section 232 of the Act provides as to this forfeiture. All that that section provides is that the wages are to be forfeited. But what are the wages? They are, I think, the sum due after all proper deductions have been made. I do not mean deductions in the sense of penalties, but in the ordinary sense of the word. It appears to me to be perfectly legitimate to make deductions which the law allows for wages advanced or for stores supplied, which, to my mind, would have exactly the same effect. Therefore I have no doubt but that the master in this case only did what was usual, and what the owners knew of and the law allows.

The other point is as to certain gratuities given to the captain by the consignees of the cargo; and I find it difficult to see how any argument can possibly be raised in favour of the shipowners on that point. We have the evidence of the captain as to what the exact nature of these gratuities was, and he drew what I think was a proper distinction. As regards a sum which appears to have been returned to him by the stevedore, that he gave credit for to his owners, properly enough, because that really amounted to a rebate, and anything connected with payments made for the owners should naturally be carried to their credit. But I regard the gratuities I have referred to as simply presents given by the merchant to the master for doing his duty both to the merchant and to his owners, and for doing it extra well. I see a broad distinction between that and anything in the nature of secret commission; and I therefore think the owners are not entitled to have these gratuities taken into account.

BARNES, J.—There are only two points for decision in this case—namely, whether or not the master, who is the plaintiff, is to have the amount of the value of the slops which were advanced to sailors on account of their wages set off against his wages; and, secondly, whether the master is entitled, in account with his owners, to some small sums, in the shape of certain gratuities, which appear to have been paid to him.

The first point arises in this way. The master, as everybody knows, and as every witness seems to have known in this case, has, in the course of the voyage, to provide the sailors with clothing, boots, and so forth (otherwise called slops), because it is common experience that these men go to sea so improvidently that they have not adequate things to wear to work the ship, especially in cold latitudes. The master, in starting, becomes responsible by the articles to the crew for their wages. He provides certain clothing and articles of use to them in the course of the voyage, and forms are provided by the Board of Trade for him to insert, on return to port, the exact amount of money given to the men on account of wages, and the amount of slops or stores he has provided them with, and which they have taken as payment in lieu of wages. When the master comes back and pays off the crew in the presence of the Mercantile Marine superintendent, even when he does so with the assistance of a clerk or other person from the office of the shipbroker or shipowner, he deducts from the amount payable as wages the amount properly advanced in respect of these matters.

That being the ordinary course of business, it is now argued that because some men deserted after they had earned wages, and have therefore legally forfeited what is their due, that the master, who, as the evidence shows, was acting with the full knowledge of his owners, is not to charge the owners in his accounts against the owners with the amount of wages which is equivalent to the value of the slops supplied to the men who deserted.

It seems to me quite beyond all question, when the Act of Parliament, the articles, and the forms are all looked at—especially when the course of business is considered—that the point taken on behalf of the owners is quite untenable.

The other point is that the master has improperly retained some small gratuities, and it is argued that these gratuities are in the nature of secret commissions. Of course no master or other agent is allowed to take any secret commission, the reason being that in so doing he is acting antagonistically to the interest of his employers, and taking a benefit which, if allowed, would be against their interests. But in this case the master has done no more than receive a little present, not in any sense antagonistic to his owners, but simply because the consignees thought he had discharged the cargo so well that he was entitled to a small sum.

This is one of the commonest forms of gratuity which exist, and which, when given under such circumstances, the master is entitled to accept and retain.

Solicitors for the appellants, *Day, Russell, & Co.*

Solicitors for the respondent, *Collins & Turney.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.), — March 17.

GOODLOCK *v.* COUSINS. (*a.*)

County court—Execution—Claim to goods seized—Sale by bailiff—Title of purchaser—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 156.

Where goods are seized in execution under a judgment of a county court, and a claim is made to them, but the claimant fails to comply with any of the three conditions laid down by section 156 *of the County Courts Act,* 1888, *a sale by the bailiff under that section confers on the purchaser a good title to the goods, although the claimant may afterwards prove that they belonged to him at the time of the seizure.*

Judgment of Wills *and* Wright, JJ., ante, *p.* 303, *affirmed.*

Appeal from a judgment of a Divisional Court on an appeal from a county court (*ante*, p. 303).

This was an action for wrongful conversion. A judgment had been obtained in the county court

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

against the plaintiff's son, in whose house the plaintiff was living, and execution was levied. Among the goods seized were certain articles belonging to the plaintiff. The plaintiff made a claim to his goods in writing, as required by ord. 27, r. 1, of the County Court Rules, and the high bailiff sent notice of such claim to the execution creditor, and also sent notice to the plaintiff requiring him to make deposit or give security in accordance with section 156 of the County Courts Act, 1888.

The execution creditor did not by return of post admit the plaintiff's title to the goods, neither did the plaintiff comply with the notice which had been sent to him. The bailiff thereupon put the goods up for sale by auction, and they were bought by the defendant for £6, which sum the bailiff paid into court. After the sale the execution creditor admitted the plaintiff's title to the goods which he claimed.

The plaintiff brought this action against the defendant to recover damages for the wrongful conversion of his goods.

The county court judge gave judgment for the plaintiff for £20 15s.

The Divisional Court (Wills and Wright, JJ.) reversed the judgment of the county court judge, and ordered judgment to be entered for the defendant.

The plaintiff appealed.

Cranstoun, for the plaintiff.—This was not a sale under an order of the court; it was merely a sale under a warrant of execution; and therefore it could not give the purchaser a better title than the execution debtor had. Section 156 of the County Courts Act, 1888, says that, where a claimant to goods taken in execution fails to make deposit or give security in pursuance of the bailiff's notice, "the bailiff shall sell such goods as if no such claim had been made." This does not take away from the claimant his right of following his goods, which are worth a great deal more than the £6 which they fetched on a forced sale, and suing a *bonâ fide* purchaser.

He cited *Hills* v. *Renny*, 29 W. R. 328, 5 Ex. D. 313; *Morley* v. *Attenborough*, 3 Exch. 500; *Farrant* v. *Thompson*, 2 Dow. & R. 1; *Heathcote* v. *Livesley*, 36 W. R. 127, 19 Q. B. D. 285.

Stroud, for the defendant.

Lord ESHER, M.R.—All that we have to do in this case is to construe section 156 of the County Courts Act, 1888, as applicable to the facts before us. Have not the circumstances mentioned in the section, as requisite to justify a sale by the bailiff, happened? In my opinion they have. The section begins thus: "Where any claim shall be made to or in respect of any goods taken in execution under the process of the court." The first circumstance is that goods are taken in execution, and the next is that a claim is made to some of them; here goods were taken in execution, and the plaintiff claimed some of those goods. The section proceeds: "The claimant may deposit with the bailiff either the amount of the value of the goods claimed . . . to be by such bailiff paid into court to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and, in default of the claimant so doing, the bailiff shall sell such goods"—the words are imperative, he shall sell the goods—"as if no such claim had been made, and shall pay into court the proceeds of such sale to abide the decision of the judge." Here the plaintiff claimed the goods, but he did not deposit any sum of money with the bailiff or give security. Therefore the last part of the section applies. It is a statutory order to the bailiff to sell the goods. To whom is he to sell them? It must mean to any person who is willing to be the purchaser. And it seems to me to follow by necessary implication that the purchaser is to be entitled to the things bought without further dispute. I therefore think that the decision of the Divisional Court is right, and that the appeal must be dismissed.

LOPES, L.J.—The question is whether, if the requirements of the section are complied with, a sale by the bailiff confers a good title on the purchaser. It is to be noticed that the claimant has an opportunity of preventing a sale by paying a deposit or giving security; and if a sale takes place, the proceeds are paid into court to abide the decision of the judge. I am of opinion that the intention of the Legislature is that a sale shall confer on the purchaser an absolute and indefeasible title to the goods.

CHITTY, L.J.—The contention of the plaintiff is that all that the bailiff sells is the interest of the execution debtor in the goods. But the Act says that the bailiff shall sell "such goods," not the interest of the execution debtor in them. I think the Act means what it says, and, considering that the purchaser pays the purchase-money, which is thereupon deposited in court, it would be a strange thing if he did not get a title.

Appeal dismissed.

Solicitors for the plaintiff, *Peacock & Goddard*, for *Lamb*, Cheltenham.

Solicitors for the defendant, *W. H. Martin & Co.*, for *Heath*, Cheltenham.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — March 15.

APPLEYARD v. LAMBETH VESTRY. (*a*.)

Metropolis management — Sewer — Drain — Combined drain laid with sanction of Metropolitan Commissioners of Sewers—Metropolis Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

The "Metropolitan Commissioners of Sewers" mentioned in section 112 *of the Metropolis Management Act*, 1862, *are the commissioners who were created under that title in* 1848 *by the statute* 11 & 12 *Vict. c.* 112, *and do not include any previously existing commissioners. Therefore no drain laid before* 1848 *can come within the definition of "drain" given in that section.*

Judgment of Hawkins, J., ante, *p.* 173, *affirmed.*

Appeal from the judgment of Hawkins, J., at the trial of the action without a jury, *ante*, p. 173.

The action was brought for a *mandamus* commanding the defendants, pursuant to sections 69 and 72 of the Metropolis Management Act, 1855, and other Acts, to repair, maintain, and cleanse certain pipes which carried the drainage of four houses belonging to the plaintiff in York-road, Lambeth, and also for a declaration that such pipes were "sewers" within the meaning of the said Acts and vested in the defendants.

The four houses were built in the year 1839 or 1840. These houses and two others were drained by pipes laid for draining all six houses by a combined operation, and the system of combined drainage so constructed remained in existence from the time when

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the houses were built till the commencement of the action.

At the time when this system of drainage was constructed the sewer authorities for the district were the Commissioners of Sewers for Surrey and Kent, and no objection was raised by them to the system adopted.

The question was whether the pipes were "drains" or "sewers" within the meaning of the Metropolis Management Acts. By section 250 of the Metropolis Management Act, 1855, "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain,' interpreted as aforesaid, applies."

By section 112 of the Metropolis Management Act, 1862, the meaning of the word "drain" is extended so as to include "any drain for draining a group or block of houses by a combined operation laid or constructed before the 1st of January, 1856, pursuant to the order or direction, or with the sanction or approval of the Metropolitan Commissioners of Sewers." The Metropolitan Commissioners of Sewers were created in 1848 by the statute 11 & 12 Vict. c. 112.

Hawkins, J., gave judgment for the plaintiff on the ground that the pipes were not drains, but were sewers, and were therefore repairable by the vestry.

The defendants appealed.

Macmorran, Q.C. (*Muir Mackenzie* with him), for the defendants.—These pipes are "drains" within the meaning of section 112 of the Metropolis Management Act, 1862. They must be taken to have been laid with the sanction and approval of the Commissioners of Sewers for Surrey and Kent, for by the Act then in force in the district all drains were required to be laid with the sanction of that body. Those commissioners were at that time, so far as this district was concerned, the Metropolitan Commissioners of Sewers, though that name was afterwards specifically given to the body which was created in 1848 to supersede the old commissioners.

McCall, Q.C., and *Morton Smith*, for the plaintiff, were not called upon to argue.

Lord ESHER, M.R.—This is a perfectly clear case. The Metropolitan Commissioners of Sewers mentioned in section 112 of the Act of 1862 must be the commissioners who were brought into existence under that title by the Act of 1848, and cannot include any other commissioners. The pipes in question, therefore, do not come within the terms of the Act of 1862, and by the definition given in the Act of 1855 they are sewers because they drain more than one house. The appeal must be dismissed.

LOPES and CHITTY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Venn & Woodcock.*

Solicitors for the defendants, *Miller, Smith, & Bell.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Feb. 19.

HILL v. HILL. (a.)

Trust—Precatory—Gift—Words of request.

Upon the marriage of a lady with the heir-presumptive to a peerage certain family jewels were given to her "for her life with the request that at her death they might be left as heirlooms."

Held, that these words did not create a precatory trust, and that the wife took the jewels absolutely.

Appeal from the judgment of Collins, J., in favour of the defendant at the trial of the action without a jury.

The action was by Viscount Hill, who was the fourth viscount and was born in 1863, to recover possession of certain family jewels—namely, a diamond necklace, pendant, and earrings—from the Dowager Viscountess Hill, the stepmother of the plaintiff, and widow of the third viscount.

It appeared that the Dowager Ann Viscountess Hill, whose maiden name was Anne Clegg, and who was the widow of the second Viscount Hill, was married in 1831, when she was sixteen, to Rowland Hill, who was the heir-presumptive to the title of Viscount Hill, and these jewels were given to her on her marriage by Mrs. Hill, her mother-in-law.

In 1890 the Dowager Ann sent a document to her solicitor, in which she stated: "When I married she (Mrs. Hill) gave them (the jewels) to me for my life, with the request that at my death they might be left as heirlooms."

In 1891 the Dowager Ann died, and by her will, made in that year, she left the jewels in question to her son, the plaintiff's father, the third viscount (who died in 1895) for life, and after his death "to each and every of the persons who shall in turn succeed to the title and dignity of Viscount Hill severally and successively as they shall in turn succeed to such title and dignity."

The action was tried at Warwick before Collins, J., without a jury, when the learned judge held that the document of 1890 showed that the jewels were settled by Mrs. Hill by parol by way of trust in 1831, and that the Dowager Ann had only a life interest and could not dispose of them by will; and further, that by virtue of the rule against perpetuities the third viscount took the jewels absolutely and that he gave them to his wife, the present defendant, and that, therefore, she was entitled to them. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Cozens-Hardy, Q.C., *Jelf, Q.C.*, and *H. J. Rowlands*, for the plaintiff.

Warmington, Q.C., and *A. Powell*, for the defendant.

The arguments and authorities cited sufficiently appear in the judgments.

Cur. adv. vult.

Feb. 19.—Lord ESHER, M.R.—I have read the judgments about to be delivered by the Lords Justices, and I entirely agree with them. I propose to say very little upon the question, but I desire to express the strongest conviction that when the court is called upon to place a construction upon words

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

spoken or written, for the purpose of adjudicating upon them, the same rule must be applied in courts of equity as in courts of law, and that rule is that where words, spoken or written, are used they must have their ordinary signification, unless there is something which obliges the court to give them a meaning other than their ordinary meaning. Is there anything here to show that the words were used in a meaning other than their ordinary meaning? The class of words used are words of request. Words of request in their ordinary meaning convey a mere request, and do not, either at law or in equity, convey a legal obligation of any kind. But in any particular case there may be something which shows that the words have a meaning beyond their ordinary meaning. Upon the construction of wills there have been very many cases before equity judges, and in many of those cases the judges decided that words of request were to be construed as bearing a meaning beyond their ordinary meaning of request, and as imposing an obligatory trust. I do not mean to criticize any of those cases, and to say that they were wrongly decided on the facts of each case. But, having read all the cases in equity from the beginning until now, I cannot find any rule laid down in any case which obliges the judge to give to the words a meaning other than their ordinary meaning. In the present case I cannot find any fact or circumstance which entitles the court to carry the meaning of the words of request beyond their ordinary meaning. Where there are prior words giving legal or equitable rights, followed by words of request, it requires the strongest possible circumstances to say that those words of request are to cut down the prior words giving the legal and equitable rights, and to say that the words of request impose an obligation. The words in the present case are said to have been used in a conversation many years ago, and we have before us a mere memorandum of that conversation made many years after the conversation, and anything more dangerous than to act upon those words as bearing a sense other than their ordinary sense cannot be imagined. We have not the whole conversation before us. There is nothing to show that the words were not used in their ordinary meaning, and it would be in the highest degree dangerous to impute an intention which was not actually expressed in the words used. I am therefore unable to agree with the judgment of Collins, J.

LOPES, L.J., read the following judgment: This case depends upon the construction of a letter or memorandum, which is admissible in evidence as being a declaration against the interest of the person making it. This document was sent by the Dowager Ann Viscountess Hill to her solicitor in 1890, and appears to be a statement by her as to what was said to her by her mother-in-law, Mrs. Hill, on the occasion of her marriage with Rowland, the second viscount, in 1831. The Dowager Ann died in 1891, leaving a will which was made a short time before her death, and by which she bequeathed the diamonds to her son, Rowland Clegg Hill, the third viscount, until his death, and after his death to each and every person who should succeed to the dignity severally and successively as they should in turn succeed to it, her intention being that the diamonds should descend as heirlooms as far as the rules of law and equity would permit. Her son, the third viscount, survived her, and died in 1895. He was succeeded by his son, the fourth viscount, who was born in 1863 (in the lifetime of the testatrix) and is the plaintiff in this action. The defendant is the second wife of the third Viscount Hill, who claims these diamonds as a gift from him, he having, as she contends, power to dispose of them as he thought fit.

The learned judge in the court below says: "I have reluctantly arrived at the conclusion that there has been a gift not absolute to Ann Clegg, but a gift for life only with a trust, a precatory trust, that she shall by her will, as far as possible, absolutely constitute these things as heirlooms to go with the title." I cannot agree with the learned judge. The two questions to be considered seem to me to be—first, had the Dowager Ann any power to dispose of these diamonds, or were they subject to a precatory trust; and secondly, if she had an absolute power to dispose of them, and they were not subject to a precatory trust, is there anything in the disposition she has made of them by her will which transgresses the rule against perpetuities. It must be conceded that, if there is no precatory trust, the property in these diamonds vested absolutely in the Dowager Ann, and that she had power to deal with them as she has done, provided the rules against perpetuities are not violated. Is there a precatory trust created by the document in question? Whether a precatory trust can be created by word of mouth or by anything less than a will, it is unnecessary to consider, because I do not think that the words used here, even if occurring in a will, would create such a trust. The doctrine of precatory trusts is a creature of equity by whose aid the intentions of testators, in my judgment, have too frequently been defeated. I agree with James, L.J., in *Lamb* v. *Eames*, 19 W. R. 659, L. R. 6 Ch. 597, when he says: "In hearing case after case cited I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." It is inconceivable to me that a testator, who really meant his hope, recommendation, confidence, or request to be imperative, should not express his intention in a mandatory form. I agree with Mr. Farwell in his book on "Powers," when he says, at p. 480: "It would not be a very strained inference to regard all such expressions as stating the motive that induced the absolute gift rather than a fetter imposed upon it." As the authorities now stand, if the gift to the Countess Ann had been absolute it would have been impossible to hold that the subsequent words created a precatory trust.

The difficulty here, if there is any, is the words "for my life" and "at my death they might be left." It is in every case a question of intention, and the whole document with the surrounding circumstances must be considered. Cotton, L.J., in *In re Adams and Kensington Vestry*, 32 W. R. 883, 27 Ch. D. 394, at p. 410, says: "Having regard to the later decisions, we must not extend the old cases in any way or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect and what was the intention of the testator as expressed in his will." Adopting that view, I come to the conclusion that it was never intended to fetter the disposition of the diamonds by the Countess Ann, and that they were given absolutely to her, but that a wish was expressed that after using them for her life she should by will dispose of them so that they should follow the title, not intending to govern the discretion of the person whom she was addressing, but indicating only what would be, in her opinion, a reasonable exercise of that discretion. The reference to the will of the Countess Ann by which she is asked to dispose of the diamonds after her death indicates a discretion reposed in her. Another objection might be taken to the precatory trust—viz., that the object of it, signi-

fied only by the word "heirlooms," is too uncertain to make such a trust maintainable. If I am right in my view of the precatory trust, then the Countess Ann had power to dispose of the diamonds by her will, and in the events which have happened the rule against perpetuities is not transgressed, because the plaintiff was born in the lifetime of the Countess Ann.

This conclusion, it is satisfactory to think, gives effect to what was obviously the intention—viz., that these diamonds should accompany the title.

The appeal must be allowed.

CHITTY, L.J.—The plaintiff claims the diamond necklace, pendants, and earrings in question under the will of the Dowager Ann Viscountess Hill, whose maiden name was Ann Clegg. She died in 1891, having made her will in the same year a short time before her death. By this will she bequeathed the diamonds to her son Rowland Clegg Hill, the third viscount, until his death, and after his death to each and every person who should succeed to the dignity severally and successively as they should in turn succeed to it, her intention being that the diamonds should descend as heirlooms as far as the rules of law and equity would permit. Her son, the third viscount, survived her and died in 1895. He was succeeded in the dignity by his son, the plaintiff, who was born in the lifetime of the testatrix. There is, therefore, no question of perpetuity arising on this will, considered apart from the document on which the question principally turns. Subject to the rule against perpetuities chattels may be settled to follow the devolution of a dignity: see *In re Rivett-Carnac*, 33 W. R. 837, 30 Ch. D. 136.

Now, the plaintiff's claim is established: (1) If the diamonds were the property of the Dowager Ann; (2) if she had a general and unrestricted power to dispose of them by will; and (3) if she had power by will to make such a disposition of them as she has in fact made. No objection was raised to the plaintiff's claim on the ground that it was merely equitable, or that the property at law in the chattels passed to the executrix of the testatrix. The only objection raised was that by reason of a prior settlement, alleged to have been made in 1831, the dowager had no power to bequeath the diamonds to the plaintiff. We are not called upon, therefore, to consider a question which has been suggested in a learned text-book as to the effect of the Judicature Act, 1873, upon a gift of chattels by will made since that Act (see Williams' Personal Property, 11th ed., 308-310). The defendant's case rests on the letter or memorandum sent by the Dowager Ann to her solicitor in 1890. The circumstances under which, or the purpose for which, it was written are not disclosed by the evidence. It purports to be a narrative of what Mrs. Hill said when she delivered the diamonds to the dowager on the occasion of her marriage with Rowland Hill, who was Mrs. Hill's son. The marriage took place in 1831, when the dowager was sixteen years old. As the law then stood she had capacity to make a will of personal property. The memorandum is set up by the defendant as an admission by the Dowager Ann against her interest. So far as material it runs thus: "January, 1890. Relating to diamonds. The original family diamonds consisted of a necklace, earrings, and two clasps, to which were added a few more diamonds and made into a large pendant or brooch to be attached to the necklace or not at pleasure. My mother-in-law, Mrs. Hill, told me that Sir Richard Hill gave them to her without any restriction. When I married she gave them to me for my life with the request that at my death they might be left as heirlooms." The diamonds are here spoken of as family diamonds. The Sir Richard Hill referred to was the father of Mrs. Hill's husband, John Hill, who had died in 1814. Sir Richard had given these family diamonds to Mrs. Hill without any restriction. Regard being had to the argument for the defendant, it is convenient here to refer to the state of the Hill family. In 1831, General Hill, the first viscount, was living. He did not die until 1842. The dignity was limited to him and his issue male in the usual way; in default of such issue it passed to collaterals, so that on the death of the first viscount without issue male it descended to his nephew Rowland, husband of the Dowager Ann. It would seem that in 1831 there was no issue male of the first viscount living, and consequently that Rowland Hill was, at the time of his marriage, heir-presumptive to the dignity. The son of the marriage of Rowland Hill with Ann Clegg was Rowland Clegg Hill, born in 1833. On the death of his father in 1875 he became the third viscount. He is the viscount named in the will of the Dowager Ann as the person to whom the diamonds were thereby bequeathed until his death.

The defendant's counsel have buried this apparently simple document under a mass of technical learning, and by reference to the subtle equitable doctrines of precatory trusts, a special power of appointment, and implied trust in default of exercise of the power, have endeavoured to convert it into a strict settlement of some kind, the trusts whereof, as will presently appear, they are unable to state in clear or satisfactory terms. They contend that by virtue of these trusts the property in the diamonds vested absolutely in the third viscount. Mrs. Hill herself, if alive, would, I think, be much surprised at the interpretation which the defendant's counsel have put upon the words she is stated to have used. The Dowager Ann did not so understand them; in disposing of the diamonds by her will she described them as "my diamonds." Still, we must take it that the words stated were actually used by Mrs. Hill, and our task is to put a reasonable and intelligible meaning upon them.

At the outset I am struck by two things. First, this was a marriage present of jewels; it is not usual to settle such a marriage gift. Secondly, it is difficult to understand why Mrs. Hill, if she really intended to make a binding settlement, did not put it into the form of a deed, or at all events reduce it into writing, instead of leaving it to depend on the slippery testimony of human memory. But taking Mrs. Hill's words as stated, and merely changing the oblique form of narrative into the direct, they stand thus: "I give these diamonds to you for your life, with the request that at your death they may be left as heirlooms." The request was therefore made to the Dowager Ann; the word "left" imports a will, and the will was to be her will. About this there was no contest at the bar. Nor was it in contest that the effect of the gift was to pass to the Dowager Ann the absolute property at law in the chattels. There was no reservation of any kind in favour of Mrs. Hill herself; she entirely parted with the property. As the common law does not recognize such a thing as an estate in a chattel, a gift of a chattel for life accompanied by delivery passes the property at law. Starting from this point, the argument for the defendant was that in equity the Dowager Ann took a life interest in the diamonds, and that after her death there arose a precatory trust, as it is termed. The term is an awkward one, but its meaning is clear. Courts of equity have held that words, *primâ facie* expressive of request, entreaty, wish, hope, and the like, may be read as words of command creating a trust. It is merely a question

of the construction of the particular instrument, or as here, the set of words used, taken in connection with any surrounding circumstances that may be legitimately brought into consideration. I entirely concur in the statement of the principle on which the courts now act contained in the judgment of Lindley, L.J., in *In re Hamilton*, 43 W. R. 577, [1895] 2 Ch. 370. He was dealing with the case of a will; it is on wills only, so far as I am aware, that these questions of precatory trust have been raised. He says that "you must take the will which you have to construe, and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe." In this case the term "trust" does not occur. A trust undoubtedly may be created by any apt words; but the circumstance that the well-understood and obvious term "trust" is not used seems to me to be worthy of some consideration when the question is whether a trust is or is not intended to be created.

Now, it is incumbent on those who claim that there is a trust, whether created by precatory words or otherwise, to point out with reasonable certainty who are the objects of the trust; these objects must be ascertained from the words used construed reasonably. The defendant's counsel relied on the word "request" as showing the trust, and the word "heirlooms" as defining the objects. It was said at first in a general way that the trust was for the Dowager Ann for her life, and that she had a special and restricted equitable power of appointing the chattels by will in favour of a particular person with an implied trust for the same person in default of appointment. I pressed Mr. Warmington, who is a learned conveyancer, to set out at large the terms of the supposed settlement. His answer, as I understood it, was that the dowager had a testamentary power of appointing the diamonds to her son, the third viscount, and in default of such an appointment the diamonds passed to him absolutely if at her death he was alive and entitled to the dignity in possession. With all respect to him, this was an arbitrary, narrow, and absurd settlement, and one which cannot be extracted from the words. I will deal presently with the words "as heirlooms." According to this construction the Dowager Ann had in effect no power at all; she had no voice in the disposition of the jewels; no choice or power of selection at all; it was immaterial whether she made a will or not, the third viscount, her son, was to take in either event. Of course he could not have taken under her will if he had died in her lifetime, an event which might well have happened. Dissatisfied with the settlement stated by Mr. Warmington, Mr. Powell tried his hand at drawing the settlement *in extenso*. He said, as I understood him, that the second viscount (who was not viscount in 1831) took for his life, and after his death the diamonds passed to his son, the third viscount; he endeavoured to connect the diamonds in some unexplained way with the descent of the dignity; but he shrank from this, for he deliberately cut out the first viscount and his issue male. He could make nothing of the supposed testamentary power, nor give any satisfactory reason for excluding the first viscount, who was living in 1831, and might have left issue male to succeed to the dignity. It was not from want of skill that the defendant's counsel failed to draw out any satisfactory or reasonable settlement by way of trust.

As reliance was placed on the words "as heirlooms," it is necessary to say a few words on the meaning and effect of the term "heirlooms." The meaning of the word standing alone, without any explanatory context in reference to chattels in gross (I am not speaking of fixtures), is the same in law as in equity. Its primary meaning is, chattels which, on the death of the ancestor, pass to the heir. These are of two classes. The first is where they pass by special custom, such as the best bed and the like. The second is where the chattels (to use the old phrase) savour of the inheritance—that is, are directly connected with it. This class includes title deeds and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage, as in the case of the Pusey horn, and the ancient jewels of the Crown. As the special custom has to be proved strictly, little or nothing is heard at the present day of the first class. For this statement of the law it is unnecessary to cite authorities. I refer, however, to Co. Litt. 18*b*, and 1 Williams on Executors, 9th ed., p. 633 *et seq.*, in which latter work the subject is fully treated. But there is a secondary sense in which the term heirlooms is used, that is, where chattels are settled by deed or will or otherwise vesting them in trustees upon trusts declared, whereby they are limited to go along with corporeal or incorporeal hereditaments so far as the rules of law or equity will permit. This secondary sense is, speaking generally, the sense in which the term heirlooms is employed popularly and also by lawyers as a brief description. As an instance of the latter I refer to section 37 of the Settled Land Act, 1882, where the marginal note (which forms no part of the enactment) is "Heirlooms." The word itself does not occur in the text, which speaks of personal chattels settled on trust so as to devolve with land. But the chattels there settled are both at law and in equity still chattels; and as neither law nor equity knows of such a thing as an estate in a chattel or a remainder in the proper sense of those artificial terms, it follows that the chattels so settled, retaining their character of chattels, are, like any other personal property, subject to the general rule against perpetuities. Accordingly, in compliance with this rule, the property in the chattels must vest absolutely within lives in being and 21 years afterwards. Consequently, in well-drawn settlements, regard being had to another rule of law that words which create an estate tail in realty confer absolute property in personalty, a provision is usually inserted that the chattels shall not vest in an unborn person who takes an estate tail in the realty by purchase, unless he attains the age of 21 years. All these propositions are well established. I am led into stating them by the argument for the defendant. There is another proposition of law, that a man cannot change the general law, and impart to a chattel a descendible quality except in some such manner as already stated. He cannot turn a chattel into freehold land. Accordingly, if A. gives a chattel to B. and merely says that B. is to have it as an heirloom, no force (in the absence of any context or special circumstances) can be attributed to the word heirloom. Such was the opinion of Lord Hatherley in *Shelley* v. *Shelley*, 16 W. R. 1036, L. R. 6 Eq. 540, and such was the decision in *In re Johnston*, 32 W. R. 634, 26 Ch. D. 538.

Now, the words used by Mrs. Hill did not expressly annex the diamonds to the dignity, nor can any such intention be reasonably imputed to her in the circumstances of the case. She certainly did not mean that the Dowager Ann should bequeath them to the first viscount or his issue male. Nothing could be further from her intention in making the gift to the young girl who was or was about to become the wife of her son. To my mind it is absurd to say that she intended that the jewels should pass in any definite order or course of limitation. No such order or course can be reasonably extracted from the words used or the circumstances under which the gift was made.

The learned judge, who was called upon to decide the case on circuit, came to a conclusion in favour of the defendant. His view was that the Dowager Ann took a life interest in the diamonds with a trust to create them heirlooms as far as she could. If this be the correct view (which I think it is not) then inasmuch as the plaintiff was living at her death the gift in her will down to and including the plaintiff was not in contravention of the rule against perpetuities, and was a valid appointment in favour of the plaintiff. Where there is a power of appointment in favour of objects of whom some are within and some are without the limits allowed by the rule against perpetuities, an appointment to objects within the limits is valid.

The sum of the case appears to me to be this: The property at law vested in Ann Clegg by virtue of the gift, and I think in equity also. She was to have the use and enjoyment of them during her life, and she had the right to dispose of them by will. She was bound in honour to Mrs. Hill not to sell them or give them away by will to strangers, but to leave them as heirlooms by keeping them in the family with which she became connected by her marriage. The word "request" may in certain cases by reason of a context be sufficient to create a trust, but it would be contrary to the true meaning of Mrs. Hill to hold that any trust or other binding obligation was here created. In the circumstances of the case it would be unreasonable to suppose that Mrs. Hill by her loose and inartificial words intended to impose any trust on Ann Clegg; the request must be taken in its ordinary and natural sense and not in its extraordinary and unnatural sense of a command. No special sense can be attributed to the words "as heirlooms." What was meant in a general way was just what was said; you are to leave them as heirlooms. If those words had any force as a condition (I think they have not) then the Dowager Ann has by her will complied with the condition; she has done exactly what was intended; she has left them as heirlooms.

For these reasons I hold that the plaintiff's claim is established.

Appeal allowed.

Solicitors for the plaintiff, *Stibbard, Gilson, & Co.*, for *Rowlands & Co.*, Birmingham.

Solicitors for the defendant, *Dunkerton & Son*, for *Pickin, Jones, & Roberts*, Pwllheli.

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Chitty, L.JJ.) Jan. 25.

DEAN AND CHAPTER OF ST. ASAPH (*Appellants*) *v.* OVERSEERS OF THE PARISH OF LLANRHAIADR-YN-MOCHNANT AND ASSESSMENT COMMITTEE OF LLANFYLLIN UNION. (a.)

Poor law—Rating—Tithe rent-charge—Assessment—Deductions—Liability to repair chancel—Tenant's profits.

In assessing the rateable value of tithe rent-charge issuing from a rectory the tithe-owner is not entitled to a deduction for money expended in repairs to the chancel of the parish church.

On an appeal against an assessment of tithe rent-charge a court of quarter sessions is not justified in allowing a deduction in respect of tenant's profits unless it finds as a fact that the allowance made for expenses of collection is insufficient to cover tenant's profits.

Judgment of the Queen's Bench Division (Wills *and* Wright, JJ.), ante, *p.* 223, *affirmed.*

Appeal from the judgment of a Divisional Court (Wills and Wright, JJ.) on a special case stated by quarter sessions, *ante*, p. 223.

At the quarter sessions for the county of Montgomery held on the 2nd of January, 1896, an appeal by the Dean and Chapter of St. Asaph against a certain poor rate was heard, the respondents being the overseers of the parish of Llanrhaiadr-yn-Mochnant and the assessment committee of Llanfyllin Union.

The assessment committee had, in the year 1895, assessed the appellants in respect of certain tithe rent-charge at the gross estimated rental of £280 2s. 2d., and the rateable value of £233 5s., and the overseers made a rate in accordance with such assessment. The gross amount payable to the appellants in respect of the tithe rent-charge for the year 1895 was £280 2s. 2d., and the questions in the appeal related solely to the deductions which ought to be made therefrom in order to arrive at the net rateable value. The deductions made by the assessment committee were as follows: Poor rate, £30 13s. 2d.; 4 per cent. for collection, &c., £11 4s.; repairs to cathedral, £5. The court of quarter sessions allowed the deduction of £30 13s. 2d. in respect of poor rate. The court also found that a deduction should be made for: (1) Remuneration of collector; (2) legal costs and out-of-pocket expenses; (3) bad debts and irregularity in payments: (4) tenants' taxes; and with respect to these the court ordered that the amount of the deduction should be 4 per cent. off the gross estimated rental. The court also held that a further deduction should be made for tenants' profits, and that the amount of this deduction should be 1 per cent. off the gross estimated rental. The court further held that a deduction should be made in respect of the liability of the Dean and Chapter, as owners of the rectorial tithe rent-charge of the parish of Llanrhaiadr-yn-Mochnant, to repair the chancel of the parish church, and that the amount of that deduction should be 1 per cent. off the gross estimated rental. A practice to this effect was proved by evidence called before the court. The court disallowed the claim of the appellants to a deduction on account of repairs to the cathedral.

The questions for the opinion of the Queen's Bench Division were whether the court of quarter sessions was right: (1) In making an allowance for tenants' profits in addition to the allowances for remuneration of collector, &c.; (2) in making an allowance in respect of any liability of the appellants to repair the chancel of the parish church. No question was raised on the special case with regard to a deduction on account of repairs to the cathedral.

The Divisional Court held that no deduction could properly be allowed, either in respect of tenants' profits, or in respect of the liability of the appellants to repair the chancel of the parish church.

The Dean and Chapter appealed to the Court of Appeal.

Macmorran, Q.C. (*Stevenson S. Moore* with him), for the appellants.—Tithe rent-charge is to be rated like other property, at what a tenant from year to year would give for it. The court of quarter sessions, in assessing what the hypothetical tenant would give for this tithe rent-charge, have made an allowance for expenses of collection, and they have made a further allowance for tenants' profits. The case of *Goodchild* v. *Trustees of the Poor of St. John's Hackney*, 6 W. R. 367 (reported in E. B. & E. 1

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

under the name of *Hackney and Lamberhurst Tithe Commutation Rent-Charges*), shows that the question whether such further allowance should be made is to be treated in each case as a question of fact: See also *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*, 22 W. R. 184, L. R. 9 Q. B. 84. The quarter sessions having decided this question of fact in our favour, the burden is on the other side to show that their decision is wrong. As to the other point, in assessing tithe rent-charge the deductions ought to include sums paid for ecclesiastical dues. The repair of the chancel of the parish church is a charge on the profits of the benefice, and this liability is on the same footing as ecclesiastical dues.

Marshall, Q.C., and *Ellis J. Griffith*, for the respondents.

Lord ESHER, M.R.—Our decision in this case leaves untouched both the case of *Goodchild* v. *Trustees of the Poor of St. John's, Hackney*, and the case of *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*. We must look at the facts before us to see what the hypothetical tenant of this tithe rent-charge would get. The court of quarter sessions rightly made certain deductions from the gross amount. They then proceeded to make further deductions. It seems to me that in allowing a deduction for tenants' profits they made a mistake in law. The special case does not contain any facts to justify them in allowing such a deduction. In my opinion, therefore, there is nothing to support the making of this deduction, and it must be disallowed. So also as to the deduction on account of the repairs to the chancel of the parish church. The hypothetical tenant could have nothing to do with such repairs; he could never be charged with them or have to pay for them. There is, therefore, no ground in fact for making this deduction either. The judgment of the Divisional Court is right, and the appeal must be dismissed.

LOPES, L.J.—We are dealing here with tithe rent-charge, which is no doubt to be rated in the same manner as other property. In my opinion a deduction might properly be made in some cases in respect of tenants' profits, but only where the court of quarter sessions found that the amount allowed for expenses of collection was not sufficient. An allowance of 4 per cent. had already been deducted in respect of the expenses of collection, which as I think must have included something for tenants' profits. The quarter sessions then went on to deduct another 1 per cent. for tenants' profits, but they have not found that the amount allowed for collection was insufficient. I think they mistook the meaning of the authorities as laying it down that after an allowance has been made for expenses of collection, even though that included tenants' profits, a further deduction may then be made under the heading of tenants' profits. The deduction asked for on this account must therefore be disallowed. With regard to the deduction on account of repairs to the chancel of the parish church, the tithe rent-charge and the chancel are distinct and separate hereditaments. The hypothetical tenant of the tithe rent-charge is not hypothetical tenant of the chancel. No deduction therefore ought properly to be made on either ground, and the judgment of the Divisional Court must be affirmed.

CHITTY, L.J., concurred.

Appeal dismissed.

Solicitor for the appellants, *E. W. J. Peterson.*

Solicitors for the respondents, *Robbins, Billing, & Co.*, for *Pughe & Jones*, Llanfyllin.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 9, 10, 16.

In re COSIER.

HUMPHREYS *v.* GADSDEN. (*a.*)

Will—Construction—Hotchpot clause.

Where a testator declares that a sum of money settled by him on a child's marriage shall be taken in or towards satisfaction of the share in the testator's residuary estate bequeathed to such child, and shall be brought into hotchpot and accounted for accordingly, any reversionary interest which the testator may have reserved to himself under the trusts of the settlement in such sum of money, will by the conjoint effect of the gift of residue and the hotchpot clause, pass to the child.

C., on the marriage of his son R. in 1885, *covenanted with the trustees of R.'s marriage settlement to pay to them within six months of his death* £10,000, *upon trust to invest and pay the income to R. for his life, remainder to the wife of R. for her life if she should survive him, remainder for the issue of the marriage, and in default of issue the ultimate trust was for C. absolutely. C. died in* 1886, *having by his will given his residuary estate equally between his son R. and his daughter L. C. directed that any sum of money which he had already covenanted or agreed to give to any child of his on his or her marriage should be taken in or towards satisfaction of the share of such child, and should be brought into hotchpot and accounted for accordingly. After C.'s death his executors paid to the trustees of R.'s settlement a sum of* £10,000, *and divided the residue of the estate equally between R. and L., counting in such division the* £10,000 *as part of R.'s share. R. died in* 1894, *leaving a widow and no issue. By reason of the failure of issue, L. claimed to be entitled to one moiety of the* £10,000 (*subject to the life interest of R.'s widow*) *as part of C.'s estate.*

Held, reversing the decision of Chitty, J., *that the executors of R. were entitled to the whole of the* £10,000.

Appeal of the plaintiffs from a decision of Chitty, J., on the true construction of a hotchpot clause in common form.

The testator, Robert Arnold Cosier, on the marriage of his son Robert Watson Cosier in 1885, covenanted with the trustees of his son's settlement to pay to them within six months of his death a sum of £10,000, to be held upon trust for the son for his life, and after his death for his wife for her life, if she should survive him, with remainder for the children of the marriage, and in default of issue the ultimate trust was for the testator absolutely. By his will dated the 10th of November, 1886, the testator gave his residuary estate equally between his son, the said Robert Watson Cosier, and his daughter Lucy Elizabeth Wheeler, the daughter's share being settled. The will contained the following proviso: "Provided also, and I declare that any and all sums of money, annuities, or annual sums, and property which I have already covenanted or agreed to give, or which I may hereafter covenant or agree to give to or with any child of mine on his or her marriage shall in default of any direction to the contrary in writing under my hand be taken in or towards satisfaction of the respective share of such child . . . and shall be brought into hotchpot and accounted for accordingly." The testator died on the 10th of December, 1886, and his will was duly proved by the executors therein named. After his death the executors of the testator paid a sum of £10,000 to the trustees of the son's settlement, and divided the residue of the estate

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

equally between the son and daughter, counting in such division the said sum of £10,000 as part of the son's share in the division.

Robert Watson Cosier died on the 23rd of June, 1894, leaving a widow and no issue, and having appointed the plaintiffs in the action executors of his will. By reason of the failure of issue of Robert Watson Cosier, the defendants the daughter Mrs. Wheeler and her children, claimed to be entitled (subject to the life interest of Mrs. Cosier) to one moiety of the said sum of £10,000 as part of the original testator's estate. The plaintiffs claimed to be entitled to the whole of the sum (subject to the son's widow's life interest) as executors of the will of Robert Watson Cosier.

Chitty, J., held that the daughter was entitled to half the fund, subject to the life interest of the son's widow.

The plaintiffs appealed.

Levett, Q.C., and *Edward Ford*, for the appellants.

Farwell, Q.C., and *J. G. Wood*, for the respondents.

W. Gordon Fellowes, for the trustees.

Cur. adv. vult.

Feb. 16.—LINDLEY, L.J.—Chitty, J., has decided in favour of the daughter's contention. The learned judge says that the result is unexpected, but he has held it to be the result of the true construction of the hotchpot clause. I confess I cannot agree with him. The hotchpot clause is in the usual form; and, whether it be looked at broadly, without minutely criticizing the words in which it is expressed, or narrowly, with a minute criticism of them, the result appears to me to be the same, and to be quite different from that arrived at by the learned judge. The object of every hotchpot clause is simply to prevent a person to whom a testator has left a share of his estate, and who has been advanced in the testator's lifetime, from obtaining by the combined effect of the bequest and the advance, more of the testator's property than the testator intended the legatee should have. But the effect of the order appealed from goes far beyond this: its effect is to deprive the son of £5,000, part of the one-half of what the father clearly intended the son to have, and to give that £5,000 to the daughter, in addition to the sum which puts her on an equality with her brother. A construction of a hotchpot clause which brings about such a result as that, is to say the least of it, very startling, and renders a close examination of the words in which it is expressed necessary, before being driven to accept so very strange a result.

I turn to the words, and I agree with the counsel for the respondents that they have to be applied to the £10,000 which the testator covenated to pay to the trustees of the son's marriage settlement upon the trusts thereby declared. The ultimate trust in default of children of the marriage was for the testator himself. The testator had a contingent reversionary interest in this sum, which he could dispose of by his will and leave to his son if he chose. Having given one-half of his residuary estate, including this reversion, to his son, the testator says this sum of £10,000 is to be taken in or towards satisfaction of the share of the son under the will, and shall be brought into hotchpot and accounted for accordingly. I pause to inquire, Who is to take this sum? Who is to bring it into hotchpot, and who is to account for it? The answer can only be—the son. It cannot be the trustees, for they are creditors—they take nothing under the will, and are not in a position to take the £10,000 in satisfaction of anything under the will, nor to bring that sum into hotchpot and account for it accordingly. But if a testator having an interest in a sum of money directs a legatee of a share of residue to take that sum on account of such share, and the legatee does so, as the son did here, the whole sum is taken out of the testator's estate, and, so far as the testator is concerned, that sum ceases to be part of his estate and becomes part of what is given to the son. The sum so given is no longer the testator's, and can only come back to him by gift or purchase from the son. It was contended that this is to render a hotchpot clause operative as a gift, which is not its function. But this is only a half-truth, and is very misleading. A hotchpot clause in a will has always to be construed with some other clause which is a clause of gift, and the question always is, What is the true effect of the clause of gift and of the hotchpot clause which has to be construed with it. The combined effect of the two clauses is always, so far as I know, to pass to the legatee of what is given, the testator's interest, if any, in what is to be brought into hotchpot. Take the very common case put by my brother Rigby in the course of the argument. Suppose a father lends his son £1,000, and then bequeaths to him a share of his residuary estate and directs the £1,000 to be brought into hotchpot. What is this but a gift to the son of the £1,000 as part of the share given to the son?

It was also urged that the hotchpot clause is only a direction to bring into account, a direction as to how the accounts are to be made up by the executors or trustees of the will. But accounts are of no use except so far as they represent realities; and the reality to be represented is that the whole £10,000 is given by the testator to the son as part of his share of the residuary estate. What is so given includes all that the testator could give—*i.e.*, the whole of his contingent reversionary interest in the sum in question. If the trustees of the will had not deducted the whole £10,000 from the son's share when they divided the residue they would have paid him too much and there would be a mistake to rectify. But like business men they very properly did deduct the whole sum from his share when they divided the residue, and as between the testator's estate and the son the whole of the £10,000 then became the son's property and he had nothing more to account for and the ultimate trust in the settlement ceased to be a trust for the testator and became by virtue of his will a trust for the son, his executors, administrators, or assigns. In my opinion the order appealed from is wrong and must be discharged, and it must be declared that the plaintiffs, as executors of the son, are entitled to the £10,000 subject to the life interest of the son's widow therein. The costs of the summons and of the appeal ought to be paid by the respondents, the Wheelers.

A. L. SMITH, L.J.—I have had an opportunity of reading the judgment of Lindley, L.J., and I agree with it.

RIGBY, L.J.—In this case I am unable to agree with the conclusion arrived at by the learned judge in the court below. Arguments have been pressed upon us on the supposition that the primary meaning of the clause referred to as the hotchpot clause is opposed to the appellants' contention. As, however, in my judgment the appellants' case is based upon and justified by the primary meaning of the clause it seems to me quite unnecessary to refer to those arguments. The respondents' case seems to me to rest entirely upon the assertion, the mere assertion, for I heard no reason and confessedly there is no authority to justify it, that the important words "shall be taken in or towards satisfaction" cannot be words of gift but must be construed

as meaning, "shall for the purpose of calculation only and not by way of bounty or gift be taken in or towards satisfaction." I see no sort of justification for modifying the phrase under consideration in so vital a manner. If the respondents' counsel had confined themselves to the statement that there may be and often are cases in which similar words in hotchpot clauses can have no greater operation than that to which they claim to confine them in the present case, that statement would, I think, have been correct, but it would not have assisted them in the least. The limited operation of the words in such cases arises not from any change in the meaning of the words, but from the want of disposing power in the testator over the subject-matter. It is not only with reference to hotchpot clauses that such cases arise. The plainest words of gift wherever they occur can operate directly only to the extent of the testator's power to give, though they may have an important indirect operation as in raising a case of election. When a testator gives a direction that a particular thing shall be taken by any one in or towards satisfaction of his share, and the thing spoken of exists and belongs to the testator, I cannot doubt that according to the plain and obvious meaning he gives that thing and this plain meaning is not controlled, or varied, but rather corroborated by adding such words as "and shall be brought into hotchpot and accounted for accordingly." If and so far as the testator cannot give, the words of gift must be inoperative in their primary meaning, though they may have a secondary meaning. Suppose a testator to have given money by way of bounty, say, for the education of a child. The money is spent and gone, the child is in no way liable to repay it, and it is impossible to make it the subject of a gift. Suppose, however, that the testator has lent a child money, say £10,000, instead of giving it, and has, to make the transaction clear, taken a bond for repayment. Or suppose again that he has lent the money to a stranger on mortgage. If the testator say, I declare that the money spent by me on my son's education shall be taken in or towards satisfaction of his share, it is plain that as to that particular subject there can be no gift. In each of the other cases the £10,000 is an existing asset, available for payment of creditors, but, subject to the claims of creditors, entirely at the testator's disposal. If then he say, I declare that the £10,000 owing to me on bond by my son, or the £10,000 lent by me on mortgage to A., shall be taken in or toward satisfaction of my son's share, in my judgment it would be repugnant to common-sense to say that the son was not released from the debt in the first case, and made the owner of the mortgage debt in the second. This is the same thing as saying that the words operate as words of gift. These are the extreme cases, but there are, of course, intermediate cases, of which the present is one—where the testator can dispose of part, but part only, of the subject-matter. The true rule must be, that so far as the words can operate as words of gift—that is, according to their primary meaning—they must do so. In this particular case, if it had been necessary in order to avoid inequality where equality was presumably intended, I should have been disposed to accept Mr. Levett's argument—that by the words "sums of money which I have covenanted to give" the testator must have meant sums of money which I have covenanted to give effectually—that is, so as to take them out of my estate. Certainly I could not treat the word "give" in such a context as being satisfied by payment to trustees who are to take no beneficial interest for themselves. I prefer, however, to take what seems to me the literal meaning of the first part of the hotchpot clause, and to follow the learned judge in treating the words as including the whole sum of £10,000 mentioned in the marriage settlement. The operative words will then run thus: "I declare that the £10,000 referred to in my son's settlement shall be taken in or towards satisfaction of his share." The words cannot operate so as to take away the wife's life interest, nor, if there had been issue, could they have modified their interest. But, to the extent of the testator's own interest, whatever it might turn out to be, they will operate according to what, in my judgment, I repeat is their primary meaning. The appeal therefore ought to succeed.

Appeal allowed.

Solicitors, *Beyfus & Beyfus; Flower, Nussey, & Fellowes.*

High Court of Justice.

Chan. Div. } Feb. 11, 12; March 10.
Stirling, J. }

BELL v. BALLS. (a.)

Vendor and purchaser—Contract for sale of land—Sale by auction—Authority of auctioneer or his clerk to sign memorandum on behalf of purchaser—Statute of Frauds (29 Car. 2, c. 3), s. 4.

Upon a sale by auction the clerk to the auctioneer has no implied authority to sign on behalf of a purchaser a memorandum of the contract within the Statute of Frauds.

The implied authority of an auctioneer to sign such a memorandum on behalf of a purchaser does not extend to authorize the auctioneer to sign such a memorandum seven days after the sale by auction.

Semble, *the auctioneer's authority merely enables him to sign at the sale.*

This was an action for the specific performance of a contract to buy certain freehold land, and raised questions as to the authority of an auctioneer or of the clerk to an auctioneer to sign a memorandum of a contract for sale as agent for the purchaser.

The following statement of the facts is taken from the judgment of Stirling, J.:

The action was by the plaintiffs as vendors of certain freehold property known as "The Riddings," No. 72, Tulse-hill, for specific performance of an alleged agreement by the defendant to purchase the same. The plaintiffs caused the property in question to be put up for sale by auction by Messrs. Herring, Son, & Daw, a firm of auctioneers, at the Mart, Tokenhouse-yard, on the 25th of November, 1895, upon the terms expressed in printed particulars and conditions of sale, at the end of which was a memorandum of agreement in blank. The defendant, in company with a friend, named Wyatt, attended the sale. Upon Mr. Daw, a member of the above-named firm of auctioneers, entering the room a short conversation took place with reference to "The Riddings" between him and the defendant, who was known to him personally, and just before he entered the rostrum he asked the defendant to "give him a bid." The sale was then begun of five different properties, among which "The Riddings" came third. The reserve price was £1,600. The defendant bid £1,550, and after communications had passed between Mr. Daw and the vendors, the property was knocked

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

down to the defendant at that price. The sale of the two remaining properties was then proceeded with, and at the close the defendant left the room. Upon the auctioneer's clerk calling Mr. Daw's attention to the circumstance that the defendant had not signed the memorandum of agreement, a messenger was sent after him, and he returned. He was then asked by Mr. Daw to sign the memorandum, but refused, on the ground that he made the bid for Mr. Daw in compliance with his request, and not for himself. The auctioneer's clerk had, in the meantime, filled up the memorandum of agreement on a copy of the printed particulars and conditions of sale in the appropriate manner. The memorandum, as filled up, ran as follows:—

"I, George Balls, of Brixton-hill, S.W., do hereby acknowledge that I have this day purchased the property described in the within particulars of sale for the sum of one thousand five hundred and fifty pounds, and having paid into the hands of Messrs. Herring, Son, & Daw, the auctioneers, the sum of one hundred and fifty-five pounds as a deposit and in part payment of the purchase-money, I hereby agree and bind myself, my heirs, executors, administrators, and assigns, to pay the balance of the said purchase-money and complete the said purchase in all respects according to the within conditions of sale. As witness my hand this 25th day of November, 1895."

Then followed a recapitulation in figures of the amount of the purchase-money, the deposit and balance owing, and the document concluded with these words: "As agents for the vendors, Peter Bell and William Dickson, we hereby ratify this sale, and as auctioneers acknowledge to have received the deposit. Abstract to be sent to ——." This memorandum was not signed either by the auctioneer or his clerk. A week later, however, on the 2nd of December, 1895, Mr. Daw, at the instance of the vendors, filled up and signed, in the name of his firm and as agent for the defendant, another copy of the memorandum, striking out, however, all reference to the deposit, which, of course, had not been paid. The defendant persisted in his refusal to complete the purchase, and the action was brought to compel him to do so, the plaintiffs relying upon both the above-mentioned documents as memoranda of the sale sufficient to satisfy the requirements of the Statute of Frauds.

Grosvenor Woods, Q.C., and *Ingpen*, for the plaintiff.—The purchaser is bound by the statement of the auctioneer's clerk made in his presence, and there is a sufficient signature on behalf of the purchaser to satisfy the Statute of Frauds if the clerk writes down the name of the purchaser in his presence: *Sims* v. *Landray*, 42 W. R. 621, [1894] 2 Ch. 318; Fry on Specific Performance, 3rd ed., s. 531. We submit that the inference from the cases is that the purchaser authorizes whoever appears at the auction to act on behalf of the auctioneer for the purpose of taking down the names of the parties, and that it is not a personal authority given to the auctioneer: *De Bussche* v. *Alt*, 8 Ch. D. 286, at p. 310, 26 W. R. Dig. 192. In sales by auction the auctioneer's clerk who is employed in taking down the names of the purchasers is just as much the agent of the purchaser as the auctioneer himself. They also referred on this point to *Henderson* v. *Barnewall*, 1 Y. & Jer. 387; *Bird* v. *Boulter*, 4 B. & Ad. 443; *Peirce* v. *Corf*, 22 W. R. 299, L. R. 9 Q. B. 210; *McMullen* v. *Helberg*, 4 L. R. Ir. 94, at pp. 105, 121, 29 W. R. Dig. 86; *Dyas* v. *Stafford*, 7 L. R. Ir. 590; Sugden on Vendors and Purchasers, p. 147. As to the question whether the later memorandum signed by the auctioneer is binding, we admit that after the sale the auctioneer could perform no new act so as to bind the purchaser to any other bargain than that concluded; but why should the purchaser be able to revoke the bargain made? The auctioneer is not bound to sign on the day of the sale. If the auctioneer is unable to sign on the day of the sale, is the vendor to be at the mercy of the purchaser. They referred on this point to *Day* v. *Wells*, 9 W. R. 857, 30 Beav. 220; Dart on Vendors and Purchasers, 6th ed., p. 209; and contended on the authority of *Tamplin* v. *James*, 29 W. R. 311, 15 Ch. D. 215, that even if the defendant bid under a mistake he could not resist specific performance.

Hastings, Q.C., and *Stallard*, for the defendant.—The defendant made the bidding under a mistake of fact: and in any event we contend that the contract is not binding on him. An auctioneer's clerk, as such, has no authority to sign a memorandum so as to bind a purchaser: *Peirce* v. *Corf*; he must have express authority in that behalf: *Bird* v. *Boulter*; *Coles* v. *Trecothick*, 9 Ves. 234; and the defendant gave him no such authority. As to the second memorandum it was not signed until long after the auction was over, and after the auctioneer's authority had ceased, it is therefore invalid: *Mews* v. *Carr*, 1 H. & N. 484, 5 W. R. C. L. Dig. 180; *Buckmaster* v. *Harrop*, 13 Ves. 456. The defendant had, in fact, at that time revoked whatever authority the auctioneer had ever had.

Grosvenor Woods, Q.C., replied.

STIRLING, J., stated the facts, and continued:—The first question is one of fact—namely, whether the defendant really bid for the property, as he alleges, in the belief that he was bidding for Mr. Daw, or, in other words, acting as a puffer at the sale. His story is a strange one, but having seen the defendant and his friend in the box and heard their evidence, I am bound to say that I believe that the defendant did act under the belief that he alleges. On the other hand I am of opinion that the defendant had no reasonable ground for so acting, and that what passed between him and Mr. Daw as told by himself ought not to have misled him into the belief which he entertained. Under these circumstances what is the legal result. It seems to me that, assuming a memorandum to exist which satisfies the requirements of the Statute of Frauds, there was a valid contract between the plaintiff and defendant, and the mistake at most constitutes a defence only so far as the action seeks specific performance, and, as was laid down by the Court of Appeal in *Tamplin* v. *James*, the court is now bound in such a case to consider the question of damages.

The validity of the second line of defence must therefore be considered. First, with reference to the memorandum filled up by the auctioneer's clerk. It has been decided that, upon a sale by auction, the auctioneer is the agent of the purchaser as well as the seller, and has authority to sign a memorandum of the sale so as to bind both parties, and if the memorandum or a copy of the particulars had been filled up by the auctioneer with his own hand in the same way as the memorandum now in question was filled up by the clerk it would have been sufficient. An agent, however, cannot delegate his authority. The law as to that in the case of an auctioneer and his clerk is laid down in *Peirce* v. *Corf*, where Blackburn, J., said: "I take it as quite clear that the auctioneer's clerk has no authority to sign by the general custom, although, as *Bird* v. *Boulter* decided, there may be special circumstances to show that the auctioneer's clerk had authority to sign. Where the bidder—that is, the person to be charged—by word or sign, authorizes the

auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent." In the present case the defendant did not by word or sign or otherwise authorize the auctioneer's clerk to sign on his behalf, and the case of *Bird* v. *Boulter* has no application.

It was, however, urged the exigencies of the case require that on sales by auction at the present day the auctioneer's clerk sitting publicly beside him should be held to be authorized to sign memoranda on behalf of purchasers.

The ordinary practice at the present time with reference to sales of real estate was stated by Mr. Daw, the plaintiff's own witness, to be that an auctioneer, after he has knocked down a particular lot proceeds with the sale of the following lots and leaves it to the clerk to find out the name of the purchaser and to prepare a record of the contract, which he does by filling up the memoranda appended to two copies of the particulars of sale, one for signature by the purchaser, the other for signature by the auctioneer on behalf the vendor. Some convenience no doubt attends such a practice, and I do not desire to question its validity, but the mere statement of it appears to me to show that there is no ground for the contention that the exigencies of the case require that the auctioneer should be held entitled to delegate his authority to his clerk.

The practice contemplates that one part of the memorandum should be signed by the auctioneer, and if this is consistent with the requirements of business why should not the signature of the other by him be also consistent with such requirements. I say this quite irrespective of what was urged in argument, that there was no difficulty in the auctioneer writing down at the time the name of the purchaser on a copy of the particulars and conditions of sale, which was held to be sufficient in *White* v. *Proctor*, 4 Taunt. 209; and *Kemeys* v. *Proctor*, 3 V. & B. 57, 1 J. & W. 350.

I therefore come to the conclusion that the memorandum filled in by the clerk did not satisfy the requirements of the Statute of Frauds.

Secondly, as to the memorandum signed by the auctioneer on the 2nd of December, 1895. It was contended that at the time when the auctioneer signed it he had no authority so to do—first, because the authority conferred by the purchaser on the auctioneer at the time of the sale had expired long before the 2nd of December, 1895, or at all events at that date; and secondly, because the purchaser had actually revoked whatever authority could be exercised at that date. This renders it necessary for me to consider on what principles the auctioneer is held to be authorized by a purchaser to sign a memorandum of the contract. This was first established in *Emmerson* v. *Heelis*, 2 Taunt. 38. There Lord Mansfield says (p. 48): "By what authority does he (the auctioneer) write down the purchaser's name? By the authority of the purchaser. These persons bid and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser; and it does seem therefore that this is a contract signed by an agent for the purchaser, and consequently is binding." In *Earl of Glengal* v. *Barnard*, 1 Keen 769, Lord Langdale thus explains that decision (p. 788): "The nature of the proceeding by auction, the bidding for the purpose of making the purchase, the necessity of making a statement of the bidding, the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances afford intelligible ground for the decision in *Emmerson* v. *Heelis* and the approbation which has since been bestowed upon it." These cases appear to show that the authority which the purchaser confers upon the auctioneer is an authority to write down the bidding—that is to say, to make a minute or record of it at the time and as part of the transaction, and such a record is held to be a memorandum sufficient to satisfy the statute. I do not consider that the nature of the proceedings justifies the implication of an authority to make a memorandum except at a time when the writing down can fairly be held to be a part of the transaction. If the auctioneer were allowed to record the biddings at a later time, evils might arise similar to those which the Statute of Frauds was intended to prevent.

In *Mews* v. *Carr* it is pointed out that the parties cannot set up a custom of trade to repeal the Statute of Frauds, and in *Buckmaster* v. *Harrop*, 13 Ves. 456, this very point was raised, and at p. 473 the Lord Chancellor says: "The only evidence that I can receive is the written memorandum itself, unless it is lost; and it must be a contemporary memorandum." The Lord Chancellor, therefore, says that the memorandum must be contemporaneous, and by that I understand one made at the time and as part of the transaction. If the auctioneer in the present case had proceeded to sign a memorandum immediately on the conclusion of the auction, I should have been slow to hold that to have been beyond his power; but I think that the memorandum of the 2nd of December, 1895, was signed at a time when the auctioneer's authority had ceased. It is, therefore, unnecessary for me to consider the question whether the purchaser could revoke the authority conferred by him on the auctioneer. I content myself by saying, with Lord Romilly in *Day* v. *Wells*, 9 W. R. 857, 30 Beav., at p. 224, that "I do not affirm any such proposition as this, that a person, having given an unlimited authority to an auctioneer, may, when dissatisfied with the price at which the property is sold, revoke his authority. That is not my opinion at all." The result, therefore, is that this action fails, and must be dismissed, with costs.

Solicitors, *Beaumont, Son, & Rigden; Charles Butcher.*

Chan. Div.
Kekewich, J. } March 6, 16.

In re MONTAGU'S SETTLEMENT.
DERBISHIRE *v.* MONTAGU. (*a.*)

Settled land—Jurisdiction—London leaseholds—Infant—Pulling down and rebuilding houses—Mortgage of settled land.

Where land is settled in favour of infants the court has no jurisdiction to sanction the raising of money by mortgage of the settled land for the purpose of pulling down and rebuilding houses thereon, although the value of the settled land would greatly be increased thereby.

Conway *v.* Fenton, 37 *W. R.* 156, 40 *Ch. D.* 512, *commented on.*

Summons.

This was a summons taken out by Eliza Derbishire and Charles Edward Cree, trustees of an indenture of resettlement made the 14th of December, 1872, for the determination of the following questions:

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

1. Whether, in the opinion of the court, it would be for the benefit of the infant defendants, and any unborn children of the defendant Philip Montagu, that the messuages known as Nos. 82, 83, and 82A, Grosvenor-street, and No. 130, New Bond-street, in the parish of St. George's, Hanover-square, in the county of Middlesex (being part of the property held upon the trusts of the above-mentioned indenture), should be taken down and rebuilt in accordance with a proposed scheme at a cost of not more than £8,500 to be raised by a mortgage of the property held upon the trusts of the indenture, or upon some part of such property.

2. Whether the plaintiffs were at liberty to raise the sum (not exceeding £8,500) required for the purpose of such taking down and rebuilding by a mortgage of the whole or a part of the property comprised in the indenture.

It was proposed to pull down the whole of the premises, which occupied a commanding corner site and were old and out of date, and to build first-class shops fitted up in accordance with modern requirements, and experts estimated that by so doing the value of the property would, by the expenditure of £8,000, be increased from £19,000 to at least £32,000. The defendants were Philip Montagu, the tenant for life, and Evelyn Maud Montagu, his wife, and their two children, Vera Evelyn Mary Montagu and Mary Catherine Jean Montagu, both of whom were infants and interested in remainder.

By the indenture of the 14th of December, 1872, it was declared that the trustees or trustee thereof should stand and be seized and possessed of the property in question in trust, in the events which happened, to pay the rents and profits to Philip Montagu or his assigns during his life, and from and after his decease in trust for his children as he should by deed or will appoint, and in default of such appointment in trust for his children in equal shares as tenants in common. It was also provided that Philip Montagu might by deed or will appoint an annuity of £200 to his widow. The indenture contained a power for the trustees to sell, and a power to demise until sale, the premises in manner therein mentioned. And it was declared that the trustees should from time to time, and when occasion required, obtain a renewed lease of the premises (which were held of the Corporation of London) and should for that purpose be at liberty to raise by sale or mortgage of the premises for the time being, subject to the trusts of the indenture, such sums as should be required to meet the fine or other expense of or incident to such renewal or incurred in relation thereto, including all such costs of repairing, rebuilding, or reinstating the premises as might be required for the purpose of obtaining such renewal.

The appellants were the present trustees of the indenture of the 14th of December, 1872.

Philip Montagu appointed an annuity of £200 to his wife, to take effect upon his decease.

By an indenture made the 27th of September, 1894, the premises in question were surrendered by the plaintiffs, and were redemised to them by the Corporation of London for a term of eighty years from the 25th of March, 1894.

Warrington Q.C., and *B. B. Rogers*, for the summons.—The question is whether the court has jurisdiction to sanction the scheme for pulling down and re-building the houses and the raising of the money for the purpose by a mortgage of the trust estate. [KEKEWICH, J.—I will assume that what is proposed is for the benefit of the estate.] There is nothing in the trust deed to prevent the trustees from acting as a prudent owner would act. The court can therefore, as they have so acted here, allow them to be repaid for what they have done, and by anticipation can allow the work to be done. In none of the cases in point has there been a trust, but where there is a trust the court can consider what the trustees may do; it is a matter of discretion. [KEKEWICH, J.—In *Vyse* v. *Foster*, 21 W. R. 207, L. R. 8 Ch. App. 309, the court insisted on an inquiry as to whether what had been done was right.] In *Glover* v. *Barlow* (reported in a note to *In re Jackson*, *Jackson* v. *Talbot*, 21 Ch. D. 786) the court exercised the jurisdiction because it was beneficial to the infants. *Frith* v. *Cameron*, 19 W. R. 886, L. R. 12 Eq. 169; *Conway* v. *Fenton*, 37 W. R. 156, 40 Ch. D. 512. In *In re De Teissier's Settled Estates*, 41 W. R. 184, 186, [1893] 1 Ch. 153, Chitty, J., points out that the decision in *Conway* v. *Fenton* depends upon the existence of jurisdiction. *In re Hotchkys*, 34 W. R. 569, 32 Ch. D. 408. In the case of a trust the court has jurisdiction to sanction trustees doing what a prudent owner would do.

H. E. Wright, for the tenant for life an d his wife.

T. A. Nash, for the infants.—With the exception of *Glover* v. *Barlow*, all these are cases of salvage or of re-building a mansion house in which the infant would live. Here the lease has nearly eighty years to run, and the work might easily be done under a building lease. In *Glover* v. *Barlow* the infants were absolutely entitled in possession. In *In re Lord de Tabley*, *Leighton* v. *Leighton*, 75 L. T. N. S. 328, *Conway* v. *Fenton* is commented on. In *Hurst* v. *Hurst*, 29 L. R. (Ir.) 219, 40 W. R. Dig. 231, the court held that it had no jurisdiction to authorize the construction of new buildings. Here the property is not even out of repair; it is only out of date. The court has no jurisdiction under the Settled Land Acts.

KEKEWICH, J., on the 16th of March delivered the following written judgment:

It is proposed to raise a large sum, say £8,500, by mortgage of the only property comprised in the settlement of the 14th of December, 1872, and to expend the money in pulling down the buildings now standing thereon and in erecting others in their place. It is admitted that this is not authorized by any provision in the settlement, and further, that it does not fall within any class of improvements sanctioned by the Settled Land Acts. In a case recently before me it was argued that the original jurisdiction of the court, whatever might be its extent and limit touching the expenditure of money on land, is ousted by the Settled Land Acts which must be deemed to have established a code beyond which the court has no power to go. That seemed to me then, and it still seems to me to be an indefensible proposition, though I recognise and respectfully concur in the opinion of Chitty, J., that those Acts must be regarded as affording a guide to the court, and as of assistance in arriving at a proper conclusion. The question, therefore, is whether, apart from those Acts there is jurisdiction to make the order asked. The trustees have properly only adduced such evidence as is necessary to prove that their proposal is reasonable, leaving all details as to the amount and manner of expenditure to be determined if and when that proposal has been sanctioned.

It may be safely concluded on the evidence that it will be to the advantage of all parties to pull down the existing buildings, and to erect in their place others of a more modern character and more appropriate to the neighbourhood, or in other words, that by the expenditure of about £8,500 the value of the property will be largely increased, both for letting and selling. It was suggested that the practical

result desired—that is, the erection of new and better buildings, might be effected through the medium of a building lease, but the ordinary terms of such a lease would yield only a moderate rent for many years to come, and postpone the full enjoyment of the property for some generations. A prudent owner, having money available for the purpose of rebuilding, would, I think, so expend it, and not resort to a building lease. There is no money available, and if rebuilding is sanctioned the costs must be defrayed by means of a mortgage of the property. Similar cases having been recently before me, and especially the one above mentioned. I did not require counsel to discuss at length the many authorities touching the jurisdiction of the court respecting infant's property, and Mr. Warrington, in substance, admitted that they would not support his application. He endeavoured to support it on the ground that the court is here executing the trusts of a settlement, and that in such a case it has a larger discretion and a more general jurisdiction. Confessedly there is no case going quite as far as what is now proposed, but it was urged that there may be extracted from the authorities a principle which may be safely applied to the present circumstances, so as to justify the order asked. It becomes necessary, therefore, to examine these authorities. Somewhat reluctantly I am compelled to commence with my own case of *Conway* v. *Fenton*. In *Lord de Tabley's case* North, J., said he was tired of hearing that case cited, and I sympathize with him. I have more than once made the same remark. It seems to me that whether treated as an example of salvage or an adaption of the doctrine of *Vyse* v. *Foster*, that case was rightly decided. The necessity and immediate advantage of repairs were alike urgent, and the money spent was taken from a fund settled upon the same trusts as the houses repaired. I do not think that as a decision, whatever may be said of the language of the judgment, it can usefully be cited as professing to lay down any rule of law. It was commented on by Chitty, J., from this point of view in *De Teissier's Settled Estates*, quoted for a different purpose above. He apparently thought that such expenditure as he was asked to sanction might be sanctioned if a case of salvage were established, but holding that the circumstances did not make it a case of salvage he followed *Hibbert* v. *Cooke*, 1 Sim. & S. 552, and declined to charge the settled property with the cost of structural alterations and repairs of the mansion house. It is to be observed that there was in that case personal estate settled upon trusts corresponding with the limitations of the real estate, so that no question about raising money by mortgage of the real estate was discussed. This happened also in *In re Lord de Tabley's Estates*, already mentioned, where likewise it was proposed to expend part of the personal estate in permanent repairs of the mansion house. North J., declined to make the order, but followed *In re De Teissier's Settled Estates*, and regarded *Conway* v. *Fenton* as only sustainable, if at all, as a case of salvage. *In re Hurst*, before the Master of the Rolls, in Ireland, was cited as more in the applicants' favour. The judgment is instructive, and I think that all the cases cited before me were there referred to by the learned judge or by counsel. There no money was available, and it was proposed to raise the needed amount by mortgage, and this was sanctioned so far as it was absolutely necessary to put the house into tenantable repair, the precise amount required being left for consideration in chambers, according to what the learned judge styled a very moderate standard indeed. But he declined to authorize money to be raised for the construction of new buildings in the place of the old dwelling-house, which was proved to be in a dilapidated condition, on the ground that he had no jurisdiction to make any such order. *Conway* v. *Fenton* was referred to and commented on, but mainly as an authority for the proposition that what might be done in an administration action might also be done on originating summons, as I have no doubt it might. So far I have no authority in support of the present application, and, as already pointed out, *In re Hurst* is an authority against it. *Frith* v. *Cameron* is a case of a different character. If I could regard that case as decided on a principle, it would justify what is asked to be done here. It was proposed to pull down the mansion house and expend £5,000 in building a new one, and to raise that £5,000 by mortgage of the settled property. There was some evidence that the value of the estate charged with the £5,000, but with a residential house upon it, would be as great as or greater than the estate without a house, and apparently the then existing house was worthless. The question of jurisdiction was raised and to some extent argued, and *Hibbert* v. *Cooke* was cited, but I doubt whether the opposition was serious, and the Vice-Chancellor, in making the order under the general jurisdiction of the court, justified it as being for the benefit of all parties under the peculiar circumstances of the case. There is no exposition of principle, no examination of authorities, and I think that it would be unsafe and unwise to treat the case as an authority for the jurisdiction purported to be exercised unless it can be seen to be consistent with, if not supported by, other authorities. *Glover* v. *Barlow* is another case where the court authorized in an administration suit the mortgage of settled property and sanctioned expenditure of money thus obtained, on repairs. It appears that among other things rebuilding was proposed, and the inquiry directed by the decree was what rebuilding and repairs were necessary and proper to be done. The master's report says nothing about rebuilding, and it appears that out of the money proposed to be raised by mortgage, only £500, or about one-seventh of the whole, was ultimately directed to be expended in repairs. So far as the final order in *Glover* v. *Barlow* sanctioned expenditure on repairs, it must, I think, be taken to be a case of salvage, and so far as it did not sanction expenditure on rebuilding, it is, of course, of no value to the applicants. The only other case which I might mention is *Re Hotchkys*. Much learning is to be found in the judgments and particularly in that of Cotton, L.J., respecting the duty of trustees to keep property in repair, and to provide for the incidence of the burden in proper proportions upon the tenant for life and remainderman, but I have been unable to find anything directly bearing on the question what ought to be done when rebuilding and not repair is under consideration.

My conclusion from all these authorities is, that, whatever the court may have from time to time done in cases of salvage, or whatever may have been done without full consideration of the question of jurisdiction, the court has never asserted a jurisdiction to spend settled money in pulling down and rebuilding houses. Indeed the cases cited and some others, including *Drake* v. *Trefusis*, which there is no occasion to mention, all in my judgment tend to show that the jurisdiction does not exist, and that I believe is the sound view. It is part of my duty to expound the jurisdiction of the court, and this I have endeavoured to do. It is no part of my duty to expand it. I must therefore decline to make any order on the present application.

Solicitors, *Cree & Son; Wood, Bigg, & Nash.*

Q. B. Div.
(Cave and Lawrance, JJ.) March 15.

DUNCAN v. DOWDING AND OTHERS. (a.)

Licensing law — Constable demanding admission to licensed premises—Private room—Refusal by keeper of licensed premises—Licensing Act, 1874 (37 & 38 *Vict. c.* 49), *s.* 16.

Section 16 *of the Licensing Act,* 1874, *does not give a police-constable power to demand admission to a private room upon licensed premises, unless some reason is shown for supposing that violations of the Act are being, or are about to be, committed.*

Case stated by the Recorder of Bristol.

The appellant was convicted under section 16 of the Licensing Act, 1874, for refusing to admit the respondent Dowding, a police-constable, demanding to enter on certain licensed premises.

The appellant was the keeper of certain fully-licensed premises in Bond-street, Bristol, known as the "Brandy Cask." One of the rooms in the premises was let, under an agreement, on every Thursday evening from 8 p.m. till closing time, at a rent of 13s. a quarter, to the Clarence and Colston Lodge of the Royal Antidiluvian Order of Buffaloes. The Order of Buffaloes is a secret society, and none but members are admitted to their meetings. The Clarence and Colston Lodge were accustomed to hold their meetings in the room hired by them in the "Brandy Cask." Liquor was served to the members during the meetings. The appellant was a member of the lodge.

On the 23rd of April the lodge were holding their usual meeting when the respondent Dowding, hearing the sound of music and singing proceeding from the room, entered the house and demanded to enter the room. He was refused admission, and the appellant made no effort to procure admission for him. The respondent, Dowding, had no reason to suppose that anyone in the room was drunk. Before the recorder he said that his object in demanding admission was to prevent and detect violations of the Licensing Acts, which it was his duty to enforce.

Section 16 provides: "Any constable may for the purposes of preventing or detecting the violation of any of the provisions of the principal Act or this Act, which it is his duty to enforce, at all times enter on any licensed premises, or any premises in respect of which an occasional licence is in force. Every person who, by himself, or by any person in his employ, or acting by his direction or with his consent, refuses or fails to admit any constable in the execution of his duty demanding to enter in pursuance of this section, shall be liable to" the penalties therein prescribed.

Candy, Q.C., and *Lionel Maddison,* for the appellant.—Section 16 of the Act of 1874 was in substitution of section 35 of the Act of 1872. Section 35 gave the constable very wide powers which the later Act was intended to curtail. The police-constable did not demand admission for the purpose of preventing and detecting violations of the law. Therefore the appellant's refusal to admit him was not an offence against the Act. The room was a private one, and for that reason the appellant could not be convicted of refusing admission to it.

Vachell, for the respondents.—The power to enter the licensed premises includes power to enter any room in the premises. The letting of the room to the lodge did not take it out of the section.

CAVE, J.—It is said that the constable had power to demand admission to all parts of the licensed premises at any time and in all circumstances. I am prepared to hold that he has power to demand admission for certain purposes, but there must be some evidence that what was alleged to exist did, or was about to exist. If, for instance, on previous occasions members of the club had been known to leave the premises intoxicated, there would have been some ground for supposing that an undue consumption of liquor took place. As to the question whether when a private room is in the occupation of a guest you can convict the licence holder because the guest refuses admission, I should like to hear further arguments before deciding it. It is sufficient to say here that there is no evidence of any kind that there was reason to suppose that violations of the law were taking place or were about to take place. All the constable went on was that he heard the sound of music and singing. That was a thing that often happened in a private room of licensed premises. To say that, because a party of persons were enjoying themselves and beguiling the monotony of staying at an inn with a song, a police-constable could demand admission to the room and, I suppose, to stay there, would be monstrous. Again, it would be a strong thing to say that a licence-holder can be convicted for refusing to admit a police-constable into a private room when it is no longer under his control.

But it is not necessary to go into these questions, because the recorder held that if the police constable demanded admission for the purpose of detecting or preventing violation of the Acts, that was enough. I am of opinion that it is not enough. There must be reasonable grounds for interfering on the licensed premises. There was nothing to prevent access to the public parts of the house, but the case of the private rooms was different. It was not likely that it was intended to entrust a delicate mission like that to a police-constable unless there was some ground for him to go upon. No such ground was before the recorder. All he says is, not that there was reasonable cause for entering, but that the respondent wished to enter for preventing and detecting violations of the law.

This decision is not intended to give colour to the proposition that persons may indulge without interference in excessive drinking in a private room of a public-house. If there is ground for supposing that such drinking is going on, there is power for a police-constable to go beyond the public parts.

LAWRANCE, J., concurred.

Solicitors for the appellant, *James Morley & S. A. Bailey.*

Solicitor for the respondent, *D. Trowers Burgess.*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Cave and Lawrance, JJ.) March 15

CLARKE v. LONDON AND COUNTY BANK. (a.)

Bills of exchange—Cheque—Liability of bankers—Collecting crossed cheque for customer—Cheque applied to payment of overdraft—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

A banker who receives payment of a crossed cheque for a customer is protected by section 82 *of the Bills of*

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Exchange Act, 1882, *notwithstanding that the account of the customer was overdrawn at the time when the cheque was paid in.*

Appeal from the decision of His Honour Judge Emden.

The plaintiff was the owner of a crossed cheque for £43 6s. payable to his order.

One, Fisher, forged the endorsement, and paid the cheque into his account at the defendant bank, where the amount was at once placed to his credit. Fisher's account was at that time overdrawn to the amount of £13 9s., and the cheque was partly applied to the payment of the overdraft. Before the cheque was cleared Fisher's draft for £5 8s. was honoured.

The plaintiff brought an action in the county court to recover from the defendant bank the proceeds of the cheque.

The action was dismissed upon the ground that the bank were protected by section 82 of the Bills of Exchange Act, and that they had not been guilty of negligence.

Section 82 provides: "Where a banker, in good faith and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Morton Smith, for the appellant.—The banker is not protected by the section where the account for which the payment is received is not in funds: *Mathiessen* v. *London and County Bank*, 27 W. R. 838, 5 C. P. D., at p. 17.

Cock, Q.C. (*Guy Lushington* with him), for the respondents.—The cheque was paid in by a customer, and was received *bonâ fide*. The bank were entitled to be protected.

CAVE, J.—The fact that the cheque was applied in the payment of an overdraft could make no difference to the true owner. There is no liability attached to receiving payment of a cheque for a customer, and it is nothing to do with the case that the proceeds were used in paying the overdraft. If the receipt of payment for the customer is not to make the banker liable when the customer's account is in funds, why should it be different when it is not in funds? I do not see anything in this case which creates a liability to the true owner.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Pike & Parrott*, for *J. & J. C. Hayward.*

Solicitors for the respondent, *Harries, Wilkinson, & Raikes.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) March 9, 10.

In re MONTAGU.

Ex parte WARD v. LONDON AND SOUTH-WESTERN BANK. (*a.*)

Bankruptcy—Banker—Banking account opened by debtor in name of wife—Payments out by bank to wife after receiving order—Intervention of trustee—Res judicata—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.

The bankrupt had opened a banking account in his wife's name before receiving order, all her cheques to be initialled by him. After receiving order the bank continued to honour the wife's cheques until the trustee moved for a declaration that the account was in fact the bankrupt's. The trustee having obtained such declaration, moved again for the repayment by the bank of moneys paid out since receiving order.

Held, that the bank was bound to honour the wife's cheques until the trustee intervened; and that had the trustee been entitled to have the amount of such cheques repaid to him he ought to have asked for it upon his first motion.

Motion by the trustee in the bankruptcy for a declaration that at the date of the receiving order the respondent bank had in their hands the sum of £486, forming part of the property of the bankrupt divisible among his creditors, and for an order for the payment by the bank to the trustee of £216, the remaining £270 having been paid under a former order of the court.

In June, 1895, shortly before the debtor absconded and became bankrupt, he opened an account at the Clapham branch of the bank in the name of his wife. The debtor and his wife interviewed the the manager together, informing him that the wife wished to open an account of her own, but that all cheques drawn by her were to be initialled by the husband, because she was inclined to be too generous with the money, and he wished to have some check upon her.

The receiving order against the husband was made on the 9th of October, 1895. At that date the balance to the credit of this account was £486. Between that date and the end of the year the wife drew out £216, after which there were no dealings with the account.

Upon the 7th of May, 1896, the trustee moved for a declaration that the account was the bankrupt's, and for an account of all dealings therewith since the date of the receiving order.

Upon the 27th of July, 1896, the trustee obtained a declaration that the account was the bankrupt's, and an order for the payment of £270, the balance then to the credit of the account. He also obtained the pass-book relating to the account, and having discovered the dealings subsequent to the receiving order, made the present application.

Muir Mackenzie (*Mackintosh* with him), for the trustee, stated the facts and cited *In re Trehearne, Ex parte Local Board of Ealing*, 7 Morrell 261.

Herbert Jacobs, for the bank.—Firstly, I submit that on the facts the bank were bound to honour Mrs. Montagu's cheques, and she could have sued them if they had failed to do so. The initialling by the husband was not notice to the bank that he had any interest in the account: *In re Barney*, 40 W. R. 637, [1892] 2 Ch. 265. Secondly, I contend that this matter is *res judicata;* the whole question was litigated in the former motion, and if the trustee had been entitled to the order he now asks he could have obtained it upon that motion.

Muir Mackenzie, in reply, cited *Concha* v. *Concha*, 35 W. R. 477, 11 App. Cas. 541, and *Ex parte Rabbidge, Re Pooley*, 26 W. R. 646, L. R. 8 Ch. D. 367.

VAUGHAN WILLIAMS, J.—I do not think that I ought to make any order in this case, although the matter is not without difficulty. I will deal first with the point of *res judicata*.

The former application of the trustee was for a declaration of his rights as to this banking account and it seems to me that he took an order, firstly declaring this to be the bankrupt's account; secondly a consequential order for the payment over to him

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

(the trustee) of the balance standing to the credit of the account. It is now said that this order entitled the trustee to the whole amount standing to the credit of the account as from the date of the receiving order. I have not to decide now what that order meant, but to decide whether the whole of this question was litigated before me in the previous motion in such a way that if the trustee had been entitled to the whole amount he could have got it upon that motion. To my mind it was a motion in which he could have got an order for all the money lying to the credit of the account from the date of the receiving order, and therefore I hold that this matter is *res judicata*.

Now, as to the other point. When the matter was before me on the previous motion, whether there was a mistake or what there was, I cannot say, but there was then no dispute as to the amount payable. It is true that the trustee had not then seen the passbook, but he saw it and discovered the amount standing to the credit of the account at the date of the receiving order, before the order upon the motion had been drawn up, and did not include it in that order.

Upon the evidence before me upon this motion I find as a fact that, as between the bank and Mr. and Mrs. Montagu, this account was opened as the wife's account, and that while funds stood to the credit of this account an action for dishonour would have lain by the wife, or, in the event of the failure of the bank, a proof could have been presented by her. I also think that the direction as to initialling was the wife's, and that she could at any time have ordered the bank to honour her cheques without their being initialled by her husband.

This being so, I found as a fact upon the previous motion that this account was the husband's account. Does that give the trustee a right to claim moneys paid in pursuance of a contract between the wife and the bank before he moved for a declaration as to the true ownership of the account? It seems to me that the result would be very unfortunate if, in a case where the contract were one purporting to be made by someone other than the bankrupt, and believed by the other contracting party to be so, the trustee, before taking steps to obtain a declaration, could call upon persons who had paid money in pursuance of that contract to pay that money over again to him. I know of no case which so decides, and I think that this case is more like those cases of contracts after bankruptcy where all payments made before the trustee interferes are held good.

Solicitors for the trustee, *Church, Rendell, & Todd.*

Solicitors for the bank, *Hubbard, Son, & Eve.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — March 31.

CARNEY *v.* PLIMMER. (*a.*)

Gaming—Money paid in respect of wagering contract—Loan—Gaming Act, 1892 (55 & 56 *Vict.* c. 9), *s.* 1.

The defendant and another agreed to fight a boxing match for £500 a side, the money to be deposited with a stakeholder. The plaintiff, at the defendant's request, agreed to lend him £500 upon the terms that the money was to be repaid if the defendant won the match, but not otherwise. The plaintiff accordingly paid the £500 to the stakeholder for the defendant. The defendant won the match and received the stakes. In an action to recover the £500 as money lent,

Held, that the £500 was paid by the plaintiff in respect of a wagering contract within the meaning of the Gaming Act, 1892, *and could not be recovered.*

Appeal from the judgment of Day, J., at the trial of the action without a jury.

The defendant and another person had agreed to fight a boxing match for £500 a side, the money to be deposited with a stakeholder. The defendant, being unable to deposit £500, asked the plaintiff, who was his second, to lend him the money, and the plaintiff agreed to do so upon the terms that he was to be repaid if the defendant won the match, but not otherwise. The plaintiff accordingly paid the £500 to the stakeholder. The defendant won the match and received the stakes and a purse of added money, and the plaintiff thereupon sued him to recover the £500 as money lent. The defendant pleaded the Gaming Acts. The learned judge gave judgment for the plaintiff. The defendant appealed.

By the Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine . . . shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

Hugo Young and *McCardie*, for the defendant.—The agreement between the combatants to fight the boxing match was a wagering contract rendered null and void by 8 & 9 Vict. c. 109: *Diggle* v. *Higgs*, 25 W. R. 777, 2 Ex. D. 422. The money, therefore, paid by the plaintiff to the stakeholder was money paid in respect of that wagering agreement: *Tatam* v. *Reeve*, 41 W. R. 174, [1893] 1 Q. B. 44. Though it may be called a loan to the defendant, it was only to be repaid if the defendant won the match. The action was, therefore, not maintainable by virtue of section 1 of the Gaming Act, 1892.

A. Lyttelton (*Dorsett* with him), for the plaintiff.—This was a simple contract of loan between the plaintiff and the defendant. The liability to repay arose at once before any question arose as to the destination of the money. *De Mattos* v. *Benjamin*, 42 W. R. 284, 63 L. J. Q. B. 248; *O'Sullivan* v. *Thomas*, 43 W. R. 269, [1895] 1 Q. B. 698, were referred to.

LORD ESHER, M.R.—In my opinion this appeal must be allowed. A boxing match was arranged to come off between the defendant and another man, and each side had to deposit £500 with a stakeholder. The defendant asked the plaintiff to lend him £500, and the plaintiff agreed to do so upon the terms that the money was to be repaid if the defendant won the match, but not otherwise. The defendant, having won the match and received the stakes, refused to repay the £500. It seems to me clear that this was a loan. But it was money lent or paid in respect of a wagering contract, because the transaction depended so far as repayment was concerned, upon the result of the wager. By the Gaming Act, 1892, the plaintiff cannot recover this sum. Judgment must therefore be entered for the defendant, but without costs either here or in the court below.

LOPES, L.J.—The defendant and another man were about to engage in a boxing match, and each side

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

was to deposit £500 with a stakeholder, the money to be handed over to the winner. The defendant was unable to deposit £500, and the plaintiff lent him the money and it was deposited with the stakeholder. The match came off and the defendant won. Thereupon the defendant, who had received the £1,000 and some added money, refused to repay the £500. There can be no doubt that the agreement between the two combatants to fight the boxing match was a wagering contract, and that that contract was null and void under 8 & 9 Vict. c. 109. The question we have to determine is whether the Gaming Act, 1892, applies. It seems to me impossible to say that this £500 was not paid by the plaintiff in respect of the contract which was entered into between the two combatants, and which was null and void under 8 & 9 Vict. c. 109. The case comes within the mischief aimed at by the Act. The appeal must therefore be allowed, but without costs here or below.

Chitty, L.J.—I also agree that the appeal should be allowed. It was argued that this was a simple contract of loan. The terms upon which the plaintiff lent the £500 were that the money should be repaid by the defendant if he won the match, and in that event only. It was not therefore a simple contract of loan. The money was paid by the plaintiff to the stakeholder, at the defendant's request, upon the terms that the defendant would repay it if and when he received it from the stakeholder. The contract between the plaintiff and the defendant was not a wagering contract, though the contract between the two combatants was. The payment made by the plaintiff to the stakeholder at the defendant's request was, in my opinion, unquestionably paid in respect of a contract that was avoided by 8 & 9 Vict. c. 109. In these circumstances the plaintiff is not entitled to recover.

Appeal allowed.

Solicitors for the plaintiff, *J. Davis*, for *East & Smith*, Birmingham.

Solicitors for the defendant, *Judge & Priestley*, for *P. Baker*, Birmingham.

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Chitty, L.JJ.) March 25.

In re Donisthorpe's Claim and Manchester, Sheffield, and Lincolnshire Railway Co. (*a*.)

Railway—Compensation—Lands taken or injuriously affected—Order for trial of question in High Court—Jurisdiction of master—Ord. 54, *r.* 12—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 41.

A master has jurisdiction to entertain an application for an order under section 41 *of the Regulation of Railways Act*, 1868, *for the trial in the High Court of a question of compensation for lands taken or injuriously affected.*

Where the master refuses to make an order under section 41, *and between the date of the master's order and an appeal to the judge the railway company issues a warrant to the sheriff to summon a jury to assess the compensation, the judge has still jurisdiction to make the order notwithstanding the issue of the warrant, as his order must be taken as relating back to the time when the application was before the master.*

Appeal from Day, J., at chambers.

(*a*.) Reported by W. F. Barry, Esq., Barrister-at-Law.

On the 20th of February, 1897, the claimant served notice on the railway company under section 68 of the Lands Clauses Act, 1845, claiming compensation in respect of certain lands injuriously affected by the execution of the works, and in case the company disputed the amount of the claim that the compensation should be settled by a jury.

On the 1st of March the company took out an originating summons under section 41 of the Regulation of Railways Act, 1868,* for an order that the question of compensation be tried by a judge of the High Court and a special jury.

On the 12th of March the summons came before a master, and he refused to make the order. Subsequently, on the same day the company issued their warrant to the sheriff to summon a jury for settling the compensation, the twenty-one days after the receipt of the notice limited for so doing by section 68 of the Lands Clauses Act, 1845, expiring on the next day.

On the 15th of March, Day, J., on appeal reversed the decision of the master and made the order asked for.

The claimant appealed.

Toller, for the claimant.—The master had no jurisdiction to entertain the application under section 41 of the Regulation of Railways Act, 1868. Before the Judicature Act, 1873, a judge of one of the superior courts alone could have exercised the jurisdiction. Though that jurisdiction has now been transferred to the judges of the High Court, yet they do not exercise it under the Judicature Acts, but by section 12 of the Judicature Act, 1873, it is a special jurisdiction to be exercised as if the Judicature Act had not been passed, and as if the judge had been appointed the successor of the judges of the superior courts before the passing of the Act. It is a special jurisdiction conferred upon the judge, not by virtue of his general jurisdiction as a judge of the High Court, but by virtue of the peculiar jurisdiction to be exercised under the Regulation of Railways Act, 1868: *per* Lord Esher, M.R., in *In re East London Railway Co.*, 38 W. R. 312, 24 Q. B. D. 507. Therefore the judge, acting under section 41 of the Act of 1868, does not exercise the jurisdiction under the Judicature Acts. Accordingly, ord. 54, r. 12, which gives a master power to exercise all such jurisdiction, with certain exceptions, as under the Acts—that is, by order 71, the Judicature Acts—may be exercised by a judge at chambers, does not apply to this case. Further, one of the exceptions in ord. 54, r. 12, is the settlement of issues, and section 41 of the Act of 1868 enacts that the question shall be stated in an issue. That shows that the judge alone has jurisdiction under section 41. That being so, the application to the judge was an original application, and as the

* Section 41 of 31 & 32 Vict. c. 119: "Whenever . . . any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway is under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury empannelled and summoned as in that Act mentioned, the company or the party entitled to the compensation may, at any time before the issuing by the company to the sheriff of by that Act directed, apply to a judge of any one of the superior courts of common law at Westminster who shall, if he think fit, make an order for the trial of the question in one of the superior courts, upon such terms and in such manner as to him shall seem fit; and the question between the parties shall be stated in an issue to be settled in case of difference by the judge. . . ."

warrant to the sheriff to summon a jury had then been issued, by the express terms of section 41 the application was too late. Moreover, even assuming that the master had jurisdiction, as the order was not made by the judge until after the warrant to the sheriff had been issued, the order is out of time and bad. The sheriff is bound to obey the warrant. By section 41 the issue of the warrant deprives the judge of jurisdiction to make an order under that section.

J. Eldon Bankes, for the railway company, was only called upon to argue the question whether the master had jurisdiction. Section 16 of the Judicature Act, 1873, transfers to the High Court the jurisdiction which was vested in or capable of being exercised by any of the judges of the superior courts, sitting in court or chambers, when acting as judges in pursuance of any statute, law, or custom, and all powers given to any such judges or judge by any statute. Under that section the jurisdiction under section 41 of the Act of 1868 was transferred to a judge of the High Court, and he acts under the Judicature Acts. Ord. 54, r. 12, applies, and the master has jurisdiction. Section 12 only applies to an authority or power not incident to the administration of justice in any court. The jurisdiction under section 41 is incident to the administration of justice. As to the settlement of an issue, that question has not arisen, and if it does a judge will have to deal with it.

Toller replied.

Cur. adv. vult.

March 25.—Lord ESHER, M.R.—The question we have to determine is whether Day, J., had jurisdiction to make an order for the trial of the claim for compensation in the High Court before a judge and jury. It is clear that the learned judge would have had jurisdiction if the application was in time. It was argued that he had no jurisdiction because at the time he made the order the warrant to the sheriff to summon a jury to assess the compensation had been issued, and that, therefore, there was no power to make the order under section 41 of the Regulation of Railways Act, 1868.

Now, the summons came first before a master, who refused to make the order, and at that time the warrant to the sheriff had not been issued. Therefore, if the master had jurisdiction to make an order under section 41, the application to him would have been in time. It was objected that the master had no jurisdiction, and therefore the judge's order must be taken to have been made upon an original application to him, and as the warrant to the sheriff had then been issued it was too late to make an order. On the other side it was contended that the master had jurisdiction, and that when the summons came before the judge he made the order which he thought the master ought to have made, that his order merely replaced the master's order, and that the case must be treated as if the order was made at the time when the master should have made it, that is, before the issue of the warrant. That contention depends upon the construction of certain sections of the Judicature Act, 1873, and ord. 54, r. 12.

By section 41 of the Regulation of Railways Act, 1868, the application has to be made to a judge of one of the superior courts of common law. In my opinion up to the passing of the Judicature Act, 1873, a judge alone had jurisdiction to make an order under that section. Then came the Judicature Act. In my opinion section 12 does not affect this case. Section 16 is the material section. By that section there was transferred to the High Court of Justice not only the jurisdiction exercised by the superior courts, but also "the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the judges of the said courts respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge, in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judge or judges, by any statute." Those words seem to me clearly to include the jurisdiction exercised by a judge of one of the superior courts under section 41 of the Act of 1868. That jurisdiction therefore now exists in a judge of the High Court, and is to be exercised by him as a judge of the High Court. Turning then to ord. 54, r. 12, we find that a master may, with certain exceptions, transact all such business, and exercise all such authority and jurisdiction in respect of the same as under the Acts—that is, by order 71, the Judicature Acts—or the rules may be transacted or exercised by a judge at chambers. Therefore, inasmuch as the judge at chambers now exercises the jurisdiction conferred upon him by section 41 of the Act of 1868 under the Judicature Acts, the master can exercise the jurisdiction. Here the master refused to make the order asked for, but the judge, upon the summons being brought before him, differed from the master (I do not call it an appeal, because I do not think it is an appeal in the ordinary sense), and made the order which he thought the master should have made. That being so, the order must be taken as made at the time when the master ought to have made it, which was before the warrant was issued to the sheriff. The learned judge therefore had jurisdiction to make the order, and the appeal must be dismissed. It follows that the warrant to the sheriff must be treated as of no effect.

LOPES, L.J.—In this case an application was made under section 41 of the Regulation of Railways Act, 1868, and a judge at chambers made the order asked for, but it is said that the order was made too late, and therefore without jurisdiction, because the warrant to the sheriff to summon a jury had been issued. The application to the master was clearly in time if the master had jurisdiction to entertain the summons. If the master had jurisdiction, in my opinion the judge had jurisdiction to make the order when the summons came before him, because upon appeal (and I think it is correct to call it an appeal) he was merely making the order which the master ought to have made. Therefore the question comes to this, Had the master jurisdiction? Before the Judicature Act, 1873, a master would have had no jurisdiction. We must look at the Judicature Act, 1873, to see what jurisdiction is transferred to the High Court. Section 16 deals with that question. In my opinion the effect of that section is to transfer the statutory jurisdiction given by section 41 of the Act of 1868 to the High Court, to be exercised by a judge of the High Court sitting in chambers. We must now look at ord. 54, r. 12, to see if the master has jurisdiction. It seems to me that the case stands thus: under section 16 of the Judicature Act, 1873, this jurisdiction can be exercised by a judge of the High Court, and by ord. 54, r. 12, the master is to have all the jurisdiction which under the Judicature Acts may be exercised by a judge at chambers, with certain exceptions. It is said that the exception as to the settlement of issues shows that the master cannot have jurisdiction under section 41 of the Act of 1868, because by that section the question of compensation is to be stated in an issue to be settled. In my opinion that contention is not a good one. The question of settling an issue

has not arisen. If it does arise, then I take it that the judge must deal with it if the parties cannot agree. The master, therefore, had jurisdiction, and it follows, as I have said, that the judge's order must be taken to have been made when the master ought to have made the order, which was before the warrant to the sheriff was issued. The warrant to the sheriff, therefore, becomes of no effect.

CHITTY, L.J.—The substantial question is whether the master had jurisdiction to entertain the summons. In my opinion he had. Section 16 of the Judicature Act, 1873, transferred to the High Court the jurisdiction vested in the old superior courts, including any jurisdiction exercised by the judges or a judge, sitting in court or chambers, in pursuance of any statute, law, or custom. Therefore the jurisdiction conferred by section 41 of the Regulation of Railways Act, 1868, is now transferred to a judge of the High Court sitting in chambers. Turning then to ord. 54, r. 12, I find that the master can exercise all such jurisdiction as under the Judicature Acts may be exercised by a judge at chambers, with certain exceptions. The result is that the master had jurisdiction to entertain the summons. It is argued that section 12 of the Judicature Act, 1873, applies. I do not think so. That section makes provision for the extraordinary duties of the judges of the old superior courts, and is limited to a duty, authority, or power "not incident to the administration of justice in any court." Therefore that section is not applicable to this case. The only other point is that, as a master has no jurisdiction to settle an issue except by consent, and as section 41 of the Act of 1868 says that the question of compensation shall be stated in an issue, the master has no jurisdiction to entertain an application under section 41. If it were necessary under section 41 that there should be only one order, and that the settlement of the issue should be included in the order for a trial before a judge and jury in the High Court, that might be so. But section 41 clearly contemplates that there may be two orders. The master, therefore, had jurisdiction to make the order, and if it is found necessary to apply to have an issue settled, that application must go before a judge.

Appeal dismissed.

Solicitors for the claimant, *Surr, Gribble, & Co.*, for *R. & G. Toller & Sons*, Leicester.

Solicitors for the railway company, *Cunliffes & Davenport*, for *J. Storey*, Leicester.

From Chan. Div. (Lindley, A.L. Smith, and Rigby, L.JJ.) — Feb. 8, 20.

THE GUARDIANS OF THE WEST DERBY UNION v. THE METROPOLITAN LIFE ASSURANCE SOCIETY. SAME v. PRIESTMAN. (a.)

Poor law—Loan to guardians—Contract—Loan for fixed period payable by instalments—Act of Parliament — Construction — Effect of proviso — Implied alteration of contract—Poor Law Loans Act, 1871 (34 & 35 *Vict. c.* 11), *s.* 2.

The plaintiffs in 1875 *borrowed from the defendants money which it was agreed should be repaid with interest at* 4¼ *per cent. by sixty equal specified half-yearly instalments in respect of principal and interest. In* 1895 *the plaintiffs applied for and obtained from the Local Government Board an order enabling them to redeem the balance of the said loan and to borrow at* 3 *per cent. interest so much money as might be necessary for that purpose. The defendants were not served with any notice of the plaintiffs' intention to apply for such order, and did not appear to oppose it.*

Held, that the plaintiffs were not entitled, under section 2 *of the Poor Law Loans Act,* 1871, *to compel the defendants to receive repayment of the balance of the said loan at any time prior to the expiration of the period fixed by the contract for the loan.*

Decision of North, J., ante, *p.* 90, *reversed.*

Appeals by the defendants from the decision of North, J., reported *ante*, p. 90, upon two special cases.

The question raised was whether by virtue of section 2 of the Poor Law Loans Act, 1871 (34 & 35 Vict. c. 11), guardians who had borrowed money since the passing of that Act upon the terms that the same should be repaid in thirty years by equal fixed instalments representing principal and interest were entitled to pay off such first-mentioned loan at any time, and for that purpose to borrow money at a lower rate of interest.

The plaintiffs in 1875 borrowed £30,000 from the defendants at 4¼ per cent. interest, and gave to the defendants a security therefor following the form provided by section 6 of the Union Loans Act, 1869 (32 & 33 Vict. c. 45), and thereby charged the common fund of their union with the repayment to the defendants of the said sum by sixty equal half-yearly instalments in respect of the principal and interest of the sum so borrowed, as stated in the schedule thereto, to be paid as therein mentioned. The said security contained a proviso (following the form given by the Act) that nothing herein contained should prevent the defendants from receiving the repayment of the whole or part of the aforesaid sum at any time before the day of payment of the last instalment, if willing to do so.

Section 2 of the Poor Law Loans Act, 1871, upon the construction of which the question turned, enacts —"If any guardians or managers, having borrowed or hereafter borrowing money under the authority of the Acts referred to, shall be able at any time to obtain a loan at a lower rate of interest than that secured by the charge previously made by them, they may apply to the Poor Law Board for an order to enable them to redeem the balance of the loan, and to borrow so much money as may be necessary for that purpose; and if the said board shall issue their order in that behalf, the said guardians or managers may borrow the requisite amount to redeem such balance, and charge the fund to which the original loan was charged with the repayment of this additional loan in so many instalments as shall be outstanding at the time when the loan is redeemed, but not more. Provided that in the event of any loan outstanding at the time of the passing of this Act, no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing." Section 3—"Loans may be repaid by half-yearly instalments, and where they may have been contracted to be repaid by annual instalments they may, with the consent of the lenders, be repaid by half-yearly instalments of the principal and interest." The Local Government Board has since been substituted for the Poor Law Board.

In September, 1895, the plaintiffs, without any previous notice to the defendants, obtained from the Local Government Board authority to repay the unpaid balance of the said loan and to borrow money for that purpose at 3 per cent. interest. Having obtained this authority, the plaintiffs served upon

(a.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

the defendants a six months' notice of their intention to pay off the balance of the loan.

The defendants disputed the plaintiffs' right so to pay them off, and the question was, by consent, raised upon two special cases.

North, J., held that the plaintiffs were entitled to redeem without the defendants' consent (see *ante*, p. 90).

The defendants appealed.

Sir R. T. Reid, Q.C., and *Danckwerts*, for the appellants.—The effect of the Act of 1871 was to enable guardians to borrow money for various specific purposes and charge the repayment of such money on the rates, but did not enable them to borrow for the purpose of paying off previous loans, for that would have enabled the guardians to evade the restriction under which loans were to be paid off in thirty years. There is nothing in any of the Acts prior to 1871 to prevent guardians from redeeming a loan with the consent of the lender before the end of the thirty years if the guardians had money derived from other sources in their hands. There was nothing to prevent the guardians from stipulating for the right to redeem us in their contract with us. Further, the lenders have no right to appear and be heard when the application is made to the Local Government Board for leave to borrow. The proviso was inserted in order to relieve lenders from the liability to inquire whether the guardians had money in their hands properly applicable for redeeming. The proviso cannot give additional effect to the enacting words, it can only qualify them.

Cozens-Hardy, Q.C., Swinfen Eady, Q.C., and *R. J. Parker*, for the respondents.—The lenders advanced their money with full notice of the effect of the Act. The only question is, What does the statute mean? [LINDLEY, L.J.—The point against you is that on your construction of the Act, it enlarges the powers of the borrowers, but does not affect the liabilities of the borrowers.] The first part of the section is perfectly general, and gives in every case the right to redeem. [RIGBY, L.J.—It merely gives a power.] If so the proviso is useless.

Sir R. T. Reid, Q.C., replied.

LINDLEY, L.J.—The question raised by these appeals is whether Poor Law guardians, who, since 1871, have borrowed money on the security of poor rates, upon the terms of paying off the principal, with interest at an agreed rate by equal annual instalments extending over thirty years, can compel the lenders to accept payment of the unpaid principal sum whenever the guardians can borrow the amount necessary for the purpose at a lower rate of interest than that which they agreed to pay. North, J., has decided that they can do so under the powers conferred upon them by the Poor Law Loans Act, 1871 (34 & 35 Vict. c. 11), s. 2. From this decision the lenders have appealed. It is conceded that the guardians have no such power apart from the statute in question, but it is said that the practical effect of that statute is to introduce into every mortgage of poor rates, made after the passing of the statute, a provision enabling the guardians to pay off the mortgage at any time if they can borrow money at a lower rate of interest than that mentioned in the mortgage. It is contended that this is no hardship on the lenders, because they must be taken to know the law and to have made their bargains with reference to it. No one pretends that the lenders can call in the money if it is to their interest to do so. The bargain, therefore, if it really is as the guardians contend, is a very one-sided one, and one which lenders would not make without raising the terms on which they would otherwise be willing to lend. However, I agree that, if the Legislature has imposed upon the lenders the obligation of accepting their money upon terms not expressed in their security, they must accept it upon those terms, whether they consider them harsh or unfair or not. They should have thought of that before they lent their money. But, unless the Legislature has clearly imposed such an obligation upon them, they may well complain of the hardship and unfairness of such a departure from the plain language in which their contract and security are expressed.

Before examining the Act to which I have referred, I pause to ask, what must be found in it to confer upon the guardians the right to pay off a mortgage on terms other than those expressed in it? A power to borrow in order to pay off is by no means enough, for such a power imposes no obligations, either on persons to lend or on lenders to be redeemed. Such a power assumes that persons can be found willing to lend, and also that lenders are willing, or have agreed, to be redeemed as desired. What has to be found in order to support the contention of the guardians is some enactment imposing upon the lenders an obligation to take the principal due to them upon other terms than those mentioned in their express contract. Unless this obligation is clearly imposed upon them by the Legislature, it cannot be imposed at all. To impose such an obligation by an inference from language which does not clearly impose it, appears to me to be wrong in principle, unless the inference is what is called a necessary inference—*i.e.*, unless the language relied upon can have no other meaning.

[His lordship read section 2.] Now, apart from any inference drawn from this proviso, there is nothing whatever to impose any obligation on lenders of money to guardians to accept repayment otherwise than upon the terms mentioned in their securities. The section simply extends the powers of guardians to borrow. Such a power was wanted, for, even if the lenders agreed that they would accept or were willing to accept payment otherwise than by instalments, the guardians had no power to borrow money in order to pay them off. It is to be observed that the application to the Poor Law Board for powers to redeem and borrow for the purpose, is made without notice to the lenders, who are not consulted or heard by the Board. The Act does not protect them in any way, not even by requiring six months' or other reasonable notice so as to give them time to find another investment. Further, if an order is obtained from the Board, all that the Act says is that the guardians may borrow the money necessary to redeem and charge it on the fund charged by the original loan. All this extends their powers; but no right to pay off the lenders against their consent, and on terms not expressed in their contracts, is conferred on the guardians. No obligation whatever is imposed on the lenders by the enacting part of the section. I pass to the proviso. It is in terms confined to loans made before the Act passed, and is clearly inserted to protect the persons to whom such loans may be owing from being paid off without their consent by means of money borrowed under the powers of the Act. This is what the proviso says, and this is all it says. It says nothing about loans made since the Act. It is contended that the necessary inference is that such loans can be paid off without the consent of the persons to whom they are owing, and although there is nothing in their securities to compel them to take their money otherwise than by instalments. I am quite unable to see the necessity for drawing any such inference. The proviso is consistent with other

views, from which no such inference can be drawn. In the first place, it may have been inserted, not because it was plain that the enacting part of the section did apply to loans made before the Act, but because persons who were regarding the interests of the owners of such loans were afraid that such a construction might be adopted, and thought it prudent to remove all doubt upon the point by introducing language the meaning of which could not be mistaken. Another explanation was suggested by counsel for the appellants—viz., that the proviso was inserted in order to prevent the powers of the Act from being used to pay off lenders who had agreed before 1871 to accept payment out of any moneys which the borrowers might happen to have applicable to the purpose of paying off loans, but which moneys could not before 1871 have been obtained by borrowing for that purpose. This explanation of the clause may be correct. The form of security given in the Union Loans Act, 1869, to which I shall again refer presently, shows that redemption otherwise than by yearly instalments was contemplated, and I suppose that such redemptions did in fact occasionally take place, but, of course, only with the consent of the lenders. I do not know whether before the Act of 1871 loans were in practice expressly made redeemable otherwise than by instalments; but, whether they were or not, they might have been, and I cannot therefore reject this explanation of the proviso as wholly unworthy of consideration. It would have the effect suggested in the cases supposed, if any such there were. The anxiety of the Legislature not to affect the rights of the owners of loans made before 1871 is apparent, not only from the proviso in section 2, but from sections 1 and 3 also. But section 3 also shows that the Legislature left the borrowers and lenders to make their own bargains after the Act passed, and did not intend to interfere with those bargains without the consent of the lenders. This section enables loans to be repaid by half-yearly instalments, instead of by annual instalments as under the previous Poor Law loans enactments. But this section 3, which applies to loans made after 1871 as well as to loans made before, expressly says that such half-yearly repayments are only to be made with the consent of the lenders.

Now it seems to me incredible that such a small alteration as this in the express terms of a written contract can only be made with consent, and yet that the lenders shall be liable to be paid off at any moment without notice, although no bargain to that effect is to be found in the security given to them. Again, it is to be observed that the form of security given by the Union Loans Act of 1869 (32 & 33 Vict. c. 45), s. 6, is left as it was, and the proviso in that form would hardly have been continued without alteration if the Act of 1871 had (as contended) made it part of every bargain that the guardians should be at liberty to pay off the loan at any time if they could obtain money for the purpose. The proviso in the form is that nothing contained in the charge given to the lenders shall prevent them from receiving repayment of the loan before the day of payment of the last instalment, if willing so to do. With such a clause still in that form, the court is asked to hold that it is also part of the bargain that the lenders must accept payment before the time stipulated, although, in fact, they never in terms agreed to do so. The Legislature in 1871 evidently desired to extend the powers of guardians in the interests of the ratepayers, and this has been very effectually done, however the Act of 1871 is construed. But I can see nothing in the Act to prevent guardians after the Act from borrowing on such terms as they, in the interest of the ratepayers, think proper to agree to. The effect of the construction of the statute contended for by the guardians is to place upon them a fetter which must seriously affect their powers of borrowing. If that construction is right—if the statute incorporates as part of every contract of loan to guardians such a condition as they contend it does—it will follow that they can only borrow upon condition that they shall be at liberty to pay off the principal sum borrowed whenever they can advantageously borrow money elsewhere to enable them to do so. Such a fetter would go far to prevent the guardians from effecting loans on the most advantageous terms they could otherwise obtain at the time when they wanted money. I can find nothing in the Act to fetter the guardians in this way. Looking at the matter from the lenders' point of view, I can find nothing in the Act which expressly or by necessary inference requires the court to hold that, if guardians think proper to borrow money on the express terms of paying a fixed rate of interest, and of paying off the loan by instalments, they can nevertheless require the lenders to take back the unpaid principal at any moment, and without previous notice. If the Legislature really meant that all loans to guardians made after 1871 should be subject to such a condition, all I can say is that they have not said so, and I cannot myself infer from the language used a direction that, for the future, the borrowing powers conferred by the Act can only be exercised for the purpose of making such very one-sided bargains. In my opinion, the decision of North, J., is erroneous, and the appeal ought to be allowed.

A. L. SMITH, L.J.—I have the great misfortune of not being able to agree with my brothers Lindley and Rigby upon the construction of section 2 of the Act of 1871. [After stating the facts and referring to the provisions of the Act of 1871 and prior Acts, his lordship continued:] Now, pausing here (*i.e.*, before the proviso to section 2 of the Act of 1871), for whose benefit is this power to redeem—with its necessary accompanying power to borrow money, if other money can, at any time during the continuance of the loan, be borrowed at a lower rate of interest than that secured by the charge—given? It seems to me obvious that it is in aid of the ratepayers, and of them alone. That the Legislature in 1871 knew of these loans for thirty years contracted prior to 1871, and of like loans about to be contracted subsequent to that date is beyond dispute, and this section was passed to give relief to ratepayers in the event of the current rate of interest at any time falling below the contracted rate during the thirty years the loan was running, if the guardians were able to borrow money to redeem the balance of the loan then unpaid, together with the contracted interest, at a lower rate of interest than that contracted for. It is only in these two events that relief is given by the section. If this section had stopped here, which it does not, I should have been by no means satisfied that its true construction was that argued for on behalf of the appellants—viz., that a board of guardians could only take advantage of the provisions enabling them to redeem if they had a clause in their contract to that effect, or if, having no such clause, they could obtain the lenders' consent to redemption. What real benefit would it be to ratepayers to give them power to redeem and borrow money for that purpose, if they could not redeem without the consent of the lenders, for what lenders would consent to be redeemed, unless they were compelled to do so by contract or otherwise? Why should they, unless compelled, abandon a first-class continuing security, bearing a high rate of interest not obtainable elsewhere? This Act would be, if con-

strued as the appellants suggest, of little, if any, value to the ratepayers. It is said that it gives the guardians power to borrow in order to redeem, but nothing more, and that redemption is only to take place in the event of the guardians having contracts compelling redemption or of the lenders being willing to be redeemed. I can find no trace of the existence or contemplation of any such contracts when the Act was passed, nor of their being in existence or contemplation now, and as to lenders voluntarily consenting to redemption I have already dealt with that point. But it appears to me that any ambiguity as to the meaning of this section is removed and its true construction made apparent when its last few lines are read. [His lordship read the proviso.] The Legislature thus clearly states what is to take place as regards loans made prior to the Act. These loans are not to be redeemed without the consent of the lenders, the reason for this being that existing contracts are not to be interfered with by subsequent legislation. But, as regards loans contracted after the passing of the Act and with full knowledge of the Act, no such reason exists, and we therefore find in the Act no requirement as to consent having to be obtained to their redemption.

It is said on behalf of the appellants that if loans made after the passing of the Act may be compulsorily redeemed without any contract or consent in that behalf, what a scandalous breach of contract is authorised by the Legislature, and that this could not have been its intention, and is, therefore, not the true construction of the section. This, however, begs the question, which is, what is the contract as regards loans to boards of guardians on the security of the rates, entered into after and with full knowledge of the Act of 1871? It must not be forgotten that the authority of guardians to enter into contracts and charge the rates thereby is the creation of statute. Everyone who contracts with boards of guardians knows this to be so, and, in my judgment, there is nothing unreasonable in the Legislature enacting that, as regards contracts for loans made after the coming into operation of the Act upon the security of the rates, guardians should be enabled to redeem the loans, if it so happens they can, during the continuance of the loan, borrow money at such a cheap rate as to enable them with advantage to do so, and, in my opinion, all contracts for loans made after the passing of the Act, though for a period of thirty years, are subject to what the Act of Parliament prescribes —viz., that they may in one event (*i.e.*, if money can at any time during the contracted period be obtained at a sufficiently low rate of interest) be redeemed with the sanction of the Poor Law Board. Take this case. Suppose guardians after the passing of the Act of 1871 by express contract were to fix their ratepayers for thirty years to pay 5 cent. upon the borrowed money, no matter whether it could afterwards during that period be obtained, say, at 2½ per cent., would that be a valid contract? I think not, for the simple reason that after the Act of 1871 the guardians had no authority by statute so to contract and bind their ratepayers. Now, the Legislature in this second section, as in the first, has been careful not to interfere with contracts made prior to the passing of the Act, except both parties to the contract agree, and it has accordingly expressly so stated, but this exception is pointedly omitted from the section as regards contracts made after the passing of the Act. To get rid of this undoubted fact the suggestion is made that the proviso in section 2 was inserted *ex abundanti cautela*, to prevent its being said that the section was applicable to contracts made prior to the passing of the Act. But, if the meaning of section 2 be as argued for the appellants, that, whether the contract of loan be made before or after the passing of the Act, redemption can only take place with the contracted or voluntary consent of the lender, I do not see the sense of inserting the proviso at all, for upon this hypothesis whenever the contract be made no redemption is to take place without the consent of the lender. Then, why insert a meaningless exception as to contracts made prior to the Act being passed? To my mind no intelligible answer has been given to this.

Sir Robert Reid, for the appellants, sought to get over the difficulties in his way by the suggestion that the proviso was inserted to meet the case of a contract made prior to the passing of the Act, in which was contained an option of redemption, upon a six or some other months' notice, and that, as before the Act (1871) it was most improbable that the guardians, although they had this option of redemption by contract, would ever exercise it, having ordinarily no means wherewith to do so, when the Legislature gave the power to borrow money, as it did in the Act of 1871, it did away with this improbability, and that it thereby altered the position of the lender for the worse, and so the proviso was inserted that contracts entered into prior to 1871 were not to be redeemed without the consent of the lender. To this I must answer that I am not aware that there ever were such contracts in cases of guardians borrowing upon the security of rates. The statutory forms of charge do not suggest them, and in the special case herein there is no such finding, and, what is more, the Act of 1871 does not purport to be dealing with any such supposed contracts, but, as will be seen by its recital, was dealing with contracts of loan which were to be repaid over a period of thirty years. But this suggestion of Sir Robert Reid only covered contracts made prior to the passing of the Act, and I asked him what about those made subsequently thereto. He said that these contracts were not mentioned in the section because they were entered into by lenders who knew that, by the Act of 1871, power had been given to the guardians to borrow for the purpose of redemption, and therefore their position would not be altered as in the case of lenders prior to the Act. I do not dispute this last suggestion, for it seems strongly to support my view of the section. As they knew of the power to borrow, so they knew of the power to redeem. The object of the insertion of the proviso is to me plain and clear, if the section gives to the guardians a right of compulsory redemption, for it then limits that right to contracts made after the passing of the Act. If the section does not give this right as is argued for the appellants, all I can say is that to me the proviso is senseless and without meaning. It was said that if my construction of the section be correct, there should be found in it some provision as to what notice should be given to the lender prior to the loan being redeemed. But the guardians are not to redeem and borrow money for that purpose without an order of the Poor Law Board in that behalf, and it seems to me that the Legislature might well leave a matter like this to such an authority, even if the guardians desired to perpetrate injustice, which is not to be assumed, and indeed, in the present case, we find that a six months' notice has in fact been given. It is next said that section 3 throws light upon section 2. Well, what light does it throw? Before the Act of 1871 boards of guardians could only repay borrowed money by annual instalments. Section 3 now allows them to do so by half-yearly instalments, and it expressly enacts that, whenever they have contracted to repay by annual instalments, they may pay by half-yearly instalments, if the lenders consent. It is said—how ridiculous this is,

If the Legislature has allowed loans to be redeemed without consent, if entered into after the passing of the Act, why not as to these also allow annual payments to become half-yearly payments without the consent of the lenders? I do not see for whose benefit making an annual payment a half-yearly one is given; I should, though, think it is more in favour of the lender than the borrower, and so the Legislature has compelled no one to consent, and left it to the parties to agree. But I think section 3, if it reflects any light at all upon section 2, fortifies my view of the construction of that section. As in section 1, so in section 2, and also in section 3, I find that the Legislature is careful to express that consent shall be obtained when it intends that it should be, and when it intends it should not be (as in section 3, regarding contracts made after the passing of the Act) it advisedly omits saying anything about consent. I cannot think that this section can be used in aid of the appellants' contention, for, in my judgment, it is against it.

For these reasons I think the appeal should be dismissed, but, as my brothers think otherwise, it will be allowed with costs.

RIGBY, L.J.—From the time of the passing of the Poor Law Amendment Act, 1834, down to the present time, it has been the policy of the Legislature to enable boards of guardians and boards of management to borrow money on the security of rates, but such borrowing has always been subject to the consent of a Government department, at first the Poor Law Board and more recently the Local Government Board. As might have been expected the conditions prescribed for the borrowing have been very strict though they have varied from time to time.

In 1851 a statutory form of security was prescribed which, with an alternative made in 1867 (substituting for the rates the common fund of the union and immaterial for the present purpose), has ever since been, and still is, the prescribed form, and was the form made use of in all the cases before the court.

The material parts of that form are: (1) The charge of the common fund of the union with repayment by instalments of specified sums for principal and interest of the loan on fixed dates; and (2) a proviso that nothing in the security contained is to prevent the lenders from receiving the repayment of the whole or any part of the loan at any time before the day of payment of the last instalment if willing so to do.

From the nature of the security it follows that the instalments of debt, so far as they are payable out of rates, can only be raised when, according to the contract, they become due; that is to say, rates cannot be levied in anticipation to pay instalments payable in future years.

This is equivalent to saying that the guardians have no capacity by statute to pay off debt or redeem the charge on rates except in strict accordance with the terms of their original contract.

Regard, however, must be had to the proviso. As the lenders may be persons acting on their own account, or if trustees for others can derive no authority from the security which would aid them as against their *cestuis que trustent*, it is plain that the meaning of the proviso must be (as the learned judge in the court below has held) to relieve the lenders from the necessity of enquiring whether the borrowers have power to anticipate repayment or not.

We are led, therefore, to the conclusion that the Legislature has all along had in its contemplation that there are or may be cases in which the borrowers have power to redeem independently of the statutory power, and has provided for and so recognized the legality of redemption in such cases with the lender's consent. To go one step further, it seems plain that this consent may be given beforehand; for instance, in the contract of loan or by a variation of the statutory form of security.

What the cases are to which the proviso has reference it is not necessary to inquire.

They cannot, in all probability be cases of very frequent occurrence, but it is sufficient that the Legislature has thought it right, in the common form of security, to provide for redemptions in anticipation of the times actually fixed.

It is plain that according to the statutory form there could be no compulsory redemption by anticipation.

Where it is an object to obtain an investment that can be reckoned upon for a considerable number of years, as in the case of insurance companies, the stability of the investment will be an inducement to give better terms to the borrowers. At the same time it is not unlikely that among the vast number of borrowings under these Acts there may be some where the borrowers having reason to suppose that they may be in a position to redeem otherwise than out of the rates, have stipulated for the right to do so. Such a right, however, would in its operation be greatly extended to the prejudice of the lenders by any legislative extension of the capacity of the borrowers to redeem.

Down to the passing of the Act of 1871, on the construction of which the present appeal turns, it seems clear that the only function of the Government department charged with the supervision of these loans was to see that the borrowing was fit and proper from the point of view of the persons liable to repay. The department had no jurisdiction whatever to interfere in the slightest way with the rights of lenders, nor have they to this day any such jurisdiction unless it be given to them by section 2 of the Act of 1871.

For nearly a quarter of a century after the passing of that Act it does not appear to have occurred to any one that such a jurisdiction was conferred by the Act. It would obviously have been to the advantage of borrowers during the greater part of that period whilst the current rate of interest has been falling to invoke the exercise of it, but no attempt has been made to do so until the obtaining of the order of the 21st of September, 1895, which is relied upon in the case. It appears from the special case that this order was only made as an experiment and to allow the question to be raised. But it is now for the first time claimed on behalf of the borrowers that the section entitles them, whatever be the terms of the contracts they have made, to redeem loans contracted since the passing of the Act whenever they can borrow on easier terms as to interest and get the consent of the department.

It is, of course, part of the proposition that borrowers cannot contract themselves out of the benefit of the Act of 1871, or in other words that it is a hard and fast condition of all borrowing under the Act that borrowers may redeem under the Act whenever it is advantageous to them to do so. If this were thoroughly understood by lenders it would be taken into account by them and would certainly embarrass borrowers not improbably to the extent of making all future borrowing for long terms impossible in many conditions of the money market.

If the Act of 1871 has by plain words of enactment or by necessary implication brought about such an extensive change in the position of borrowers under the Acts and lenders to them the result however unexpected must be acquiesced in, and if lenders since the passing of the Act have failed to realise

the meaning of the statute they have no legal ground of complaint; but before the construction suggested is accepted it must be shown to rest upon a clear basis. In my judgment there is no such basis, and on the ordinary rules of construction the rights of lenders under the Act are in no way interfered with. The operative words in section 2 of the Act (independently of the proviso) seem to me altogether incapable of the meaning sought to be attributed. In terms they give only the capacity to borrow with a view to redemption (a most valuable extension of powers as regards the ratepayers), but that does not profess to give and in my judgment as more fully appears below, is incapable of giving anything more.

There are two, and only two, parts of the section which can be relied upon by the guardians as giving new rights, the rest of the section dealing only with the conditions, subject to which the rights or powers, whatever they may be, are to be obtained and exercised. These are as follows: First, they (the guardians or managers) may apply to the Poor Law Board for an order to enable them to redeem the balance of the loan, and to borrow so much money as may be necessary for that purpose; secondly, and if the said board shall issue their order in that behalf the said guardians or managers may borrow the requisite amount to redeem such balance.

The first part quoted shows the object of the application, and the second the result of an order made upon the application.

In the first part above quoted, the right given is a right to apply. The purposes of the application are, however, carefully indicated; they are to enable them to redeem and to borrow. The one word "enable" governs both "redeem" and "borrow." In itself it has the primary meaning in the case of a person under any disability as to dealing with another of removing that disability, not of conferring compulsory power as against that other. But in such an Act as the present, one of a series which has never dealt with compulsory powers, but has been exclusively concerned with conferring capacity, the presumption already strong in favour of the primary meaning becomes almost irresistible. When we add to this that in order to use the word "enable" for the purpose required by the argument, it must have one meaning in connection with "redeem," and another in connection with "borrowers," it may be said to be fairly demonstrated that the word cannot bear the meaning sought to be attributed to it. But the case by no means ends there. The second part, above quoted, is inserted for the express purpose of explaining and defining the effect of an order made upon an application under part one, and it is confined strictly by removing disability or conferring capacity—the guardians and managers may borrow the requisite amount to redeem such balance. If it had been intended to confer a right of compulsory redemption it seems almost impossible to explain why such an important right should not have been even glanced at when the effect of the order is being stated.

I am quite unable to say as matter of construction that a compulsory power of redemption is here coupled with a mere capacity to borrow, compulsory borrowing is of course out of the question. I think that capacity, and capacity only, is being dealt with here as throughout the rest of the Acts.

But then comes the proviso which has to bear the whole weight of the argument of the guardians. Now, no doubt a proviso may assist in determining which of two reasonable constructions of the clause upon which it is a proviso ought to be adopted, but hardly to give to that clause an entirely different meaning from that which, standing alone, it would bear. At any rate such a controlling force can only be attributed to a proviso when it can be demonstrated to be entirely meaningless on any other supposition. Is that the case with the proviso in this section? I think not. It provides that only in the event (meaning, I suppose, in case) of loans outstanding at the time of the passing of the Act, no such redemption shall take place without the consent of the persons to whom the loans shall be owing. I think that the word "such" is emphatic and important. It means plainly a redemption under and by virtue of the preceding part of the section—that is to say, by money borrowed for the purpose. This seems to me to be the key to the whole proviso. The section itself, on any construction of it, introduces an important power (the power of borrowing with a view to redeem) which had no existence before the passing of the Act. No real consent to a redemption in such circumstances could possibly have been given before the passing of the Act, for no one could foresee that such a change would arise. I read the proviso, therefore, as necessarily referring to and requiring a consent after the passing of the Act. But although no real consent to such a redemption could have been made before the passing of the Act there might have been, and probably were (as hereinbefore shown), consents to anticipatory redemption which, though made with reference to totally different circumstances, would in terms apply to the new state of things introduced by the Act. To allow them to have such an operation would be manifestly unfair. The avoidance of this unfairness would be a reasonable, and is, I think, the true explanation of the introduction of the proviso. Expanded by construction it means, notwithstanding any consent to redemption given before the Act no redemption under the Act shall take effect without a consent given with reference to the new conditions. Of course this explanation would account for the fact that no reference is made in the proviso to loans incurred after the passing of the Act. All such loans would be contracted with the knowledge that the borrowers had, not indeed, a compulsory but a facultative power to redeem, and the parties would be left to make their own bargain as to redemption. If, as in the present case, the contracts and charges excluded the hypothesis of an anticipatory redemption by compulsion that would be enough. If, on the contrary, there was an agreement to accept redemption by anticipation there would be no reason why further consent should be given when the section became operative.

The result is that in my judgment the proviso is intended to place lenders before the Act not in a better but only in the same position as lenders after the Act. Section 3 of the Act, which plainly applies to all loans, whether contracted before or after the passing of the Act, seems to me strongly to confirm the conclusion to which I have arrived as to section 2. It indicates a continuing appreciation on the part of the Legislature of the strict manner in which the powers of redemption of borrowers under the Acts are limited, and the same abstinence from interference with the contractual rights of lenders which is manifest throughout those Acts, and so far as I know in this class of legislation generally. To entitle the borrowers by one and the same Act to pay off a loan compulsorily, it may be twenty or twenty-five years before the time fixed by contract for payment of the last instalment, and at the same time to make the right of paying by half-yearly instead of annual instalments dependent upon the consent of the lenders, would be such an insistance of straining at a gnat and swallowing a camel as could hardly be attributed reasonably to the Legislature. I have assumed that the Government department under section 2 of the Act have nothing to do with the interests of lenders

as, of course, is the case, if their authority only extends to increasing the capacity of borrowers. On the other construction the want of notice to the lenders would increase the arbitrary nature of the legislation, if, indeed, anything could be more arbitrary than an enactment authorizing borrowers who have stipulated in terms for a loan to continue for thirty years, to pay off that loan whenever it is to their advantage, without even the usual six months' notice to which an ordinary mortgagee is by law entitled when the day for redemption had passed, or without any notice whatsoever.

Solicitors, *Travers, Smith, Braithwaite, & Robinson; Sharpe, Parker, & Co.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Feb. 18.

THE ATTORNEY-GENERAL *v.* TOD-HEATLEY. (*a.*)

Nuisance—Vacant land—Deposit of filth—Removal—Duty of landowner — Injunction — Public Health (London) Act, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 13, 35, 138.

The defendant was the owner of a piece of vacant land in the metropolis. Costermongers and others used the land for the deposit of offal and other kinds of filth, so that it became a nuisance to the neighbourhood. The Attorney-General, at the relation of the vestry of the parish, brought an action to restrain the nuisance.

Held, that there is a common law liability on the owner or occupier of land to abate a nuisance upon his land, and that the Attorney-General was entitled to an injunction to enforce the performance of such duty by the owner or occupier.

Appeal by the Attorney-General from a decision of Kekewich, J.

The action was brought by the Attorney-General at the relation of the united vestry of the parishes of St. Margaret and St. John the Evangelist, Westminster, and by the united vestry of the said parishes for an injunction (*inter alia*) to restrain the defendants from allowing or permitting a piece of land belonging to them to be in such a state as to be a nuisance or injurious to health.

The land in question was a piece of waste or vacant land situate at the corner of St. Ann's-lane and Great Peter-street, Westminster, and was vested in Sir Henry Moore Brownrigg, one of the defendants, prior to 1894 as trustee for the defendant Tod-Heatley, but since that date as absolute owner. It was alleged that the owner had allowed the hoarding enclosing the land to become very dilapidated, and that the public in the neighbourhood were in the habit of throwing or depositing upon the land all sorts of filth, refuse, and organic matter to such an extent as to create a nuisance and to be injurious to health within the meaning of section 2 (*a*) and (*d*) of the Public Health (London) Act, 1891.

The question at issue was whether the duty of cleansing the vacant land periodically and keeping it clean devolved upon the owner Sir Henry Brownrigg or upon the vestry under the provisions of the Public Health (London) Act, 1891.

Kekewich, J., held that the action was properly brought under section 13 of the Act, that there was a nuisance resulting from the deposit by the public of filth and refuse on the land, and that it was the duty of the owner to see that his land was not a nuisance to his neighbours. His lordship, however, having regard to the character of the neighbourhood, refused to grant an injunction to restrain the nuisance on the ground of the difficulty the defendant would have in obeying such an order, and therefore left the vestry, who had the means to remove the refuse, to their powers and remedies under section 35 of the Act.

The Attorney-General appealed.

Warrington, Q.C., and *Morton Smith*, for the appellant.—Under the Act the sanitary authority is not bound to remove anything but house refuse, and section 35, on which Kekewich, J., relied, contemplates something very different from summary proceedings in a case such as this, where the nuisance is continuing. We come both under our common law rights and under the Act. The injunction ought to have been granted.

They referred to *Margate Pier and Harbour Co.* v. *Town Council of Margate*, 20 L. T. N. S. 564.

Renshaw, Q.C., and *Ingpen*, for the respondent.—We do not admit that if a stranger comes on the land and commits a nuisance the owner is liable. [RIGBY, L.J.—A man has power to interfere with a nuisance committed by his tenant: *White* v. *Jameson*, 22 W. R. 761, L. R. 18 Eq. 303.] A distinction is drawn between a thing done by a man or his servants and a thing done by strangers over whom there is no control: see *Gandy* v. *Jubber*, 12 W. R. 526, 13 *ib.* 1,022, 5 B. & S. 78, 485. [LINDLEY, L.J.—I do not think it would be any defence to an indictment to say, "I am doing all I can to prevent a nuisance."] On the construction of the Act the vestry is bound to remove the refuse.

They referred to *Saxby* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 17 W. R. 293, L. R. 4 C. P. 198; *Reg.* v. *Bradford Navigation*, 13 W. R. 892, 6 B. & S. 631; *Conservators of the River Thames* v. *Port Sanitary Authority of the Port of London*, [1894] 1 Q. B. 647, 42 W. R. Dig. 45.

No reply was called for.

LINDLEY, L.J.—Looking at the matter from the point of view of the public—that is to say, with reference to the duty of the defendant, and the right of the Attorney-General as representing the public—the case appears to me to be one of the simplest possible description. The defendant is the owner and occupier, or possessor, of a piece of vacant land. It appears to me that it is a common law duty of the owner of a vacant piece of land to prevent that land being a public nuisance. If I turn to the books to which we are accustomed to go for information about such matters as this, the Criminal Law books, and I will take Hawkins' Pleas of the Crown, which is one of the best, he says, in his chapter on Nuisances: "It seems that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the king's subjects, or by neglecting to do a thing which the common good requires." If the owner of a piece of land does permit it to be in such a state, so smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say, "I did not put the filth on, but somebody else did." He must provide against this if he can. His business is to prevent his land from being a public nuisance. One very early authority or illustration of that doctrine is to be found in the case of *Reg.* v. *Watts*, 1 Salk. 357. It was an "Indictment for not repairing a house standing upon a highway, ruinous and likely to fall down"—I do not mean across the highway, but near

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

it—"which the defendant occupied and ought to repair *ratione tenuræ suæ*. The defendant pleaded not guilty, and the jury found a special verdict—viz., that the defendant occupied, but was only tenant at will, and whether he was liable was the question." Then the court said: "The *ratione tenuræ* is only an idle allegation; for it is not only charged, but found that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance." That principle has been always followed, so far as I know, in criminal law, and also on information by the Attorney-General representing the public. I cannot for a moment entertain the slightest doubt that it is the common law duty of the defendant to prevent that piece of land from continuing as a public nuisance. That it is a public nuisance is beyond all controversy. Under the circumstances, why is not the Attorney-General entitled to an injunction to restrain the defendant from committing a breach of that duty to the public? It appears to me it is almost a matter of course, unless there are instances to the contrary, which I will consider presently, that the Attorney-General should, on behalf of the public, have an injunction. The mere fact that it puts the wrong-doer to expense, or that it is difficult for him to get rid of it, is no defence in point of law, or any reason at all why the rights of the public should not be enforced.

So much for the common law aspect of the case. But the common law aspect of the case is that which we are to regard by reason of the 138th section of the Public Health (London) Act, 1891, which has been so much referred to. That Act, which I will refer to presently at a little more length, gives the sanitary authority, who are here the vestries, power to remove nuisances and to clean streets, and do all sorts of things for the benefit of the public, and amongst other things, I have no doubt under the circumstances which have been referred to, they could proceed against the defendant criminally. But that is an extremely inconvenient mode of proceeding. They have found that so in practice. What does section 138 say? "All powers, rights, and remedies given by this Act shall be in addition to and not in derogation of any other powers, rights, and remedies conferred by any Act of Parliament, law, or custom, and all such other powers, rights, and remedies may be exercised and put in force in the same manner and by the same authority as if this Act had not passed"; that is to say, attending only to the rights of the public, and the Attorney-General as representing the public, saving all his rights and all his remedies. With that section in the Act no section in the Act can oust the jurisdiction of the court to grant an injunction if it be a proper case in other respects.

Now, as to the alleged reasons for not interfering. They are that the vestry is empowered by this Act of Parliament to clean such places as this at the expense of the ratepayers, and even under section 35 at the expense of the defendant himself. I think that is so. Now let us consider upon what principle of justice can the expense of keeping the place clean be thrown upon the ratepayers. It is the common law duty of the owner to prevent it being a nuisance. Why should the ratepayers pay for it? There is a clause in section 35 under which, so far as I can follow it, I think the vestry might have taken proceedings. That is itself an awkward section. It is inconvenient in practice. I do not say that it cannot be made use of, but the machinery of its provisions would have to be put in force constantly, and instead of having one declaration or one injunction there would have to be a heap of different orders—assuming of course, the defendant did not obey and perform the duty which lies upon him. It would be an extremely inconvenient procedure to have recourse to. Under these circumstances I think the existence of that power ought not to influence us in considering whether we should grant an injunction.

Now, look at the matter from a practical point of view. The defendant takes this position, which one would expect from any gentleman. He has fought for his rights. He finds the law is against him. He says, "Do not grant an injunction against me, I will make some arrangement with the vestry by which they shall keep this place clean at my expense." That was perfectly right and proper. Nobody wants to put him to greater inconvenience than necessary; therefore, I do not think it is necessary now, for the sake of the public or anybody else, to grant any injunction, but he must accept the consequences of being in the wrong, and that which we propose to do is to discharge the order, make the declaration (as stated below), and the defendant must pay the costs which have been incurred—not the whole costs, but the costs of the action so far as it was dismissed against him, and the costs of this appeal.

A. L. SMITH, L.J.—It is proved undoubtedly that a public continuing nuisance to the danger of the inhabitants of the district exists upon the land of Sir Henry Brownrigg. The point is taken that Sir Henry Brownrigg is under no duty to abate that nuisance. It seems to me it is perfectly clear, in addition to what my learned brother Lindley said in one or two cases on this point, that where an owner and occupier, which Sir Henry Brownrigg is, is possessed of land, and upon it there is a continuing public nuisance which is dangerous to the health of the inhabitants, there is a duty cast upon the owner of that land to abate that nuisance; and the judgment of Lord Blackburn, in *Reg.* v. *The Bradford Navigation*, is very apposite to the point I am now upon. If that case is looked at carefully it is an indictment against the Bradford Canal for a public nuisance. I find it is "an indictment for a public nuisance by collecting, impounding, and keeping exposed on the 1st of July, 1864, and thence continually until the 10th of August, 1864, in the Bradford Canal at Bradford, in the West Riding of Yorkshire, large quantities of foul liquid, filth, sewage, and polluted water." It went down for trial, and judgment was given for the Crown, subject to a special case. The defence set up to this indictment was that when the canal was first supplied with water from the Bradford beck, the water of the canal was pure; and that the beck had been polluted by somebody else, and so it was that the defendants got their canal into such a state of public nuisance for which the indictment was brought. That is the history of the case shortly. In this state of things what does Lord Blackburn hold? He says: "There is no precise authority in point, and we must have recourse to the general principle of law. Persons who maintain their property so as to be a public nuisance are indictable." I will pause there. What did Sir Henry Brownrigg do? Is he maintaining this property so as to be a public nuisance? Of course he is. I have no doubt this part of the case is perfectly true; that he is indictable. "And the question in the present case which concerns the occupiers, the lessees of the canal"—they were the persons indicted—"is whether they, having maintained and kept part of it in such a state as to be a public nuisance, there is anything which prevents them from being indictable." He said: "You are indictable, there is a case against you, how do you get out of it?" I am paraphrasing this part of the

judgment. Then they said: "The statute allowed us to bring the beck into our canal. Some people upon that beck have been polluting it, and hence it is that our canal is in the state you complain of." The learned judge points out that if the statute has compelled the company to take that beck, and put the obligation upon them, that might be an answer to the indictment, because they are doing what the statute compels them to do, but he points out that inasmuch as the statute only authorized them to take that beck into their canal, that is no answer to the position they are in. They had a public indictable nuisance upon their premises, and he held, like the rest of the court, that the indictment was good, and he held they must be convicted, and they were convicted. That is very apposite to the point we have to decide here. Then I come to read the other case to which I have been referred: the *Margate case*, before Lush and Hayes, JJ. There there was an indictment against the authority for having a nuisance of seaweed upon their foreshore. It was a continuing public nuisance. Lush, J., said: "I have no doubt whatever that it is the duty of the appellants to prevent the accumulation of seaweed so that it shall not become a nuisance, and that, whether produced by natural or artificial causes"—that would be if throwing the rubbish over the paling—"they are bound to remove all matter in the harbour which is a nuisance or injurious to health." These authorities, and the authority to which Lindley, L.J., has referred, appear to me to dispose of the first point taken—namely, that there is no duty upon Sir Henry Brownrigg to prevent this piece of land from continuing to be a public nuisance, dangerous to health.

Now, what is the next point that is taken? It is said, as I understand: "But you, the vestry, ought to have done this under the Public Health (London) Act, 1891." I will deal with the section in a moment; but if that had been the defence, is not that exactly the defence raised in *Reg.* v. *The Bradford Navigation?* It was raised, and this is how Lord Blackburn dealt with it. He said: "Inconvenience to the public and to the company may be occasioned if, from the want of pure water, the supply of water in the canal runs short; but that can afford no justification for the defendants creating a nuisance. It throws on them the necessity of taking legal steps to compel the Local Board of Health to do their duty in cleansing the beck, or, if that be found an inefficient remedy, to obtain a private Act of Parliament for the purpose." Supposing the argument on behalf of Sir Henry Brownrigg was right, namely, that it was the duty of the vestries to clear this piece of land, what answer is that to the information of the Attorney-General, who says there is a public nuisance which exists on the defendant's land which he is bound to abate? None at all; for, as Lord Blackburn points out, if it be the duty of somebody else, it is the defendants' duty to make them perform their duty. I doubt very much myself whether or not Mr. Renshaw with all his ingenuity is able to make out that it is the duty of the vestry to do this cleansing under either section 30 or 35. He only gets the cleansing by reason of reading in, the interpretation clause, and by reading in the interpretation clause I admit he does bring this case within the sections I have mentioned; but we ought not to overlook this fact, that in the interpretation clause, section 141, it says "In this Act unless the context otherwise requires." I think the context in section 30 or section 35 is repugnant to the introduction of the words contended for. Although I am not necessarily deciding it absolutely, I doubt very much whether these authorities—that is, the vestries—can be forced to do what it is contended they could be forced to do.

But be that as it may, that is no answer to the information of the Attorney-General, because if you read section 13 and section 138, one or the other, or both, it seems to me the jurisdiction of this court on information by the Attorney-General is left absolutely untouched. Section 13 says: "The sanitary authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in the High Court to enforce the abatement or prohibition of any nuisance liable to be dealt with summarily under this Act." That would seem to show their position if they go to the Attorney-General and get him to take proceedings as he has done in the present case. If not, section 138, which I am told was not called to Kekewich, J.'s, attention, seems to me to be conclusive of the subject. That section says: [His lordship read the section, and continued:] Therefore, as far as this relation by the Attorney-General is concerned, the case may be dealt with as if this Act had not been passed, as the Legislature says, and therefore, there being this continuing public nuisance upon the land of Sir Henry Brownrigg, on the information of the Attorney-General, he is bound to abate it, and an injunction ought to go.

I wish to add one thing. A good deal has been said about the impossibility of Sir Henry Brownrigg being able to obey the injunction. The injunction is not going at present, as Lindley, L.J., has said, and I quite agree. But if this had been used as a market garden and occupied as a market garden by Sir Henry Brownrigg I think he would have found means to prevent the nuisance without any difficulty at all. I am of opinion the appeal should be allowed.

RIGBY, L.J.—In this case, down to the present time, Sir Henry Brownrigg had denied his liability to abate the nuisance occurring on his property. It is argued, in addition to that denial of liability, that because the vestry deny their liability, he is entitled in some way or other to leave the nuisance to continue, or at any rate an injunction should not be granted against him. Upon those points I think he is entirely in the wrong. There is a common law liability in the owner or occupier of land to abate a nuisance arising upon his land, and whenever he becomes aware that there is a nuisance at once the duty arises. In some cases a man subjects himself to indictment—as for instance, being not the owner but a tenant at will only, as in *Reg.* v. *Watts*—if he allows a nuisance to remain upon the land of which he is occupier, in the shape of a dangerous thing. What is there peculiar in that? Mr. Renshaw tried to distinguish that case because of the ownership. I do not think the tenant at will is owner in any sense, or that that makes a substantial difference. The defendant in that case was there as tenant at will, and there was the dangerous structure. If it fell down it might injure someone passing by. I cannot, in point of principle, distinguish a case of dangerous structure and a nuisance in the nature of injurious effluvia that come from the land. It seems to me when you take the common law point of view there is only the alternative of allowing the nuisance to go on indefinitely, or making liable the only person who can abate the nuisance, whether the owner or occupier; so I have no doubt about the existence of that common law liability.

In reference to the next point, that the position is altered by the statute, reading section 138—which, by the way, does not appear to have been called to Kekewich, J.'s, attention—it appears to me that that argument, without further enquiry, must fail. The statute says that you are to have the same remedies as though the Act had never been passed;

that is to say, you are to have all your common law remedies as though this statute, at any rate, was not in existence. That means that you are to disregard for the purpose of remedy everything that there is in this statute. Now I do not mean to say that if it were clearly shown that the vestry had been acting in a really vexatious manner, that that might not be taken into consideration. I do not find that at all. I asked for any clear admission that had ever been made by Sir H. Brownrigg that he was liable, and there is none to be found. Under these circumstances we do not really need to consider the difficulty in which he may be placed if an injunction is granted. He has not tried to do anything really practicable to get rid of this nuisance. I cannot imagine that that flimsy sort of hoarding that he has put up and allowed to be pulled down, is to any extent, what you might call a serious attempt to prevent the nuisance. He has gone upon the ground he is not liable and the vestry is, and that has been the case really down to the present time. I think a declaration that the Attorney-General is entitled to an injunction, and giving liberty to apply is the best way of settling the contention. No doubt it will lead to something which will render an injunction unnecessary.

Appeal allowed.

The order was as follows: Discharge the order appealed from and allow the appeal. Declare that the defendant, Sir H. M. Brownrigg, was legally bound to prevent the piece of land in question from continuing to be a public nuisance, and that the Attorney-General was entitled to an injunction to enforce the performance by him of such duty. Liberty for the Attorney-General to apply to the judge for such an injunction if necessary. The defendant to pay the costs of the action so far as it was dismissed against the defendant without costs, and also to pay the costs of the appeal.

Solicitor for the appellant, *J. C. F. Warrington Rogers.*

Solicitors for the respondent, *Last & Sons.*

High Court of Justice.

Chan. Div. Stirling, J. — March 13, 17.

In re BENTINCK.
BENTINCK *v.* BENTINCK. (*a.*)

Administration of assets—Crown debt—Specialty and simple contract creditors—Hinde Palmer's Act, 1869 (32 & 33 *Vict. c.* 46).

The object of Hinde Palmer's Act, 1869, *is only to put specialty and simple contract creditors on an equal footing* inter se *for purposes of distribution, but it does not affect any other rights and priorities that may exist, nor does it bind the Crown in any way. Where, therefore, a testator died leaving assets sufficient, after the payment of his specialty debts in full, to pay a simple contract debt due to the Crown which before the statute would have had priority over other simple contract debts, but been postponed to the specialty debts,*

Held, that the assets ought, in the first place, to be divided rateably between the specialty and simple contract creditors, and that the payment of the Crown debt ought to be borne by the fund for the payment of the simple contract creditors.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law

In re Jones, Calver *v.* Laxton, 34 *W. R.* 249, 31 *Ch. D.* 440, *followed.*

In re Williams, Williams *v.* Williams, 21 *W. R.* 160, 15 *Eq.* 270, *distinguished.*

This was a summons taken out by certain specialty creditors of the testator in an action for the administration of the testator's estate to have it declared how, as between the specialty and simple contract creditors, the payment of the sum of £3,733, being a Crown debt due from the testator as legal personal representative and residuary legatee of a deceased relative, ought to be borne, regard being had to the provisions of the statute of 1869.

The Crown debt in question consisted of unpaid probate duty and unpaid legacy duty which ought to have been paid in or about the year 1874. Doubts having arisen as to whether the Crown had not lost their right to recover the same, the court had sanctioned an arrangement which in effect was a compromise of the claim of the Crown, and an order was made for payment to the Crown out of moneys in court of the sum above mentioned, without prejudice to the question how the debt should ultimately be borne.

The testator died in the year 1891, leaving assets amounting to about £114,000.

His gross liabilities exceeded the sum of £274,000, including specialty debts amounting to £17,980, the Crown debt of £3,733, and other simple contract debts amounting to £253,000. A dividend of 7s. 6d. in the pound had already been declared, and it was anticipated that a further dividend would shortly be declared. Before the Act of 1869 the Crown was entitled to be paid the debt of £3,733 after all specialty debts, but before any simple contract debts.

It was admitted that this right had not been affected by the statute, and the assets being sufficient for payment of the Crown debt in full after satisfying all specialty debts, the Crown debt was paid in full accordingly.

G. Hastings, Q.C., and *Cunliffe,* for the specialty creditors.—The statute of 1869 put specialty and simple contract creditors on equality, but does not affect the Crown. Here the Crown is a simple contract creditor in respect of this debt (*In re Henley,* 26 W. R. 885, 9 Ch. D. 469) and is entitled to priority over the other simple contract creditors, but has no priority over specialty creditors. The cases of *In re Jones, Calver* v. *Laxton,* 34 W. R. 249, 31 Ch. D. 440; and *Wilson* v. *Coxwell,* 23 Ch. D. 764, 32 W. R. Dig. 82, were cases of retainer by an executor, and we submit that these cases are analogous to the present, and the principle there laid down ought to be followed here. The application of the principle here gives the specialty creditors some advantage, and it is said that this is contrary to the statute, but that difficulty was also raised in these cases. The statute only says there shall be no priority in respect of a specialty debt. Retainer is merely a matter of preferential payment. In the same way the Crown here has a preferential payment (*In re Henley*). The statute does not abolish the distinction between specialty and simple contract debts, but only the priority of payment by reason of one debt being specialty and the other simple contract. *In re Briggs,* 38 SOLICITORS' JOURNAL 662, W. N. 1894, p. 162.

Buckley, Q.C., and *T. T. Methold,* for the simple contract creditors.—As regards the point that the Crown is not bound by the statute we submit that the Crown gets the benefit of the statute, and therefore obtains priority over both specialty and simple contract creditors: *In re Williams, Williams* v. *Williams,* 21 W. R. 160, L. R. 15 Eq. 270. The right

of retainer by an executor really stands on a different footing. Retainer is not payment, and that is the reason of the decisions in *In re Jones*, where *In re Williams* was distinguished, and *Wilson* v. *Coxwell*. The Crown having been paid, there are only two classes of creditors before the court, the specialty and simple contract creditors; of these the specialty creditors are setting up a claim to be paid more than the other creditors by reason of their being specialty creditors, but their priority has been expressly taken away by the statute. Section 3 of the Intestate Estates Act, 1884, would seem to imply that the Crown has no priority at all. [STIRLING, J.—I do not think that section applies.]

Davenport, for the executors.

G. Hastings, Q.C., in reply.—*In re Williams* does not govern this case for the reasons given by Kay, J., in *In re Jones*. [STIRLING, J.—I have some difficulty in grasping the distinction.]

Cur. adv. vult.

March 17.—STIRLING, J., stated the facts, and continued:—The precise point has not as yet arisen for determination, but decisions have been given in two classes of cases, each of which bears a resemblance to the present. The first was that of a simple contract creditor who, after the death of the debtor, recovered judgment against his legal personal representative. By so doing the creditor did not, before the Act place himself in the position of a judgment creditor of the testator, and he gained no priority as against specialty creditors, but it was held that he was entitled as a reward of his diligence to be paid in priority to simple contract creditors who had not obtained a judgment. See *Ashley* v. *Pocock*, 3 Atk. 208; *Dollond* v. *Johnson*, 2 W. R. 805, 2 Sm. & G. 301. In *In re Williams*, *Williams* v. *Williams*, arose the question of how the position of such a judgment creditor was affected by the statute of 1869, and it was held by Wickens, V.C., that he was entitled to be paid in priority to both specialty and simple contract creditors. The judgment of the Vice-Chancellor is as follows. [His lordship read the judgment, and continued:—] Now it is to be observed that the Vice-Chancellor recognizes that the effect of the statute was only for certain purposes, and to a certain extent to make the mode in which the debt was contracted by the intestate immaterial, but it appears to me that the inference from his language is that he did not consider that among those purposes was included the prevention of a simple contract creditor who had obtained judgment against the legal personal representative of the intestate from obtaining priority over the specialty creditors. That case stands alone.

The other class of cases relates to the right of retainer on the part of a legal personal representative, in respect of a debt due to him from the deceased; a right which can only be exercised in preference to creditors of equal degree. With reference to this right it has been decided in three cases—viz., *Wilson* v. *Coxwell*, *In re Jones*, *Calver* v. *Laxton*, and *In re Briggs*, that the assets must in the first place be divided rateably between specialty and simple contract creditors, and that effect is to be given to the right of retainer in respect of a simple contract debt due to the legal personal representative only out of the portion coming to the simple contract creditors. The grounds for the decision are thus stated by Kay, J., in *In re Jones*. [His lordship read the judgment from the words, "I think the object of this Act, . . ." to "Equality between them in the case of distribution is the declared purpose," and continued:—] Later he says: "I do not think that a statute, the object of which is to effect equality of distribution, should be construed to give incidentally the power to defeat specialty as well as simple contract creditors."

I understand the case of *In re Williams* to be there distinguished because, after the death of the testator the creditor had recovered judgment, and had thus attained a higher rank than he had at the time of the death. It is also distinctly laid down that the object of the statute is "only to take away the priority of a specialty creditor over simple contract creditors not to give any of them priority over him." I am not sure that Wickens, V.C., had the same view.

In that state of the authorities I have to say which of them ought to govern the present case; and in my judgment I ought to follow those which relate to the right of retainer. In the first place the creditor now in question has obtained no judgment; and nothing has happened to affect the rank of the debt as it stood at the testator's death, and the position of the Crown resembles more closely that of an executor seeking to retain his debt than that of a simple contract creditor who has recovered judgment from the legal personal representative. In the second place, if there be any difference in the views entertained by different judges as to the object of the statute, that expressed by Kay, J., appears to be that which is in itself preferable, and also that which is supported by the greater weight of authority.

Solicitors, *Cunliffes & Davenport*; *R. S. Taylor*, Son, & *Humbert*.

Q. B. Div.
(Hawkins and Lawrance, JJ.) March 15.

ARTER v. THE VESTRY OF THE PARISH OF HAMMERSMITH. (*a*.)

Metropolis management—Street—New street—Adjoining owner—Metropolis Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

A private roadway existed before 1855. *No new buildings were erected which had access to it after that date.*

Held, that the roadway was not a new street within the meaning of section 112 *of the Metropolis Management Act*, 1862, *and the adjoining owners were not liable to be charged with the expense of paving it under section* 105 *of the Metropolis Management Act*, 1855.

Case stated by justices of the county of London.

A complaint was preferred against the appellant for neglecting to pay the sum of £295 11s. 4d., which was charged upon him as owner of houses or land abutting upon a certain alleged new street known as "Beavor-lane" in respect of the expenses of paving the said street.

The appellant was the owner of the soil of Beavor-lane. Over a portion of the lane there was a public right of footway. The remainder was an entirely private roadway, but vehicles sometimes passed over it, a toll being charged by the appellant if he was aware of their presence. There were movable bars at either end of the roadway. The portion of Beavor-lane on which there was a right of footway was already paved.

On the west side of Beavor-lane there was a public-house, a row of cottages enclosed by a wall, and a warehouse or oil-mill. Neither of these buildings had access to the lane. In front of the wall of the

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

cottages, at a distance of from three to eight inches from it, the appellant had erected a fence, and in front of the walls of the public-house and of the oil-mills, at a similar distance, he had placed rows of posts bearing his own name and the date 1877. There was no evidence as to when the buildings on the west side were erected. The buildings on the east side were erected before 1855, and were not in a continuous line.

The respondents proposed to pave a portion of the roadway, and sought to charge the appellant with the expenses of so doing as the owner of land abutting upon the whole of the west side of Beavor-lane.

The justices held that Beavor-lane was a new street within the meaning of section 105 of the Metropolis Management Act, 1855, and that the appellant, having reserved to himself the narrow strip of land between the buildings on the west side and the fence and posts he had erected, was the owner of land abutting on Beavor-lane throughout its entire length on the west side.

The question for the opinion of the court was whether the justices were right in so holding.

C. A. Russell, Q.C. (*Mansfield* with him), for the appellant.—New street is defined by section 112 of the Metropolis Management Act, 1862, thus: "The expression new street shall include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out." Beavor-lane was not a new street within the definition. It was not laid out as a street, and no buildings had been built with access to it. The obvious intention was to preserve it as a private way to the appellant's house.

Macmorran, Q.C. (*F. Low* with him).—The justices have found as a fact that the appellant was the owner of the narrow strip, which he reserved for the purpose of preventing access from the houses on the west side into the lane. It has been decided that the owner of such a strip is chargeable: *Williams* v. *Wandsworth Board of Works*, 32 W. R. 908, 13 Q. B. D. 211. Beavor-lane is a new street. It comes within the definition in section 112 of the Act of 1862. For a definition of the word "street" in that Act, reference is made to section 250 of the Act of 1855, which provides: "The word 'street' shall apply to and include any highway, except the carriageway of any turnpike road, and any road, bridge (not being a county bridge), lane, footway, square, court, alley, or passage." The fact that it was not dedicated to the public does not prevent its becoming a new street: *Vestry of St. Mary's, Islington* v. *Barrett*, 22 W. R. 402, L. R. 9 Q. B. 278.

CAVE, J.—Two questions are asked in this case: (1) Whether Beavor-lane was a new street? and (2) whether the appellant was the owner of the land abutting on the west side of it? The justices were right as to the second point. There was evidence upon which they might come to the conclusion that the appellant had reserved to himself the narrow strip of land behind the fence and posts he had erected. But with regard to the first point they were wrong.

Beavor-lane was before the Metropolis Management Acts a private road, and there is nothing to show that it has altered its position since. There was no evidence to show that allowing people to pass along it turned it into a new street. No new houses were built with access to it. There is not the slightest difference between its position now and its position fifty years ago, except that the neighbourhood has become more populous. It has never been dedicated to the public, nor has it become repairable by the inhabitants at large. It was an old road, and nothing has been done to make it into a street.

It was admitted that it was not within the *primâ facie* meaning of the new street as defined in section 112 of the Act of 1862. But it is said that it comes under the words, "streets, the maintenance of the paving and roadway whereof, &c.," and that "streets" in that phrase means streets as defined in section 250 of the Act of 1855. But before a roadway can become a new street, something must have been done so as to make it of the nature of a street. You cannot take the two interpretation clauses together to find the meaning of "new street," because to be a new street the roadway must be used as a street. If the old roadway had been laid out as a street, or turned into a street, it would have been within the definition of "new street," but that is just what has not been done. It is still an old roadway. You cannot dovetail two provisions of an Act of Parliament together so as to make an old road become a new street.

LAWRANCE, J., concurred.

Solicitors for the appellant, *Cunliffes & Davenport.*

Solicitors for the respondents, *Watson, Sons, & Room.*

Q. B. Div.
(Cave and Grantham, JJ.) March 13.

GOLDSTEIN (*Appellant*) *v.* VAUGHAN (*Respondent*). (*a.*)

Factory—Workshops—Work carried on in workshop on Sunday—"Open for traffic on Sunday"—Meaning of—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 51.

The occupier of a workshop, who was of the Jewish religion, employed a woman of the Jewish religion to work in his workshop on Sunday. The business carried on was the making of buttonholes on garments for tailors, and garments were carried to and from the shop on Sunday in pursuance of prior arrangements; but no arrangements, payments, or settlements were made with any customers or other persons on the Sunday.

Held, that the workshop was not "open for traffic on Sunday" within the meaning of section 51 *of the Factory and Workshop Act*, 1878.

Case stated by Mr. Mead, metropolitan police magistrate sitting at the Thames Police Court.

An information was laid by the respondent, an inspector of factories and workshops, against the appellant, who was the occupier of a certain workshop, for that on the 20th of September, 1896, a woman was employed at the appellant's workshop contrary to the provisions of the Factory Acts, and that the workshop was open for traffic on that day, being Sunday.

The magistrate convicted the appellant, and fined him 1s. and 4s. costs.

The appellant was a buttonhole machinist, his business being to make buttonholes for master tailors. He was of the Jewish religion, and having

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

his workshop closed on Saturdays, had availed himself of an exemption under Part 2 of the Factory and Workshop Act, 1878, section 51, which entitled him if he thought proper to employ women and young persons on Sundays, subject, however, to the condition that his workshop should not be open for traffic on Sundays.

The appellant's mode of doing business was as follows: He entered into arrangements with his customers under which he was to make buttonholes on their garments at certain prices. They sent the garments to the workshop and fetched them away when the work was done. The buttonholes were not paid for at the time the work was left, or when it was fetched away, but accounts were kept and settlements were made at times quite independent of these visits. The workshop was open on Sunday in order that such customers might send or fetch garments in pursuance of such prior arrangements; but the workshop was not kept open on Sunday for the purpose of making an arrangement either with an old or a new customer, or for the receipt of work from a casual customer, or for the payment for work already done, or for the settlement of any accounts with respect of work done or to be done.

The appellant employed on the 20th of September, 1896 (being Sunday), in the said workshop a woman of the Jewish religion, as charged in the information.

The magistrate was of opinion that the facts stated brought the appellant's workshop within the words "open for traffic on Sunday," and he convicted the appellant accordingly.

The question for the opinion of the court was whether the facts stated brought the appellant's workshop within the words "open for traffic on Sunday."

Section 51 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), enacts that "No penalty shall be incurred by any person in respect of any work done on Sunday in a factory or workshop by a young person or woman of the Jewish religion, subject to the following conditions: (1) The occupier of the factory or workshop shall be of the Jewish religion; and (2) The factory or workshop shall be closed on Saturday, and shall not be open for traffic on Sunday."

Channell, Q.C. (*Israel Davis* with him), for the appellant.—The workshop was not "open for traffic on Sunday" within the meaning of the section. There was a similar provision in section 1 of the Workshop Act, 1871 (34 & 35 Vict. c. 19), so that this legislation is not new. In order that the section may apply, both the employer and the persons employed must be of the Jewish religion. The meaning of the word "traffic" as given in the dictionaries is "trade," and the meaning in this section is trading or trafficking. Persons may work in the workshop on Sunday, but they must not carry on a trading business or a trafficking with the outside world; and what is prohibited by the section is the trading or trafficking with outside persons. Here there was no such trading or trafficking with outside persons. There was the mere carrying of parcels to and from the workshop in pursuance of arrangements made previously; but no arrangements were made with customers or others, and no payments were made on the Sunday. The workshop was, therefore, not "open for traffic" within the meaning of the section.

H. Sutton, for the respondent.—The magistrate was clearly right in convicting the appellant. A workshop is not "open for traffic" within this section only when it is closed to outside persons for all business purposes. All business dealings or intercourse with outside persons must be cut off, though work may be carried on in the shop; otherwise the workshop is "open for traffic" within the section.

CAVE, J.—It is not very easy to construe the words "open for traffic." There is a natural difficulty attending the use of the word "traffic" which makes it difficult to say what is the real meaning of the words "open for traffic." But I think the view the learned magistrate took was rather too narrow. It is obvious that if the things had been done which the magistrate finds were not done in this factory, the factory would have been "open for traffic"; if, for example, people could have come in and out and have given orders as they would on other days, have made their arrangements, enquired the prices, and things of that kind, then there would have been no doubt that the place would have been "open for traffic." I have, however, some difficulty in seeing how that would be so where all that is done is that the things are brought by a person with whom an arrangement had been previously made. I have some difficulty in seeing that, because goods are brought there in pursuance of a business arrangement made on another day, therefore the workshop is open for traffic on a Sunday. The section is not very clear, but, according to the best interpretation I can put upon it, I should say that the workshop was not "open for traffic" if nothing more took place than what has been found to have taken place here. I think, therefore, the conviction ought to be quashed.

GRANTHAM, J., concurred.

Conviction quashed.

Solicitor for the appellant, *T. W. Moore.*

Solicitor for the respondent, *The Solicitor to the Treasury.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Chitty, L.J.) — March 1.

TATE v. LATHAM & SON. (a.)

Master and servant—Employers' Liability Act, 188 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* 1—*Defect i condition of machinery—Absence of safeguard.*

The temporary absence of a movable guard or shutt which had been provided to afford protection from circular saw, held to be a defect in the condition o machinery within the meaning of section 1, *sub-secti* 1, *of the Employers' Liability Act,* 1880.

Appeal from a decision of a Divisional Court on a appeal from a county court.

The action was brought under the Employe Liability Act, 1880. The plaintiff claimed that was entitled to compensation, first, under section sub-section 1, for injury caused by reason of a defe in the condition of the machinery used in the defe dants' business; and secondly, under sub-section for injury caused by reason of the negligence o person in the service of the defendants, to wh orders he was bound to conform.

The plaintiff was engaged in working at a circu saw in the defendants' saw-mills with a fell workman named Cook. The saw revolved o bench, the lower part of the saw being under bench. The saw-bench had been furnished wit

(a.) Reported by F. G. RUCKER, Esq., Barrist at-Law

movable shutter, or lid, made to cover the lower part of the saw, for the purpose of protection, which was taken off from time to time in order that the sawdust which collected under the bench might be removed. On the day of the accident this shutter was not fixed to the bench, having been taken off by Cook and not put back again. There was evidence that Cook was the person entrusted with the duty of seeing that the shutter was in its proper place. The plaintiff, while acting in accordance with instructions given him by Cook, slipped and fell under the bench, and was severely injured by the revolving saw.

The county court judge held that there was no evidence of any defect in the condition of the machinery, but left to the jury the question whether the defendants were liable under sub-section 3. The jury returned a verdict for the plaintiff for £128.

Both the plaintiff and the defendants appealed to the Queen's Bench Division. The Divisional Court (Wright and Bruce, JJ.) held that the temporary absence of the shutter amounted to a defect in the machinery within the meaning of sub-section 1, but that there was no evidence on which the defendants could rightly be held liable under sub-section 3.

Both appeals were therefore successful.

The defendants appealed to the Court of Appeal, and the plaintiff gave notice of cross-appeal.

Jelf, Q.C., and *H. Lynn*, for the defendants.

Cyril Dodd, Q.C., and *W. Addington Willis*, for the plaintiff.

Lord ESHER, M.R.—In my opinion there must be a new trial upon both the points which have been raised in the action. The first point is whether the county court judge was right in holding that there was no defect in the condition of this machinery. The machinery was a saw-bench; that is, it consisted of the circular saw and the whole bench, and the working of it was not confined merely to turning the saw and putting planks on the bench and passing them through the saw, but included also the removing of the sawdust. The machine was furnished with a guard which kept the sawdust in, and which, while the machine was in motion, protected any person standing by from being caught by the saw. When it was necessary to remove the sawdust the guard had to be taken off. In my opinion, if the guard was allowed to remain off, and if the machine was put in motion without the guard, the machinery might be said to be in a defective condition, and if by reason of such defective condition a workman sustained injuries, the owners might be liable. But in order the render the owners liable it is necessary that the defective condition should have been brought about by the negligence either of the owners themselves or of someone entrusted by them with the duty of seeing that the machinery was in proper condition. There is evidence that Cook was a person entrusted with the duty of seeing that the guard was in its proper place, and that he knew it was not in its proper place. Therefore the question whether the defendants are liable under sub-section 1 ought to be left to a jury. I think there is also evidence on which the defendants might be held liable under sub-section 3, and this question, too, ought to go to the jury.

The case must therefore go back to be tried again.

CHITTY, L.J., concurred.

Order for new trial.

Solicitors for the plaintiff, *Lindus & Bicknell.*

Solicitors for the defendants, *Watson, Son, & Room.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Jan. 22, 30.

In re NATIONAL BANK OF WALES. (*a.*)

Company—Voluntary winding up—Transfer of shares after commencement of winding up with consent of liquidator—Alteration of status—*Contributories—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 131, 153.

After the commencement of the voluntary winding up of a limited company T., the holder of certain shares not fully paid up, transferred them, with the consent of the liquidator, to P., whose name was substituted for that of T. on the register of members, and P. afterwards, with the like consent, transferred them to R., whose name was substituted for his on the register. It subsequently became necessary to make calls in respect of the shares.

Held, that R. was the proper person to be upon the register of members; that he alone should be upon the A list of contributories; and that T. and P. ought both to be on the B list.

Appeal from a decision of Vaughan Williams, J., reported [1896] 2 Ch. 851.

The National Bank of Wales was registered under the Companies Act, 1862, with limited liability. Its shares were not paid up in full.

By a confirmatory resolution dated the 12th of June, 1893, it was resolved to wind it up voluntarily with a view to its amalgamation with another bank.

At that date Taylor held thirty £20 shares in the bank.

On the 29th of November, 1893, he transferred them to Phillips with the assent of the liquidator, who registered the transfers, cancelled Taylor's certificate, issued a fresh certificate to Phillips and thereupon placed Phillips's name upon the register of shareholders in place of Taylor's.

On the 24th of May, 1894, Phillips transferred the shares to Rickards with the assent of the liquidator, who observed the same formalities as on the occasion of the former transfer, placing Rickards' name upon the register in place of Phillips's.

Eventually it became necessary to make calls in respect of the shares, and the liquidator put Taylor, Phillips, and Rickards all upon the A list of contributories.

These gentlemen thereupon applied to the court to have their names removed from the list. The case was a test case, each of the gentlemen named being representative of a class of persons having a like interest with himself in shares of the company.

Vaughan Williams, J., being of opinion that the liquidator had power to assent to a transfer of shares and to alter the register of members, but not to release from liability a transferor liable as a contributory at the commencement of the winding up, held that Rickards should be left on the register of members, but that Taylor alone should be on the A list of contributories, though Phillips and Rickards would be liable to indemnify their respective transferors, and should therefore be on the B list.

Against this decision Taylor appealed.

Levett, Q.C., and *Macnaghten*, for Taylor.—Taylor is no doubt a "member" of the company within the definition in section 23 of the Companies Act, 1862. He is not, however, a "present" but a "past"

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

member within section 38, and therefore he ought not to be on the A list of contributories, though he may be on the B list. Though he transferred his shares after the commencement of the winding up, he did so with the consent of the liquidator. On the true construction of section 131 such a transfer has all the effect of an ordinary transfer, and is valid, even so far as it may involve an alteration of *status*. That section is analogous to section 153, which deals with the case of a winding up under the supervision of the court, and provides that every transfer of shares made between the commencement of the winding up, and the order for winding up shall, unless the court otherwise orders, be void. The latter section does not invalidate a contract to transfer shares made in the interval, or a transfer made after the winding-up order: *Rudge* v. *Bowman*, L. R. 3 Q. B. 689; *Cleve* v. *Financial Corporation (Limited)*, 21 W. R. 839, L. R. 16 Eq. 363, 380. It is implied in the decision in *In re Onward Building Society*, 40 W. R. 26, [1891] 2 Q. B. 463, that in a compulsory winding up the court has power to sanction transfers, and in a voluntary winding up it must be presumed that the liquidator has a similar power. The expressions "present member" and "past member" in section 38 do not refer to the commencement of the winding up, but to the time when the list of contributories is settled. The section does not mean that the character of the membership is to be irrevocably fixed at the former period of time, and the contention that it does is not borne out by *Webb* v. *Whiffen*, L. R. 5 H. L. 711, and *In re Hull and County Bank, Burgesses' case*, 28 W. R. 792, 15 Ch. D. 507, 512, which were relied upon in the court below. A member who has validly transferred his shares cannot be put upon the list of contributories: *In re Joint-Stock Discount Co. (Limited), Fyfe's case*, 17 W. R. 978, L. R. 4 Ch. App. 768.

Buckley, Q.C., and *Ingpen*, for the liquidator.—Taylor, Phillips, and Rickards should all be upon the A list. Taylor was liable to be put upon that list at the commencement of the winding up, and he still remains under the same liability. The alteration in *status* which is rendered void by section 131, is any alteration in liability to contribute: *In re Oriental Commercial Bank, Barge's case*, L. R. 5 Eq. 420, 16 W. R. Ch. Dig. 66; *In re Continental Bank Corporation, Castello's case*, L. R. 8 Eq. 504. A shareholder by transferring his shares after the commencement of the winding up does not escape from his liability to contribute: *In re Imperial Land Co. of Marseilles, Vining's case*, 19 W. R. 173, L. R. 6 Ch. App. 96. It is implied in section 38 that the commencement of the winding up is the time when it is to be determined who are present and past members. It is only by applying to the court under section 138 that the liquidator has power to discharge a transferor's liability. Rickards was on the register of members at the time when the list of contributories was settled. By taking a transfer of the shares during the winding up he incurred a new liability different from that of Taylor. He stepped into Taylor's shoes and covenanted to pay the amount due upon the shares. Apart from the Act altogether, the company might sue him on his contract. He is liable under section 16, even if he is not liable under section 38. Phillips, by allowing his name to be put upon the register, covenanted to pay the calls. Under section 75 he became liable for a present debt payable at a future time. Several successive holders of the same shares may be liable as past members: *Kellock* v. *Enthoven*, 22 W. R. 322, L. R. 9 Q. B. 241, 247. If only one of these persons can be put upon the A list, Taylor should be put upon it.

Bramwell Davis, Q.C., and *Muir Mackenzie*, for Phillips.—Phillips is not a present member, and therefore should not be put upon the A list. Section 22 authorises a member to transfer his shares. A transfer is valid as between the parties thereto: *In re Blakeley Ordnance Co., Lumsden's case*, 17 W. R. 65, L. R. 4 Ch. App. 31; *Biederman* v. *Stone*, 15 W. R. 811, L. R. 2 C. P. 504; and the liquidator's consent makes it valid against the company and entitles the transferee to be substituted for the transferor on the register of members: see *In re Onward Building Society*. Section 131 does not invalidate an alteration of *status* so far as that is involved in a transfer with the sanction of the liquidator. Neither is Phillips a past member. On the true construction of section 38 those only are "past" members who were members prior to the commencement of the winding up: *In re Hull and County Bank, Burgesses' case*. The cases relied upon on behalf of the liquidator do not support his contention.

Farwell, Q.C., and *Ingle Joyce*, for Rickards.—To be liable as a contributory under section 38 a person must be either a present or past member of the company. To be a member, he must be properly on the register. Rickards ought not to have been put upon the register. The liquidator has power to consent to a transfer of shares, but he has no power to rectify the register corresponding to that given to the court by section 98: Lindley on Companies, 5th ed., p. 748. There can be no alteration of *status* except by rectification of the register. In a compulsory winding up, even after the date of the order, the register cannot be rectified by the insertion of a transferee's name without the sanction of the court: *In re Onward Building Society*. Three successive holders of shares cannot all be liable in respect of the shares at one time.

Sheldon, for the Metropolitan Bank of England and Wales.

Levett, Q.C., replied.

LINDLEY, L.J.—The question raised on this appeal is—Who ought to be put on the list of contributories of a company being wound up voluntarily, when after the commencement of the winding up shares have been transferred with the consent of the liquidator? Is the person to be on the A list the transferor or the transferee; or, are both to be on that list; or, is the transferee to be on the A list and is the transferror to be on the B list? This is the general question, and it turns on the true construction of section 131 of the Companies Act, 1862, a section which applies to all companies which are being wound up voluntarily, whether they are registered with limited or unlimited liability, and whether the shares are fully paid up or not.

The National Bank of Wales was formed and registered under the Companies Act, 1862, with limited liability. Its shares were not paid up in full. Resolutions were passed to wind it up voluntarily with a view to transferring its business to another limited company. At the commencement of the winding up Mr. Taylor was the registered holder of thirty shares. On the 29th of November, 1893, he transferred them to Phillips with the assent of the liquidator. This transfer was duly registered by the liquidator. Taylor's name was removed from the register, and Phillips's name was put on it. Taylor's certificate was cancelled, and a new certificate was issued to Phillips. All this was done by the liquidator. On the 24th of May, 1894, Phillips transferred these shares to Rickards with the assent of the liquidator, and the same formalities were gone through by the

liquidator as on the former occasion. These transfers were sanctioned as part of a scheme of arrangement approved by the liquidator, and the propriety of which is not in question. If, therefore, the liquidator had powers to assent to these transfers and to give effect to them in the usual way by registering the transferee as a member in the place of his transferror, it will follow that both Taylor and Phillips have ceased to be members and Rickards has become a member in their place. The consequence of this on the same supposition would be that Rickards would be liable to be placed on the list of contributories as the member liable to future calls if any should be made in the winding up, and that Phillips and Taylor would only be liable to be put on the list as persons who had been, but had ceased to be, members. If, on the other hand, the liquidator had no power to assent to the transfer and to give effect to it by substituting the transferee for the transferor as a member, it would follow that Taylor ought to be still on the register and to be on the list of contributories accordingly, as a continuing or present member.

Vaughan Williams, J., has come to the conclusion that the liquidator had power to assent to the transfers and to alter the register of members, but that he had no power to release Taylor from the liability which he was under at the commencement of the winding up. The learned judge, therefore, has left the register as the liquidator altered it—*i.e.*, has left Rickards on it as the existing member, but has put Taylor alone on the list of contributories. I confess I cannot think that this is right. The commencement of the winding up of a company is a very important date, whether the company is being wound up by the court, or voluntarily, or subject to supervison. Subject to what the statute allows to be done after that time, nothing can be done after that date to prejudice the creditors or to alter the rights or liabilities of the then members. Moreover, persons who have ceased to be shareholders for one year or more before that date are under no liability to contribute to the debts or liabilities of the company. (See section 38, clause 1.) But certain things are allowed to be done after that date, and amongst other things allowed are transfers of shares in companies being wound up voluntarily, if such transfers are made to or with the sanction of the liquidators of such companies. (See section 131.) But what is meant by a transfer of a share? The word "share" does not denote rights only, it denotes obligations also; and when a member transfers his share he transfers all the rights and obligations as a shareholder as from the date of the transfer. He does not transfer rights to dividends or bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls. Again, the power given to liquidators by section 131 to sanction a transfer of shares is not a power to sanction a transfer of benefits only, but to sanction a transfer of all those rights and obligations which together constitute what is called a share. This appears to me to be so plain that I cannot suppose anyone could doubt it if it were not for the words in section 131 "or alteration in the *status* of the members of the company." I cannot construe these words as nullifying the power of the liquidator to take or sanction a transfer of shares and to register such transfer in the ordinary way. Some alteration in the *status* of a member other than that occasioned by a transfer sanctioned by the liquidator must here be referred to. The words in question are far from meaningless. They apply to transfers made before the commencement of the winding up and without the sanction of the liquidators, but not then registered. The words also apply to and prevent alterations in liability and *status* by agreements not involving transfers—*e.g.*, such an arrangement as was made in *Barge's case*, L. R. 5 Eq. 420, 16 W. R. Ch. Dig. 66. Also alterations in the *status* or liability of members under a company's articles of association providing for forfeiture or cessation of membership and liability in the event of winding up. Other cases, which do not at present occur to me, might possibly arise in practice. The words are evidently put in to hit transactions not authorized by the words which precede them.

It is said that section 38 presents a difficulty in putting on the list of contributories, either as a present or a past member, any person who was not either a present or a past member at the commencement of the winding up. It is said that neither Phillips nor Rickards can be put on the list, they not being at that time either present or past members; and that Taylor, who was then a present member, must be put on the list as such. I admit that this view would be correct if there were no provisions in the Act permitting transfers after the commencement of the winding up. I have no doubt that the expression "all present and past members" has reference to the commencement of the winding up. But the expression is not confined to them. There is no definition or language in section 38 so rigid as to prevent transfers authorized by section 131 or section 153 from operating so as to render the transferees liable as present members and the transferors liable as past members. The court has frequently put on the list of contributories as present members persons who have agreed to buy shares before the commencement of the winding up, but who, not having been registered at that time, were not then present members of the company. *Fyfe's case*, 17 W. R. 978, L. R. 4 Ch. App. 768, is one of many instances in which this has been done. In all these cases the transferors who were present members at the commencement of the winding up have been struck off the list of contributories as present members, but no one ever doubted their liability to be put on it as past members. These cases show that section 38 presents no difficulty in giving effect to whatever transfers or alterations of *status* are permitted by other sections of the Companies Act, 1862. No doubt clause 1 of section 38 can have no application to members who transfer their shares after the commencement of the winding up with the consent of the liquidator, or the court, as the case may be. Such transferors do not escape liability altogether; but there is nothing to prevent them from being treated like all other transferors who are not discharged from liability altogether, nothing to prevent them from being put on what is called the B list. So as regards the transferee, although he is not a present member at the commencement of the winding up, there is nothing in section 38, when taken in conjunction with sections 131 and 153, which prevents him from incurring the liabilities of present members and from being put on the A list of contributories.

Then it is said that the section 133, clause 8, and sections 98 and 35, relating to the settlement of the list of contributories and rectification of the register, prevent the liquidator from rectifying the register and from giving full effect to any transfer which he may have sanctioned. But altering the register so as to make it conformable with a lawful transfer is not to rectify the register under section 35. That section only comes into operation when the company improperly puts on the register a name which ought not to be on it, or improperly refuses to put on the register a name which ought to be on it. To alter the

There is the place where we would expect a line to be drawn, beyond which no change should take place in the liability of the members. The section, however, seems to show that it was not the intention of the Legislature to draw a line. When we come to sub-section (1) we find the commencement of the winding up expressly referred to, but only for the purpose of showing that no past member shall be liable to contribute if he has ceased to be a member for a year before that point of time. I do not find in section 38 any prohibition of dealings which tends to give a restricted construction to section 131. The liquidator having authorized a transfer from Taylor to Phillips, and from Phillips to Rickards, when you are dealing with the question who is to be on the list of contributories, you must consider who are present and who are past members. In my opinion Rickards is the present member and Taylor and Phillips are past members. I therefore think that the former should be upon the A list of contributories, and the two latter upon the B list.

Appeal allowed.

Solicitors for the appellant, *Bower, Cotton, & Bower*, for *T. H. Stephens*, Cardiff.

Solicitors for the respondents, *Riddell, Vaizey, & Smith*, for *Vachell & Co.*, Cardiff; *Few & Co.*, for *Bythway & Son*, Pontypool; *Richard White*, for *Frank Lewis*, Newport, Mon.; *Burton, Yeates, & Hart*, for *Johnson, Barclay, Johnson, & Rogers*, Birmingham.

High Court of Justice.

Chan. Div. Kekewich, J. } Feb. 24, 25.

In re THE MAGNOLIA METAL CO.'S TRADE-MARKS. (*a*.)

Trade-mark—Geographical word—Word bearing a geographical as well as another signification — Word which has become descriptive of a particular article—Assignment of trade-mark where there is no goodwill—Patents, Designs, and Trade-Marks Act, 1888 (51 & 52 *Vict. c.* 50), *s.* 10—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 70.

A word which in its primary signification is not a geographical name may be registered as a trade-mark under section 10 *of the Patents, Designs, and Trade-Marks Act of* 1888 (*which takes the place of section* 64 *of the Act of* 1883), *notwithstanding that it has also acquired a secondary signification in which it may be regarded as being a geographical name.*

Thus the word "Magnolia" was held not to be incapable of registration by reason of its being used as the name of numerous towns and villages in the United States, seeing that in its primary signification it was not geographical, but had reference to the tree of that name.

A word which has been so used as to become the descriptive name of a particular article of manufacture has "reference to the character of the goods," and cannot be registered as a trade-mark.

Thus the word "Magnolia," which was the only name for a particular metallic alloy, was held disqualified for registration.

By section 70 *of the Patents, Designs, and Trade-Marks Act of* 1883 *a trade-mark can be assigned "only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill."*

Where, therefore, a trade-mark was registered in Class 6 *in respect of "Anti-friction metal bearings," but the registered proprietors carried on business only in anti-friction metal intended for use in bearings, but not in bearings themselves,*

Held, that the trade-mark above mentioned did not pass on an assignment by the registered proprietors of their goodwill and trade-marks, seeing that they had no goodwill in bearings to assign; and that the mark ought to be removed from the register.

Motion with witnesses.

In February, 1889, an American company trading under the name of "The Magnolia Anti-Friction Metal Co.," describing themselves as "manufacturers of anti-friction metal," and giving a London address, applied for and they shortly after obtained registration of a trade-mark (No. 86,401) for certain goods in class 6, namely, "anti-friction metal bearings, being parts of machinery being other than horticultural or agricultural machinery." The trade-mark consisted of a representation of a magnolia flower with two leaves.

In June, 1889, the same company, describing themselves as above, but giving as a first address 74, Cortlandt-street, New York, U.S., applied for and subsequently they obtained registration of a second trade-mark (No. 90,573) for the same goods in class 6 as before, the trade-mark consisting of the same representation of a magnolia flower with leaves as before, but with the addition of the words "Magnolia Anti-Friction Metal," stating in their application, "The essential particulars of the trade-mark are the device and 'Magnolia,'" and disclaiming any right to the use of the added words.

In June, 1894, the same company, describing themselves as "manufacturers" simply, and giving their New York address only, applied for and subsequently they obtained registration of a third trade-mark (No. 180,551) for certain good in class 5, namely, "Unwrought and partly wrought metals used in manufacture." This trade-mark consisted of the word "Magnolia" alone.

None of these three trade-marks was claimed as an "old mark" as having been in use before the 13th of August, 1875.

In 1889 a partnership firm was constituted in England under the style of "The Magnolia Anti-Friction Metal Co. of Great Britain," and this firm entered into a contract with the American company, undertaking to purchase from them a certain fixed amount of "Magnolia Metal" per annum as therein stated, and in consideration thereof the American company undertook (*inter alia*) not to sell either directly or indirectly "Magnolia metal" to any person or firm in Great Britain.

The English firm continued to have the exclusive sale of "Magnolia metal" in the United Kingdom down to 1896, but from time to time their contracts with the American company were varied as to price and quality, only the exclusive use being always reserved to the English company.

In 1894 the persons controlling the American company formed a new American company called the "Magnolia Metal Co.", and the new company claimed to have acquired by purchase from the old company the goodwill of its business and rights, including its trade-marks (which, with the goodwill, were assigned to the new company on the 19th of October, 1896), and took its place as manufacturers and vendors of Magnolia metal; and by a contract made between the English firm and the "Magnolia Metal Co." in that year provision was made for the taking by the English

(*a*.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

firm of 3,000,000 lbs. of Magnolia metal as therein provided, after which the English firm were to own absolutely all the rights of the American company in the territories (including the United Kingdom) comprised in the contract, and to have the right to manufacture the metal on their own account.

In September, 1895, disputes arose between the English firm and the American company, and the former alleging that they could not obtain a sufficient supply of Magnolia metal from the American company, claimed to have the right to manufacture and sell it themselves, which they accordingly did; and after the Atlas Metal Co. (Limited) was formed in June, 1896 (after the dissolution of the English partnership firm), they did the same thing, the process of manufacture being well known to them.

On the 26th of June, 1896, the Magnolia Metal Co. issued a writ against the Atlas Metal Co. (Limited), against the members of the English firm, and other persons, and obtained an *interim* injunction against the Atlas Metal Co. (Limited) from using the plaintiffs' trade-mark, trade designs, or any mark or device or design in any way resembling those of the plaintiffs.

On the trial of the action, on the 6th of November, 1896, Collins, J., refused to grant an injunction founded on infringement of the trade-marks, but granted an injunction restraining the Atlas Co. and all the other defendants except one, from selling Magnolia metal without clearly distinguishing it from the metal sold by the plaintiffs.

Prior to the formation of the English firm, the original American company had, by agreement, appointed a Mr. Stanley, a metal merchant at Cardiff (and subsequently his firm of Toywill & Son), their sole agents or importers. Stanley had the management under this agreement, and was supplied by the American company with metal and with gratis samples of bearings to show to intending purchasers. He did not sell any of the bearings supplied to him by the American company, but had a few made by manufacturers at Cardiff by his instructions, and these he, on his own behalf, sold to customers. The metal he received from the company (with the exception of the gratis samples), and which amounted to between one and two tons, he bought absolutely from and paid for to the American company, and then resold on his own account, without accounting, or being held liable to account, in any way to the American company. The agreement was subsequently terminated, and Stanley, on the formation of the English firm, entered its service.

At the date when the trade-marks were registered, "Magnolia" had become the name by which the metal alloy was widely and exclusively known. The composition was originally a secret one, but in 1889 was disclosed by a patent being taken out; and it appeared that it consisted of an alloy of lead, tin, antimony, bismuth, and graphite. The validity of this patent had been put in question by an alleged infringer, and it was not set up in this case.

At the date of the registration it appeared that there were about twenty places in the United States of America bearing the name of "Magnolia," being so called, no doubt, after the magnolia tree, which is very abundant in that country.

Section 10 of the Patents, Designs, and Trade-Marks Act of 1888 (which takes the place of section 64 of the Act of 1883) provides, by sub-section (1) (*e*), which was the sub-section applicable to this case, that (1) "a trade-mark must consist of or contain at least one of the following essential particulars:" (*e*) "a word or words having no reference to the character or quality of the goods, and not being a geographical name."

Section 70 of the Act of 1883 says: "A trade-mark, when registered, shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be terminable with that goodwill."

This was a motion on behalf of the Atlas Metal Co. (Limited), asking that the register should be rectified by striking out the three trade-marks.

Bousfield, Q.C., and *Wilkinson*, for the respondents, raised the preliminary objection that the applicants were not "persons aggrieved" within the statute, but Kekewich, J., overruled the objection.

Warrington, Q.C., and *Sebastian*, for the applicants.—There are three trade-marks we seek to remove: (1) No. 86,401, registered the 7th of February, 1889, consists of a representation of a magnolia flower, and was registered in class 6 for bearings; (2) No. 90,573, registered the 5th of June, 1889, a magnolia flower with the word "Magnolia" (claimed) and added words (disclaimed) in the same class and for the same goods; (3) No. 180,551, registered in 1894 the word "Magnolia" alone, registered in class 5 for wrought or unwrought metals. As to 1 and 2, we say the American company had no business in bearings in the United Kingdom; that the metal in the bearings was a mere film and not a part of the machinery; and that the trade-marks were acquired by the present American company without any "goodwill." We further say with reference to 2 and 3 that the flower is a mere pictorial representation of the word "Magnolia," which cannot be a good trade-mark, because it is the descriptive name of the metal sold; moreover, it is a geographical name within section 10 of the Act of 1888. Taking the word "Magnolia" first. It is geographical: *In re Apollinaris Co.'s Trade-Mark*, [1891] 2 Ch. 186, at pp. 202, 221, 39 W. R. Dig. 237; *In re Van Duzer*, 34 W. R. 730, 35 *Ib.* 294, 34 Ch. D. 623; *In re Sir Titus Salt, Son, & Co.'s Trade-Mark* (the "*Eboline*" *case*), 42 W. R. 666, [1894] 3 Ch. 166. The word "Magnolia" is expressly claimed in 2, and is therefore an essential part of that mark.

Bousfield, Q.C., Wilkinson, and *Newton Crane*.—The primary meaning of "Magnolia" is not geographical: ("*Trilby*" *case*) *Holt* v. *Saunders*, 44 W. R. 369, [1896] 1 Ch. 711. "Trilby" is geographical.

Warrington replied.

KEKEWICH, J.—This is a question of novelty. Notwithstanding the many decisions on the Act, and this particular section of the Act, and in view of the novelty, and the other decisions which do not directly touch it, it is necessarily of some importance, and, to my mind, it is one of considerable difficulty. The respondents have registered—one in class 5 and one in class 6—two trade-marks; I entirely set aside the trade-mark which is first mentioned as not now being under consideration, though I will refer to it directly.

The first registered trade-mark consists of the word "Magnolia," with a device representing the flower of that name in bloom. The second consists of the word "Magnolia" alone. In the first the word "Magnolia" is described as one of the essential parts of the trade-mark. In the second, as I have already mentioned, "Magnolia" itself is the trade-mark, and there is nothing else. It follows that if "Magnolia" is bad both the trade-marks go, one because it consists wholly of "Magnolia," the other because it depends on "Magnolia" as an essential part. The question is whether "Magnolia" can be sustained. It is entirely a question of the meaning of the Act of Parliament construed with reference to decided cases. The Act of Parliament excludes from words that may be properly registered those of a geographical character, but the exact words of the Act which is before

my mind, sub-section (1) (*e*) of section 10 of the Act of 1888 (which takes the place of section 64 of the Act of 1883), are these: "The essential particulars (which are described under (*a*) (*b*) (*c*) (*d*) and (*e*)) must be a word having no reference to the character or quality of the goods, and not being a geographical name." Now in one sense, the literal sense, "Magnolia" is a geographical name, and, therefore, if that is the proper sense of the statute, there is an end of the respondent's case, and the applicants are entitled to have the trade-mark expunged. I have been referred to one definition, and one only, of the meaning of this clause in sub-section (*e*) of the Act. I think others might probably be found, but what Chitty, L.J., said in the *Eboline case* is sufficient for all purposes: "The object of the Legislature was to prevent a trader from acquiring a monopoly in the name of a place, and from thereby suggesting that the goods had a local origin or a local connection, which, in fact, they might not have." We need not press the matter further, and consider why that seemed important to the Legislature.

What Mr. Warrington says or suggests was the reason is this, that if any trader in a particular place desire to name his goods by reference to his place of residence, or where he carries on his manufacture or business, he would be precluded from doing so, if there was a trade-mark containing the name of that place registered against him, and that that would not, of course, be right. It would no doubt be wrong, I mean in moral justice, that a man living in a small town or village, and having put forward some new article of trade, should not be entitled to connect it with his residence or place of business. That may not impossibly, by any means, be the object of the Legislature. But it is sufficient for my purpose that the Lord Justice's words say what the object of the words of the Act was. Then Mr. Bousfield says that that cannot apply very well to a case like this, where in 1889 some fifteen Magnolias were in existence in the United States, and there are more now, and it cannot be applied to prevent persons living in forty-four different towns—fifteen will do as well for this argument; and I think it convenient first to say that I must try the question as at the date of the registration, and that the subsequent growth or creation or incorporation of towns cannot have any bearing on the subject. If it was a geographical name at the date of the registration, it fails on that ground. If it was not a geographical name at the date of the registration, it seems to me that no one can have a right to have it expunged because some town or place has grown up and been called by that name since the registration.

Those being the words of the Act, and that being the object, am I bound to say that the Legislature meant that whenever a name proposed to be put on the register, or being actually there and sought to be expunged, has a geographical meaning, therefore it must not go on the register, or, being there, it must be taken off, even though its primary meaning may be something quite different, and it may have two or three other meanings, perhaps all of them better known than the geographical meaning? That is, the real question in this case is the question which was illustrated by some remarks made by myself in the the *Apollinaris Co.'s case*, and which have been cited on p. 204 of [1891] 2 Ch. There, taking up, I suppose, what was said in argument, I instanced or illustrated what I had to say by reference to "Monkey" as connected with soap, and to "St. Paul" as connected with some other goods, I am not sure what. No ordinary person would jump at the conclusion, when he found that soap was called "Monkey," that it had any connection with the one or two by no means large places, or well known to the public, which are called by the name of Monkey. He would naturally consider that it was connected with the inferior animal of that name. Again, as regards St. Paul, no one would suppose, if he came across St. Paul, that any reference was meant other than one to the apostle known by that name. Nevertheless, it may be (and it appears that it is so), that both are geographical names. Of course, if the point had been decided in that case, I should not have been discussing it now, but the point was not decided.

It seems to me that on these lines I have good ground for consideration whether "Magnolia" here is a geographical name in the sense of its being the primary meaning of the word, or that which would occur to the man of ordinary education and intelligence, I mean the Englishman of that character. I am not for a moment putting out of sight that "geographical" extends to the whole of the world, and that if there is a geographical name derived from any part of the globe it will offend against the words of the Act; but still, the persons who are to decide, whether it be a judge or a jury, if there is any question for decision at all, must be Englishmen of ordinary education and intelligence. If there is no question to decide it is because all that you have got to do is to establish, as has been established here, that there are several places known as Magnolia in the United States, and that therefore it is in one sense a geographical name, and there is an end of the whole discussion. If there is any question at all, then I think it has to be submitted to the Englishman of ordinary education and intelligence, and he has to decide whether that is—I will not say even the primary meaning of the word, but—the meaning which would occur to the large majority of people, as that which it would be regarded in ordinary society as bearing. Without going into the evidence I venture to say that a very small proportion of persons of the character I have mentioned would recognize in the word "Magnolia" any reference to any town or place in the United States or elsewhere. On the other hand, though not so common as many other flowers, the magnolia is thoroughly well known to all persons of the character I have mentioned, and if "Magnolia" were mentioned in any ordinary society consisting of persons of fair education, it would be understood at once to refer to the flower. That seems to me to be, I will not say the primary meaning, because primary or secondary are rather out of the question, but the meaning which the word would bear ordinarily to ordinary people. Is there any reason why I should not construe the Act in that way? I admit, and I do not hesitate to say it, I am perplexed by the extreme terseness and literal use of the words "geographical name," but, on the other hand, I do not think I am bound to decide that it was meant by the Legislature that every word that was capable of being treated as a geographical name, but was also capable of being used, and was ordinarily used, among ordinary people as meaning something else, was intended to be referred to as a geographical name. Mr. Bousfield has given me many instances in addition to those which I have noticed above—"Monkey" and "St. Paul." I take for instance "Magnet." I suppose there are few things of which every little boy or girl at school know more than a magnet. It is a thing to which one is introduced in his early youth; and to be told that when a magnet is mentioned it means not that extremely useful article, which may be also made an extremely amusing toy, and useful in that way, but some place, somewhere in America or elsewhere, that we have never heard of, is, I think, rather running

the language of the Act of Parliament into an absurdity. I have tried to dismiss from my mind, I hope successfully, but I am by no means sure, one consideration which I mention to show that I have not forgotten it. The first mark registered by the respondents was the magnolia flower, without the word "Magnolia." Then came "Magnolia" and the flower, and then the word "Magnolia" and no flower. I know as a matter of fact in this case that the origin of the series of trade-marks was the magnolia flower. Now, I do not think that has anything to do with it. I think I ought to dismiss it from my mind. I am not sure my mind is capable of the process, but I will endeavour to perform it, and decide it simply on the grounds which I have mentioned. I think it would be going too far, notwithstanding many cases, including the *Eboline case*, to say that "Magnolia" must be expunged because it is a geographical name. I think, though it is a geographical name—I feel that difficulty—for this purpose it is not a geographical name, but the name of a flower.

Warrington, Q.C., and *Sebastian*.—Our next point is that the word "Magnolia" has reference to the character and quality of the goods, and therefore cannot be a good trade-mark: *Linoleum Manufacturing Co.* v. *Nairn* (*Linoleum case*), 26 W. R. 463, 7 Ch. D. 834; *Waterman* v. *Ayres*, 37 W. R. 110, 39 Ch. D. 29 (Reversi); *Leonard* v. *Ellis*, 32 W. R. 530, 26 Ch. D. 288 (Valvoline); *In re Harrison, M'Gregor, & Co.*, 42 Ch. D. 691, 38 W. R. Dig. 198 (Albion); *In re Arbenz*, 35 W. R. 527, 35 Ch. D. 248 "Gem" Guns).

Bousfield, Q.C., *Wilkinson*, and *Newton Crane*, for the respondent. — We are entitled to protection: *Powell* v. *Birmingham Vinegar Brewery Co.*, 44 W. R. 688, [1896] 2 Ch. 54 (Yorkshire Relish).

Warrington, Q.C., in reply, cited *In re Farbenfabriken's Trade-Mark*, 42 W. R. 488, [1894] 1 Ch. 645 (Somatose); *In re Trade-Mark "Bovril," ante*, 150 (Bovril).—On the evidence it is quite clear that "Magnolia" meant a particular alloy of metal, and that alloy has been disclosed by a patent, which is bad, and so anyone can make "Magnolia."

KEKEWICH, J.—The objection now urged depends entirely upon seven words of the same sub-section of the same section of the Act of 1888. The essential particulars must be, according to sub-section (*e*), "a word or words having no reference to the character of the goods." The exact words of the section are "to the character or quality of the goods," but I have intentionally left out "or quality." I think they are strictly an alternative proposition, and have no connection with character. They are not meant as in any way synonymous, pointing to the same thing, and I am not sure that during the argument my mind has not been wanting in precision by reason of thinking of the two things together. I think they are essentially different. The character and the quality of the goods are necessarily, as it seems to me, when one comes to consider, entirely different in language, and also in substance and practice. I dismiss quality—one might easily illustrate it—and deal only with the character of the goods.

In this case the respondent has, I will not say invented, because that is a word very difficult of construction, but has discovered a new metal to which he has affixed the title or name "Magnolia." He has, as he is entitled to, taken out letters patent to protect, for a limited period, the goods manufactured by him, and he is bound to have set out in the specification a sufficiently full description of the method of manufacture so that any competent workman can produce it when the time for protection expires. That, of course, entitles him to prevent any person during that period, as long as the patent is held good, from manufacturing goods or selling goods of that character, but subject to those letters patent the right of all her Majesty's subjects to make those goods still exists. It is only suspended for a limited period during the currency of the letters patent, and during that time the specification and the process of manufacture may be studied, and at the end of that time the goods may be produced. It is therefore, it seems to me, important that the patentee shall not, by virtue of his patent, be able to lay hold upon any particular class of goods, and be able to say at the expiration of the patent, "That which I have made under the patent until now, henceforth I will protect under a registered trade-mark, or in some other way." It is reasonable to suppose that the Legislature has intended that the liberty of the public shall be preserved in that manner, and that the patent shall only operate during the currency of the patent. There is no reason why a man should not call—at least so I have held—any goods which he has produced "Magnolia," and there is no reason why he should not call a white metal which he produces "Magnolia," but it seems to me that, regarding it from general law, and remembering that the Legislature must be taken to have meant that the general law shall only be interrupted so far as is necessary for the purpose of particular legislation, and so far as the particular purpose is expressed, it seems to me reasonable to conclude that what a man can protect by means of a trade-mark must be something which the public can produce either now, or, if it is in the meantime protected by letters patent, at the expiration of those letters patent. If the respondent's arguments be sound, that position is supported in the present case, because what the respondent makes is a metal to which he has given and which he says has assumed and has gained the title or name of "Magnolia," and he has registered it as "Magnolia." The result is that it is known as magnolia, and nothing else; that any magnolia which is produced is the respondent's magnolia; that anyone who professes to manufacture and sell magnolia will, quite apart from the letters patent, simply under the trade-mark, be acting wrongfully, and be liable to an injunction and other remedies, because he has made that which the respondent has appropriated to himself, that is, magnolia. There are not several kinds of magnolia. Magnolia is not one of a class of white metals. It is what it is described as; it is a white metal named magnolia. There may be, and apparently there are, many other white metals; there are apparently many other anti-friction white metals, but this is a new production to which the name of magnolia is given. The result is that either, if not now, at anyrate by-and-bye, if this white metal can be described only as magnolia, it will probably be so described, unless other persons manufacture it, if nothing happens by reason of what we are told in this affidavit of Mr. Mellor's. It will be described so during the continuance of the letters patent, and it will be continued to be so described after the letters patent have expired, with the result that the respondent will have appropriated to himself the name "Magnolia," not as describing one of the descriptions of anti-friction white metal, but the particular white metal which he produces, and which he has discovered. It seems to me that it cannot have been the intention of the Legislature that that should happen, and I think it comes within the exact words. The character of those goods is described by the name "Magnolia." Whether it is a full and sufficient description in the letters patent or not is not for this purpose material. If it is, then you have the whole description, and it is called magnolia. If you

have not, still it is what the respondent makes and calls magnolia. Whichever way it is, what he is protecting is of the character magnolia. It seems to me, therefore, that the respondent unfortunately selected a word which does not fall within the limited terms of the Act of Parliament, and on that ground these two trade-marks must come off. That leaves the flower.

Warrington, Q.C., and *Sebastian.*—As to the first trade-mark, our first objection is that the magnolia flower is only the equivalent of the word "Magnolia," and as the word "Magnolia" has been found improper for registration as a trade-mark, the trade-mark consisting of a flower must be bad also. We further say that it is registered only in class 6 for bearings by the Magnolia Anti-friction Metal Co. That company had no goodwill in England at all. Certainly none in bearings. Persons here bought in America metal from the American company, but that was all in ingots and was paid for. Subsequently the American company assigned to the present registered proprietors, but the American company had no goodwill in the class, so nothing passed. The facts show that there is no question of agency for the American company, but only an exclusive contract. The object of a trade-mark is to protect a man's trade, here there was no trade or goodwill in the matter of bearings.

Bousfield, Q.C., Wilkinson, and *Newton Crane.*—The sole use of this metal is for anti-friction bearings, either alone or in combination with a hard metal. The New York company wished to establish a business in this country, and appointed "agents" for the purpose of pushing the business, and these agents were to be paid for it—it does not matter in what way, and the fact that in this case it was by grant of right of exclusive use of metal instead of commission is immaterial. We established a goodwill at the expense of giving Stanley exclusive right to sell the metal. Then comes the partnership which paid Stanley £300 in lieu of his sole right to trade in the metal hereafter. Consequently they stand in his shoes. Suppose the partnership came to an end the goodwill would revert to us, even if for years we sold not an ingot, and we could sell it along with our trade-marks.

KEKEWICH, J.—The only trade-mark remaining to be dealt with is No. 86,401, registered on the 9th of February, 1889. It is in the form of a flower. The first objection taken to it is that that flower is merely the representation of a magnolia; that it must be taken to be equivalent to the word "Magnolia"; and that as "Magnolia" itself has been held to be an insufficient and improper trade-mark, therefore the flower which is its equivalent is also improper.

I cannot follow that argument. Here I have a device or a design, and not a word. It may very well be that this is intended, as we know it is, to be a magnolia, and that any persons of ordinary acquaintance with flowers would recognize it as a magnolia. But there seems to me to be all the difference in the world between a device, however equivalent it may be to a word, and a word itself. Without going further into it I overrule that objection.

The other objection is of an entirely different character. This trade-mark was registered in the first instance, and, I assume, properly registered, by the Magnolia Anti-Friction Metal Co. It has been assigned by that company to the Magnolia Metal Co., which company is now defending this trade-mark. The objection is that there can have been no proper assignment of that trade-mark to the Magnolia Metal Co., because the assignor had not, at the date of the assignment, which was the 29th of October, 1896, any "goodwill of the business concerned in the particular goods or classes of goods" for which it was registered.

Mr. Bousfield has addressed me an argument which is perfectly convincing, to my mind, that the Magnolia Anti-Friction Metal Co. had at the date of that assignment a goodwill in a business. It seems to me that whether you call Mr. Stanley and those who succeeded him agents or sole importers, whatever the particular relation of his was to the company, and how he was remunerated, whatever those details may be, and however they may be accurately described, still, on the determination of that agency or licence or privileges, the business which had theretofore been conducted by them in that representative capacity reverted, as Mr. Bousfield says, to the principals, or the Magnolia Anti-Friction Metal Co., and therefore, they thenceforward had the benefit of the business which had been established in this country, and in that business they had a goodwill. So far I entirely follow the argument, but that does not grapple with the meaning of the statute or the circumstances of the case. The statute says that it shall be the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered. Therefore, in order to sustain the trade-mark, it must be shown that the company had not merely a goodwill in a business of metal manufacturers—but a goodwill in a particular business—namely, that of the manufacture and sale in this country, of metal bearings, the trade-mark being registered simply in class 6, and being for "anti-friction metal bearings, being parts of machinery other than horticultural and agricultural machinery." It is not pretended that the American company ever sold a metal bearing in this country. They were minded to sell their metal in this country, and by means of arrangements between Mr. Stanley and others they succeeded in pushing apparently a considerable business in England. In order, as I understand the evidence, to procure purchasers in this country they sent over to Mr. Stanley, and I suppose also to those who succeeded him, samples of metal bearings, not samples for sale, but samples by way of illustration of the great and advantageous uses to which the metal was capable of being applied. Some of them were bearings not fresh from the manufacturer, but bearings which had been used by railway companies, and were intended to show and convince intending purchasers what a long life these metal bearings had when properly constructed. Mr. Stanley says that the American company were as a fact prepared to supply the bearings themselves, but equally as a matter of fact they never did so, and I have heard of no transaction, no attempt at an order, no attempt at a fulfilment of an order for metal bearings to be supplied by the American company. What happened was this. Mr. Stanley having persuaded divers persons here of the great merits of this metal and its applications to metal bearings, instructed certain manufacturers in Cardiff to produce these metal bearings and then those metal bearings were sold by him or his firm for their own profit, not accounting in any way to the American company. The business so far as there was a business, and so far as there was a goodwill in it in the matter of bearings, was the business not of an American company but of Mr. Stanley and his firm. There was no business done—no business really attempted to be done—however much there might have been if the opportunity had occurred to do it, no business was actually done by the American company. The opportunity did not

occur. Therefore, though they had a goodwill apparently of considerable value at the date of the assignment, in the metal, they had no goodwill in the metal bearings. The result is that they had no goodwill in a business—"of a business" is the term used in the statute, "concerned in the particular goods or classes of goods for which the trade-mark was registered." The result is that the trade-mark is incapable of assignment by them. It was really an assignment of a trade-mark "in gross" as the phrase is, and of course it cannot any longer belong to the original company if it still exists, they having attempted to assign it, and it cannot be held by the assignees because nothing passed to them. The result is that that trade-mark like the others must come off, and the respondents must pay the costs.

Solicitors, *Sugden & Harford; Indermaur & Brown.*

Chan. Div.
Byrne, J. } Feb. 25.

RYMER v. MCILROY. (a.)

Easement—Right of way—Easement in gross—Covenant with yearly tenant and his "heirs and assigns"—Alteration of grantee's interest in the dominant tenement—Estoppel.

A grant by deed of a right of way to a yearly tenant of the dominant tenement and his heirs and assigns, will not determine by reason of the fact that the yearly tenant of the dominant tenement subsequently acquires the fee in the dominant tenement.

Trial of action.

This was an action in which the plaintiff claimed a declaration that the defendant was not entitled to a right of way over certain land of the plaintiff in Wellesley-road, Croydon, an injunction, and damages.

The facts of the case were as follow:

By an indenture dated the 12th of March, 1869, and made between John Drummond and William Drummond of the one part, and the Warden and Poor of the Hospital of the Holy Trinity in Croydon of the Foundation of John Whitgift, Archbishop of Canterbury (thereinafter called "the said hospital"), of the other part, a piece of land in the parish of Croydon containing 3a. 19p., or thereabouts, was conveyed by the said John Drummond and William Drummond to the use of the said hospital in fee simple. From the date of the said conveyance the said hospital and the governing body thereof had been in undisturbed possession of the said land, which is known as "The Cricket Field."

The said indenture contained a recital that it had been agreed upon the treaty for the purchase of the said land that the said hospital should, immediately after the completion of the said purchase, grant unto the said John Drummond and William Drummond, their heirs and assigns, a right of footway at all times of the width of six feet, for them and each of them, and their and each of their heirs and assigns, and their or any of their agents and servants, and the tenants and occupiers for the time being of the messuages, gardens, and premises coloured pink on the plan annexed, or any part thereof, and all persons going to or from the said messuages, gardens, and premises with the permission of them, or any of them, over and along a footpath on the north side and part of the west side of the said piece of land thereby conveyed, which footpath was distinguished by a yellow colour on the said plan, and which said right of footway was to extend to and into and from any part of the boundary line of the said premises coloured pink from and to and into the said road called "Wellesley-road"; and a further recital that in pursuance and part performance of the said agreement a deed had been prepared and was intended to be executed immediately after the execution of the said indenture now being stated for the purpose of granting such right of way as aforesaid.

Accordingly, by a deed dated the 13th of March, 1896, and made between the said hospital of the one part, and the said John Drummond and William Drummond of the other part, in pursuance of the said stipulation and agreement and in consideration of the said conveyance, the said hospital covenanted and granted as follows:—"The said hospital doth hereby, for themselves, their successors and assigns, covenant and grant with and to the said John Drummond and William Drummond, their heirs and assigns, that it shall be lawful for the said John Drummond and William Drummond, their and his heirs and assigns, and their and each of their agents and servants, and the tenants and occupiers for the time being of the messuages, gardens, and premises coloured pink on the plan in the margin of these presents, and of every part of such messuages, gardens and premises, and all persons going to or from the said messuages, gardens, and premises with express or implied permission by them or any of them, to enjoy and use a right of footway at all times hereafter of the width of six feet over and along a footpath on the north side and part of the west side of the piece of land conveyed by the said recited indenture (*i.e.*, the deed of the 12th of March, 1869) and which said footpath is distinguished by a yellow colour on the said plan drawn in the margin of these presents, and which said right of footway shall extend to and into and from any part of the boundary line of the said premises coloured pink from and to and into the said road called Wellesley-road."

The deed contained covenants for title in respect of the said grant.

At the date of these deeds the land conveyed to the hospital was bounded on the east by the Wellesley-road, on the northerly half of its west side by two pieces of land, one of which was then held by John and William Drummond as lessees for a term which expired in 1878, and the other by John Drummond on a parol tenancy from year to year, which lasted until 1870. These two pieces of land were the premises coloured pink on the plan annexed to the deed of the 12th of March, 1869.

In 1870 John Drummond purchased the fee in the latter portion.

John Drummond died in 1880, having devised and bequeathed his residuary estate (which included the fee simple in this plot) to William Drummond, who died in 1884, having devised and bequeathed all his estate to Elizabeth Drummond, whose devisees, by an indenture dated the 14th of November, 1894, granted and conveyed the same piece of land to Staples in fee, "together with such rights of way belonging to the vendors as tenants or occupiers of the premises hereby conveyed or otherwise at all times over and along the footpath of the width of six feet as was granted by" the indenture of the 13th of March, 1869.

By a lease dated the 29th of May, Staples demised the same piece of land together with the right of way to the defendant.

In 1895 the plaintiffs, who, under a scheme approved by the Queen in Council in 1881, were the governing body of the hospital, commenced the

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

erection of a wall to divide their three-acre field known as the "Cricket Field," from the defendant's land, a portion of which wall the defendant on the 25th of August, 1895, caused to be thrown down, claiming a right of access from his land to, and a right of way across the plaintiffs' field to, the Wellesley-road.

Eve, Q.C., *Badcock*, and *Henderson*, for the plaintiffs.—It is not possible to grant a right of way in perpetuity by a use of the words heirs and assigns. The grant of the easement could only operate to vest in John Drummond an interest co-extensive with his interest in the dominant tenement, which was that of a tenant from year to year. Such interest terminated by merger when he purchased the fee in 1870, and the grant can have no application to the new interest which he acquired at that date. If the grant was more than this it was an attempt to create an easement in gross, and this is invalid. The words heirs and assigns cannot assist the defendant.

They referred to *Lord Dynevor* v. *Tennant*, 37 W. R. 193, 13 App. Cas. 279; Year Books, 21 Edw. 3, 2, pl. 5; *Ackroyd* v. *Smith*, 10 C. B. 164.

Rentoul, Q.C., and *Turrell*, for the defendant.—The two conveyances must be regarded as one transaction, and the plaintiffs cannot insist on the validity of the conveyance to themselves and treat their own grant and covenant as bad. This was not an attempt to create an easement in gross. It was a covenant to grant a right of way to a person so long as his interest in a certain tenement continued. It was probably in the contemplation of the parties at the time that these deeds were drawn up, that the Drummonds, or one of them, might acquire the fee in the tenement in question.

Eve, Q.C., in reply.—On the question of intention the grant could hardly have been supported if the fee had been purchased after the leasehold interest had determined.

BYRNE, J.—[His lordship first stated the facts of the case, and then continued:] The short point is this. John Drummond was tenant from year to year of a plot of land marked C in the plan on the statement of claim. In 1870 he bought the fee simple in that land. There were some other plots held by the Drummonds on leases which have expired, and with these I have therefore not to deal; confining myself, therefore, to plot C. At the date of the covenant and grant relating to the right of way, John Drummond was only tenant from year to year of that plot, and the argument is that the grant was only intended to give him a right of way while the tenancy lasted, and if that were so, the right would not extend to any subsequent interest that he might acquire in the tenement. But in my judgment, having regard to the use of the words "heirs and assigns" and "at all times hereafter," and the whole tone and tenour of the deed, and in view of the fact that John Drummond shortly afterwards acquired the fee, this cannot be said to be the true construction. It was, I hold, contemplated that so long as the Drummonds or either of them, or the heirs or assigns of either of them, were interested in the tenements in question, the right of way was to subsist. It is not an unfair inference to draw that it was in the contemplation of the parties that the Drummonds might acquire the fee simple. There is no need to dwell on the authorities. The case from the Year Books is no authority in the present case. In that case the grantee of the right of way over land to a mill, of which he was not, at the time of the grant, seised for any estate, afterwards purchased the mill, and it was held that he could not maintain an action against the grantor for disturbing him in this right of way. The point, however, was that the grantee had no interest in the mill when the right of way was granted. *Lord Dynevor* v. *Tennant* does not involve the present point. Assuming that it does decide that you must regard a right of way as having been made with reference to an existing interest in a dominant tenement, that does not preclude the question whether, on the determination of such interest, if a larger interest is acquired by the grantee, his right is not continued. The action must be dismissed.

Action dismissed.

Solicitors, *Prior, Church, & Adams*, for *Drummond, Robinson, & Till*, Croydon; *W. C. Goulding.*

Q. B. Div. (Cave and Lawrance, JJ.) March 18.

WILLIAMS AND ANOTHER v. MAYOR AND CORPORATION OF MANCHESTER. (a.)

Local government—Municipal corporation—Burgess—Minutes of proceedings of council—Right to inspect—Committees—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 233.

By section 233 of the Municipal Corporations Act, 1882, a burgess has the right to inspect minutes of proceedings of the municipal council, but the Act does not give the right in terms to a burgess to inspect minutes of proceedings of a committee appointed by the council.

Burgesses of the city of M., being dissatisfied that on the minutes of the council no particulars appeared of the proceedings of committees approved by the council, claimed the right to inspect all minutes of such committees.

Held, that the burgesses had the right to inspect only such minutes of committees as were actually laid before the council for their approval.

Special case.

This was an action brought to obtain an expression of opinion by the Divisional Court as to the nature and extent of the right conferred on the burgesses of a city or borough by section 233 of the Municipal Corporations Act, 1882, to inspect the minutes of the council and those of its committees.

The facts set out in the case were as follow:—The plaintiffs were certain citizens, and the defendants the municipal corporation, of the City of Manchester. The proceedings of that corporation are regulated by the Municipal Corporations Act, 1882, which provides as follows by section 233:—"(1) The minutes of proceedings of the council shall be open to the inspection of a burgess on payment of a fee of 1s., and a burgess may make a copy thereof or take an extract therefrom. (2) A burgess may make a copy of or take an extract from an order of the council for the payment of money."

The corporation had from time to time exercised the powers conferred on them by this statute and by various local Acts, and had appointed committees for the transaction of certain business, and the acts of these committees had been submitted to the council for approval, as required by the Act of 1882.

The corporation, under clause B of Schedule II. of the Act, made several standing orders for the regulation of the management of the council. Among them was the following:—"XI. (1) An epitome of the minutes of the several committees of the council shall be prepared each month under the direction of

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the town clerk and be submitted to the chairman of each committee prior to its being sent to the council."

The minutes kept by the council merely referred to the proceedings of the different committees by stating that the proceedings of a particular committee had been read and approved. Minutes of proceedings of committees are also recorded in books, which are submitted for the approval of the council.

The plaintiffs made an application for an inspection of the minutes of proceedings of the Gas and Rivers Committees, which are referred to in the minutes of the council as having been read and approved during the past two years, and they tendered the fees mentioned in the section. The corporation declined to produce the minute-books of either committee, on the ground that the production of them for inspection would be inimical to the interests of the citizens. They were advised also that it would be inconsistent with public interests to permit an inspection of the minutes of committees as of right in all cases, and as they believed such inspection could not be claimed under the statute, they declined to accede to the plaintiffs' demand.

C. A. Russell, Q.C., for the plaintiffs.—The minutes of the town council had been kept for years past in such a way that it was impossible to ascertain therefrom what the proceedings of committees really were that appeared on the minutes as having been approved. The plaintiffs do not ask the court to direct that the corporation should adopt a different method of keeping their minutes, but to express their opinion that so long as the council thought fit to keep them in the present illusory manner, the burgesses should have the right to inspect the minutes of the committees for the purpose of ascertaining what in fact the proceedings were that the council had approved. The minutes of the council certainly did not give sufficient details of work sanctioned to be done. For instance, the minutes of the corporation would read: "The proceedings of the Watch Commitee having been read, resolved that the same be approved." To ascertain what was approved a burgess must have access to the minutes of the Watch Committee referred to. Again, suppose the Parks Committee recommended the erection of a bandstand at a cost of £250. The minute of the council would give no information whatever, and this was clearly against the spirit of the Act.

Asquith, Q.C. (*Macmorran, Q.C.*, with him), for the corporation.—The corporation do not contest this matter in any contentious spirit, but merely to get guidance from the court. [CAVE, J.—One thing is clear, that under the Act the burgesses are intended to know about the acts of the corporation.] The burgesses have always been allowed to inspect the minutes of committees when such inspection was consistent with public interest, but there were cases when it would be most inexpedient to allow them to see all the preliminary details. [CAVE, J.—They are entitled to ask to be shown what has been approved by the council.] The corporation were willing at once to concede that point, but they desired to keep back from inspection such minute-books of committees as contained preliminary proceedings leading up to the final acts. [CAVE, J.—There I agree with the corporation. But the difficulty is to separate what the burgesses are entitled to see in the minutes, from what they are not.] A practical solution of the difficulty might be arrived at if the "epitome" directed to be presented to the council under Order XI. (1), which contained a summary of the decisions actually arrived at by the committees, were in future treated as part of the minutes of the council. What the corporation desired to be made clear was that they were in no way bound to disclose confidential preliminary matters. The Act did not confer on a burgess a right to inspect minutes of any committee. There was a distinction made in the Act between the two. Thus, in section 22 (5) reference was expressly made to the "minutes and proceedings of the meeting of the council and of committee." The prayer of this claim was that the burgesses should be declared to have a right to inspect the minutes and proceedings of any committee. [CAVE, J.—That, in our opinion, is asking too much. Mr. Russell has intimated that he is willing to accept the offer of the corporation, provided that the right to inspect be extended to all acts submitted for approval to the council.] The corporation offering no further objection.

The COURT (CAVE and LAWRANCE, JJ.), on those terms, granted a declaration that the burgesses were entitled to inspect in future the minutes of all acts of committees submitted to the council, whether those acts were finally approved or not.

The question of costs having previously been arranged by the parties, the court made no order thereon.

Solicitors for the plaintiffs, *Busk & Mellor*, for *Hinde, Milne, & Bury*, Manchester.

Solicitors for the defendants, *Sharpe, Park, Pritchard, & Barham*, for *W. H. Talbot*, clerk to the corporation.

Q. B. Div. (Hawkins, Cave, and Wright, JJ.) — Nov. 14; Dec. 21.

COWEN (*Appellant*) *v.* THE TOWN CLERK OF KINGSTON-UPON-HULL (*Respondent*). (*a.*)

Election law—Registration—Parliamentary franchise—Borough vote—Disqualifying alms—Almspeople in almshouses—Lands vested in almspeople—Reform Act, 1832 (2 & 3 *Will.* 4, c. 45), *s.* 36.

By a grant of lands a charity, known as the Charterhouse Hospital, was established at Hull for a number of poor men and women, and the condition for election to the charity was, and still is, that the persons should be "feeble or old, so long as they are necessitous." The lands, including the Charterhouse Hospital itself, were, and still are, vested in the master and almsmen themselves, and form the source of the revenue of the charity. Under the scheme at present in force the almsmen were appointed by the town council and were removable by them, but the power of removal had never been exercised. The almsmen receive a weekly allowance out of the revenues of the charity, and each occupy a separate room in the Hospital House, which room is separately rated, but the rates are paid out of the charity funds. The almsmen had hitherto always voted at parliamentary elections without objection.

Held, that the almsmen, the recipients of this charity, were not disqualified by the receipt of alms within section 36 *of the Reform Act*, 1832.

Harrison *v.* Carter, 25 *W. R.* 182, 2 *C. P. D.* 26, *distinguished.*

Case stated by the revising barrister for the borough of Kingston-upon-Hull.

The facts were stated in the written judgment of Hawkins, J., as follows:

This is an appeal from the decision of the revising

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

barrister for the borough of Kingston-upon-Hull removing the name of the appellant, John Cowen, from the occupiers' list of voters for the central division of that borough upon the ground that he was disqualified under section 36 of the Reform Act of 1832 by the receipt of alms during the past year.

The appellant is, and for some years has been, a brother of a charity known as the "Charterhouse," or "God's House" Hospital, in the said borough, and as such brother he has during all that time occupied a room in the said house or hospital, in respect of which he has been duly rated in the rates for the relief of the poor. Such rates, however, have been paid out of the funds of the charity. He has also been in receipt of a weekly allowance of 7s. and medical attendance and coals.

The charity was founded by letters patent in 1384, in the reign of Richard II., by a grant of lands by Sir Michael de la Pole "to the masters, brothers, and sisters of the house" in two messuages called "Maison Dieu for thirteen poor men and thirteen poor women, feeble or old, to be called God's House of Hull, so long as they are necessitous"; and this is still the necessary qualification for election to the charity. Over them was appointed a master and warden, under obedience to whom the rest of the poor people, as well brothers and sisters, should continue in perpetuity, and the said master was required to pay to each one of the said poor people 40s. annually for all their necessities, as well food as clothing—namely, to everyone of them 8d. per week. By the said letters patent the said founder, with the King's licence and consent, gave, granted, and confirmed unto the master and brethren and sisters the said messuages, &c., for their dwelling, or foundation, or endowment, to have and to hold unto the said master, brethren, and sisters, and their successors, &c., for ever. The property so granted, with subsequent additions, forms the source from which the revenues of the charity are derived. In 1752 the rents of the property had increased to a sum considerably in excess of the sum necessary for the current expenses and allowances of the house as they then stood. In 1755 a suit in Chancery was instituted which resulted in the approval in 1764 by the Lord Chancellor of a scheme for the better management of the house and the application of its revenues. This scheme provided that fifteen poor men and fifteen poor women, feeble and old, should be placed in the said hospital, each of whom should receive 3s. a week for maintenance, with an allowance for coals and turves, and that the number of rooms and the pay of the poor of the hospital should be increased or diminished in proportion to the increase or decrease of the revenues of the charity estate, as the mayor and aldermen of Hull and the master of the said hospital should see convenient and direct. So things remained substantially till 1872, when a new scheme was formulated and legalized by the Charity Commissioners. That scheme did not, however, alter the existing state of the hospital beyond this, that the brethren and sisters of the Charterhouse who are elected by the town council were made removable at the pleasure of the town council, and on such removal his or her allowance was to cease, but such power of removal does not appear to have been exercised. At present there are about eighty brethren and sisters, each of whom receives 7s. weekly.

It is found as a fact that the houses and land forming the charity estate and from whence the revenues are derived are still vested in the master, brothers, and sisters. It is also found as a fact that one necessary qualification for election to the charity still is that the brothers and sisters should be feeble or old and necessitous; and, further, that they are elected by the town council. The brethren are required by the rules to keep within the hospital premises, and the gates are closed for the night at 10 p.m., at which hour all the brethren must be within. They cannot sleep out or allow relations to sleep in their rooms without leave. The gates are also closed for an hour on Sunday afternoons, and the inmates are unable to pass in or out during that time. The brethren are bound to clean their rooms to the satisfaction of the master; and each of the brethren is separately rated, but the rates are paid out of the funds of the charity.

Hitherto the brethren have always voted at Parliamentary elections without objection.

It was agreed that the translation of the original grant, and the account of the Charterhouse contained in the "History of God's House in Hull commonly called the Charterhouse," by John Cook, should be accepted as correct.

The revising barrister decided, on the authority of *Harrison* v. *Carter*, 25 W. R. 182, 2 C. P. D. 26, and *Baker* v. *The Town Clerk of Monmouth*, 34 W. R. 64, that the appellant, John Cowen, was disqualified by the receipt of alms.

There was another appellant, William Steele, who was an inmate of the Mariners' Almshouse in the same borough, but it was agreed that the result in his case should follow the result in Cowen's case.

The question was whether the decision of the revising barrister was right in law.

Jelf, Q.C. (*Grotrian* with him), for the appellant.—In the present case one of the conditions for election to this charity is that these poor men or women should be "necessitous." That is not equivalent to a state of absolute poverty, and does not of itself disqualify these persons. Although the recipients of this charity should be "necessitous" as the condition of their receiving the charity, still they have a legal right to the relief they receive, and they are not disqualified. The cases relied on by the revising barrister are clearly distinguishable from the present. In *Harrison* v. *Carter* the facts were very different from the facts in this case. In that case there was no legal right to receive the fund; here there is a legal right on the part of the recipients to receive the fund, and the lands and houses of the charity are legally vested in the almspeople themselves. That completely distinguishes this case from *Harrison* v. *Carter*, and Lindley, L.J., in that case, takes the very point, where he says: "If the fund is one in which the party is legally entitled to participate, as in *Smith* v. *Hall*, 12 W. R. 172, 33 L. J. C. P. 59, he is not disqualified." In *Baker* v. *Town Clerk of Monmouth* the condition was that the persons "should be unable to maintain themselves by their own exertions." Here there is no such condition, as the utmost is that they should be necessitous. In *Edwards* v. *Lloyd*, 20 Q. B. D. 302, 36 W. R. Dig. 75, there was the same condition, that the persons should be "unable to maintain themselves by their own exertions," and disqualification followed. *Smith* v. *Hall* governs the present case.

He also referred to *Dix* v. *Kent*, 39 W. R. 173; *Fryer* v. *Bodenham*, 17 W. R. 294, L. R. 4 C. P. 529; *Roberts* v. *Percival*, 13 W. R. 265, 18 C. B. N. S. 36; *Simpson* v. *Wilkinson*, 7 Man. & G. 50; *Daniels* v. *Allard*, 1 Fox & Smith Reg. Cas. 70.

The respondent did not appear.

Cur. adv. vult.

Dec. 21.—The judgment of the court (HAWKINS, CAVE, and WRIGHT, JJ.) was read by

HAWKINS, J.—[His lordship having stated the facts, proceeded:] By the Reform Act of 1832 (2 & 3 Will. 4, c. 45), s. 36, it is enacted that "no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough who shall within twelve calendar months next previous to the last (now, by 41 & 42 Vict. c. 26, s. 7, the 15th) day of July, in such year, have received parochial relief, or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament."

The question we have to determine is, whether under the circumstances the appellant was within the year next before the 15th of July, 1896, in the receipt of such alms. It was not suggested before the revising barrister that any of the appellants have been in receipt of parochial relief. But it was objected that the appellants had received such other disqualifying alms as are mentioned in section 36. This objection was upheld by the revising barrister on the authority of *Harrison* v. *Carter* and *Baker* v. *Town Clerk of Monmouth*.

It would be difficult to point to any authoritative definition of the law of Parliament upon this subject, and it would serve no good end to examine in minute detail such authorities as are to be found in the reports of the trials of election petitions before Parliamentary Committees, for they are conflicting beyond the power of reconciliation. Many of them are to be found collected in Rogers on Elections, Part I., pp. 79, 189, *et seq.*, to which I simply refer. It is stated by Whitelocke in his work on elections, published in 1766, that persons who are, or have been, within a certain time obliged to depend wholly or in part on eleemosynary assistance are disqualified by the common law, not only because from their indigence they were unable to contribute to the wages of their members, but because from their dependent situation their voices were no longer free. This receipt of alms, however, was only considered as evidence of inability which might be rebutted by circumstances. On the other hand, it was presumed that a voter continuing in possession of his freehold was not in a condition of disqualifying indigence, and that even parish alms paid to a freeholder did not invalidate his vote—*Bedfordshire*, 2 Lud. Elec. Cas. 564.

In dealing with the question, What are disqualifying alms? it is necessary always to bear in mind that the answer depends not upon whether the person whose voting capacity is challenged has been the recipient of charitable assistance or alms in the popular sense of that term, but whether he has accepted such alms under such circumstances as by the law of Parliament as it existed when the Reform Act of 1832 was passed would have disqualified him from voting. And it must further be remembered that, although the onus of proving a *primâ facie* title to vote by reason of property, occupation, &c., rests on the person claiming to vote, the onus of proving affirmatively the disqualification to vote by reason of the receipt of alms, is cast upon the objector. I may observe also, what I believe to be a generally accepted view, that a qualification should be favoured, unless the law compels the contrary. It is impossible to say that there was when the Reform Act of 1832 was passed any fixed definite rule of Parliamentary law which was applicable to every case. If there had been such definite rule the conflicting authorities reported in the books, would have made one marvel at the incompetency of some of those who were called upon to administer it; but the truth is there was no fixed principle at all to guide. Each case of necessity depended, as it still does, upon its own particular circumstances, and that state of things which in one place would have been held to be a disqualification might have been no disqualification in another. It is truly stated in Rogers on Elections, Part I., 193, that in many of the old boroughs the usage of the place and the decisions of the House or Committees have determined the point—in fact, the usage made the law. A perusal of the old election cases determined by Parliamentary Committees, some of which are referred to in pp. 193-5 of Rogers, abundantly proves this. In one borough usage sanctioned that which would have been condemned in another.

If usage may be taken into consideration, and I see no reason why it should not, we have this very striking fact found by the revising barrister, that certainly for sixty-four years since the Reform Act was passed, and I know not how many years previous to that time, the brethren of this hospital at Kingston-upon-Hull have always voted without objection, nobody ever dreaming they were disqualified because of such charity as they have received. This concession of right to vote was strong evidence that in fact the relief was not deemed to be of a character to disqualify. It would certainly be a strong measure to disqualify so large a number of voters as the brethren now represent without overwhelming proof of their disqualification. Such I fail to find in the case submitted to us, upon which alone we must act, for we have no right to draw any inferences of fact which are not the irresistible conclusions to be drawn from facts actually found by the revising barrister. I am not concerned to question the soundness of the two judgments relied on by the revising barrister as the basis of his decision—*Harrison* v. *Carter* and *Baker* v. *Town Clerk of Monmouth*. On the contrary, in each of these cases I think there was evidence to justify the finding of the court—viz., that there was that amount of poverty and such a receipt of alms to alleviate it as was calculated to destroy the independence of the recipient. But I do not concur in the revising barrister's opinion that they were decisive of the present case, for I think they are distinguishable in some substantial particulars. In *Harrison* v. *Carter* the lands forming the charity estate were devised to and vested in trustees, persons other than the claiming voter. Here they are vested in the brethren themselves, and the brethren, so long as they are such, live in houses of which they are for the time legal owners; and though their right to occupy is dependent on the will of the trustees, the power of removal has never yet been exercised. Again, here the funds are to be distributed to feeble, old, or "necessitous" persons—"necessitous" not necessarily meaning persons in extreme poverty. In *Harrison* v. *Carter* they were to be shared by the poorest inhabitants, and the particular voter whose vote was questioned was so needy as that, the money being distributed according to actual necessity, he was awarded the largest amount distributed to any one family. There was also this further fact in *Harrison* v. *Carter*—that before 1867 the person who was removed from the register had never been in a condition to claim a vote, the house he occupied being of insufficient value, whereas in the present case the claimant had, with his predecessors for a longer period than 1832, been uninterruptedly allowed to vote in respect of the same qualification until 1896. In *Baker* v. *The Town Clerk of Monmouth* poverty and inability to maintain themselves by their own exertions were found as the condition of the claimants to vote, and each occupant of an almhouse was required to wear a badge; and it was not suggested that any occupant had any freehold interest in the house he occupied. Following these two cases, *Edwards* v. *Lloyd*, (1887) 20 Q. B. D. 302, 1 Fox's Reg.

Cas., 54, and *Dix* v. *Kent* (1890), 39 W. R. 173, 1 Fox 186, 63 L. T. N. S. 641, might also be cited as supporting to some extent the objection of the respondent. Those cases are, however, distinguished in their material facts from that now before us. They were both cases of almspeople occupying almshouses or charitable hospitals, and receiving money allowances from the hospital funds, and the qualification for such charity in the first of them was *inter alia* inability of the recipients to maintain themselves by their own exertions. In the other the qualification was that the recipients had no means of subsistence other than the allowances from the hospital. In neither case was any legal interest in the almshouses vested in the almspeople, and it did not appear that the almspeople had for any substantial period (if at all) been allowed to exercise the franchise.

On the other hand, the case of *Smith* v. *Hall* (1863), 15 C. B. N. S. 485, strongly supports the case of the appellant to have his name upon the register. In that case the persons objected to were on the list of voters as freemen of the borough of Sandwich, they were brethren of one or other of the two hospitals, St. Bartholomew's or St. John's, Sandwich, both of which were identical in their constitution and management, and both were under charity trustees appointed by the Lord Chancellor. Each was a corporation by repute. The property of each consisted of landed estates and houses occupied by the brethren. In each, income of the landed estates was divisible annually among the brethren in equal proportions, and a house was assigned to each wherein to live, and each brother kept the house occupied by him in repair. The appointment of the brethren to the hospitals was vested in the charity trustees, and there was no instance of a brother once appointed being turned out. There was no deed defining the qualifications of the persons to be appointed brethren, but in the year 1612 the mayor and jurats of Sandwich having the management of the hospitals, an ordinance was made by them that "every person placed in the hospitals should be of the age of forty years or thereabouts, except always decayed jurats, or any lame, blind, or impotent person"; and by an inquisition of charitable uses taken on the 7th of September, 6 Car. I., it was found that the brethren ought to be "above the age of fifty, except lame, blind, or impotent persons, and unfit for husbandry, and should be inhabitants of the said town, or a child of some of them, or late inhabitant having no competent means to live." The brethren had always theretofore voted for members of Parliament without objection. The persons objected to were all brethren, and had been recipients of the gratuities and other benefits for more than a year next previous to the last day of July, 1863. The revising barrister held they were not disqualified from being registered by section 36 of 2 & 3 Will. 4, c. 45. An appeal against that decision was heard before Erle, C.J., Williams, Byles, and Keating, JJ., who upheld the decision. Erle, C.J., in delivering judgment, said: "We should always incline to favour the qualification unless the law compels us to decide against it. If we are to resort to conjecture as to the meaning of the Legislature which evidently was that persons so placed by their indigence as to be presumably subservient and destitute of all freedom of mind, should not be permitted to exercise the franchise. . . . I must own I should think that these freemen, by reason of their having a house and a share in the profits of the land belonging to the hospital for life, are gifted with a far greater probability of independence than those who have nothing to rely on but the precarious proceeds of their own labour." Williams, J., agreed on the ground that the recipients of these benefits were not shown to be in a state of indigence and abject dependence. Byles, J., agreed on the ground that the persons were residing in houses in which they were entitled by law to continue for life, sharing the revenue of the corporation; and he added that what a man receives as a matter of right cannot be treated as disqualifying alms. Keating, J., said that usage is in favour of their qualification.

The case of *Daniels* v. *Allard*, wherein the question arose whether the inmates of the Licensed Victuallers' Asylum were disqualified as having been in the receipt of alms, is not of much assistance in the consideration of the main question before us. I therefore abstain from comment upon it. It does, however, decide that when a body of men claim to be placed on the register—all relying upon the same qualification as owners or occupiers—the disqualification by receipt of alms must be decided upon the case made and presented against the whole body, and not by considering every possible case against particular individuals, unless in the case stated by the revising barrister a distinction is made between different members of the general body of the claimants. The case of *Smith* v. *Hall* is, in my opinion, more applicable to this case than the case of *Harrison* v. *Carter*. I therefore, for the reasons I have set forth, after much consideration have arrived at the conclusion that the appellant is entitled to our judgment, with costs.

CAVE, J., added: I agree with the judgment just read; and I agree also that the revising barrister was bound by *Harrison* v. *Carter*, but that case, so far from being a decision against the appellant, is in his favour. In that case Lindley, J., said: "If the fund is one in which the party is legally entitled to participate, as in *Smith* v. *Hall*, he is not disqualied." The appellant in this case had a legal right to participate in these funds until for good cause he was removed. That distinguishes this case from *Harrison* v. *Carter*. The revising barrister also relied on *Baker* v. *The Town Clerk of Monmouth*. If that case goes no further than *Harrison* v. *Carter* it is unnecessary to consider it; if it does go further, then I cannot agree with it, as I think *Harrison* v. *Carter* is right. I think, therefore, that in this case the appellant is entitled to succeed and to have his name on the register.

WRIGHT, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Rollit & Sons*, for *Rollit & Sons*, Hull.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — March 30.

In re STEPHENSON.

Ex parte BROWN *v.* STEPHENSON AND OTHERS. (*a.*)

Bankruptcy—Voluntary settlement—Life interest defeasible on bankruptcy—Damages in divorce suit—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 33.

A settlement of damages obtained by the settlor in a divorce suit cannot be set aside as voluntary or as made with intent to defeat creditors.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Motion for a declaration that a settlement by the debtor, dated the 6th of March, 1896, was voluntary, and made with intent to defeat creditors, and for an order for the payment of the income of the settled funds to the trustee in bankruptcy.

In November, 1895, the debtor obtained a decree *nisi* against his wife, and a verdict for £1,500 damages against the co-respondent. On the 6th of March, 1896, with the approval of the Divorce Court, he executed a settlement of the £1,500 upon trustees, firstly, to pay the income thereof to his wife until death or re-marriage; secondly, to pay the income to himself until death or bankruptcy, in which latter event the trustees were to apply the income at their discretion for the maintenance of himself or his children. The debtor was admittedly in difficulties at the time when he executed the settlement. The trustee now sought to invalidate the gift over on bankruptcy, and asked that the income should be paid to him for the benefit of the creditors.

Muir Mackenzie, for the trustee.—The damages were the husband's property, and the settlement thereof was none the less the act of the settlor because it was made with the approval of the court. It was a voluntary settlement, and the gift over on bankruptcy is evidence of intent to defeat creditors. No one can settle his own estate so as to qualify his own interest in the event of bankruptcy: *Higinbotham* v. *Holme*, 19 Ves. 88.

Leigh Clare, for the trustees of the settlement and the beneficiaries thereunder.—The damages are not the property of the husband; the invariable practice is to pay them into court; and, by section 33 of the Matrimonial Causes Act, 1857, the court has power to direct how they are to be applied or settled. A bankruptcy petition cannot be based upon them: *Ex parte Muirhead, Re Muirhead*, 24 W. R. 351, 2 Ch. D. 22.

[He was stopped by the court.]

VAUGHAN WILLIAMS, J.—I am of opinion that in this case the trustee must fail; it is quite plain that this case does not come within *Higginbotham* v. *Holme*. That decides that where a man voluntarily settles his own property to pass away upon bankruptcy, that is evidence of intention to defraud creditors. But it seems to me that the moment one arrives at the conclusion that the damages cannot come to the husband at all without the judgment of the court, and that the court has power the direct a settlement for the benefit of the wife or children, and that the husband can only make a settlement of them with the approval of the court, it is clear that this is not a voluntary settlement. The court could have directed a settlement in favour of the wife or children alone, but here it has thought proper to allow the debtor a life interest to go over on bankruptcy, and then to be applied for the benefit of the husband or children at the discretion of the trustees. This is a very different thing from a settlement of property by a man of his own free will. It is an act of the court, and I cannot hold that it is an attempt to defraud creditors.

Application dismissed.

Solicitors for the trustee, *Spyer & Sons*.

Solicitor for the respondents, *George Trenam*.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — April 5.

SMITH v. CHORLEY RURAL DISTRICT COUNCIL. (a.)

Local government—Building plans—Refusal by district council to sanction—Action of mandamus.

An action of mandamus *will not lie against a district council to compel them to approve building plans which they have* bonâ fide *in the exercise of their discretion refused to approve.*

Appeal from the judgment of Kennedy, J., after the trial of the action with a jury, reported [1897] 1 Q. B. 532.

The plaintiff was the owner of certain land in the defendants' district, upon which he proposed to build certain houses, and in accordance with the defendants' bye-laws he deposited the plans of the houses with them.

The defendants came to the conclusion that the proposed houses amounted to the laying out of a new street, and refused to approve the plans upon the ground that the proposed street was not of the width required by their bye-laws.

This action was thereupon brought for a *mandamus* to compel the defendants to approve the plans.

At the trial the jury found that the proposed houses did not amount to the laying out of a new street.

The learned judge, however, held that an action of *mandamus* would not lie, and gave judgment for the defendants.

The plaintiff appealed.

E. Sutton, for the plaintiff.

C. A. Russell, Q.C., and *F. H. Mellor*, for the defendants.

The following authorities were referred to: *Fotherby* v. *Metropolitan Railway Co.*, 15 W. R. 112, L. R. 2 C. P. 188; *Reg.* v. *Mayor, &c., of Newcastle-upon-Tyne*, 60 L. T. N. S. 963; *Cook* v. *Hainsworth*, 44 W. R. 541, [1896] 2 Q. B. 85; *Reg.* v. *Lambourn Valley Railway Co.*, 22 Q. B. D. 463, 37 W. R. Dig. 116; *Reg.* v. *Tynemouth Rural District Council*, 44 W. R. 646, [1896] 2 Q. B. 219, 451; *Reg.* v. *London and North-Western Railway Co.* (*No.* 1), [1894] 2 Q. B. 512; *Reg.* v. *London and North-Western Railway Co.* (*No.* 2), 65 L. J. Q. B. 516, 44 W. R. Dig. 120; *Reg.* v. *Vestry of St. Pancras*, 38 W. R. 311, 24 Q. B. D. 371; *Reg.* v. *Fulwood Local Board*, 72 L. T. N. S. 592, 43 W. R. Dig. 100; Judicature Act, 1873, s. 25, sub-section 8; Order 53.

LORD ESHER, M.R.—A local tribunal, which admittedly had jurisdiction to consider the question whether it would or would not approve of certain plans laid before them, considered that question. The plans were not laid before them that they might ministerially express their approval. The plans were laid before them in order that they, in the honest exercise of their jurisdiction, might say whether they approved or disapproved of them. It was admitted that they honestly considered the question. The question before them depended upon this fact, amongst others—namely, whether or not the plans showed a proposal to lay out a new street. They were bound to consider and decide that fact, as it went to the root of the question before them. They decided that it was proposed to lay out a new street,

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

and disapproved of the plans. It is impossible to say that they exceeded their jurisdiction. They acted within their jurisdiction in every way. It follows, in my opinion, that there is no appeal from their decision. The plaintiff has brought this action for a *mandamus* avowedly to compel the defendants to alter their decision. The jury, in answer to a question put to them by the learned judge found that the propose buildings did not amount to the laying out of a new street. The learned judge, upon further argument, came to the conclusion that he ought not to have left any question to the jury, and entered judgment for the defendants. In so holding, the learned judge, in my opinion, was quite right. The local tribunal acted honestly within their jurisdiction, and this action, which was really brought by way of appeal from their decision, connot be maintained. Our decision simply comes to this, that this action is not maintainable.

LOPES, L.J.—The plans of these houses were laid before the district council. The district council did not refuse or neglect to come to any decision with regard to them, but, in the exercise of the discretion vested in them, they disapproved of the plans upon the ground that the plans involved the laying out of a new street which was not of the requisite width. It seems to me that the law applicable to that state of affairs is this: The exercise by the local tribunal of the discretion vested in them in respect of a matter within their jurisdiction, if the discretion is *bonâ fide* and honestly exercised, is a matter for the local tribunal alone, and, however erroneous the exercise of that discretion may be, no appeal lies. If that were not so, the result would be that, when a matter was entrusted by the Legislature to the local tribunal, and the tribunal exercised their discretion in the matter honestly, the court would be entitled to review the exercise of that discretion, and tell the tribunal to exercise it in another way. Though the learned judge at the trial left a question to the jury as to this being a new street, upon further consideration he held—and I think rightly held—that there was no question for the jury, as the action would not lie.

CHITTY, L.J.—This is an action for a *mandamus* to compel the district council to approve of certain plans of which they had previously disapproved. The district council have a discretion conferred upon them as to approving or disapproving of these plans. They honestly considered the plans and disapproved of them. It was within their province, as forming part of the ground of their decision, to inquire whether the plans proposed the laying out of a new street. It is said that the court can, in this action, review the decision of the district council honestly arrived at, and can overrule the exercise of their discretion. I am of opinion that such an action will not lie. The jury were asked to say whether what was proposed amounted to the laying out of a new street, and that was done with the object of getting a decision that the discretion vested in the district council had been wrongly exercised. That is in reality appealing from the decision of the district council, and such an appeal will not lie.

Appeal dismissed.

Solicitors for the plaintiff, *Rowcliffes & Co.*, for *Jackson & Son*, Chorley.

Solicitors for the defendants, *Crowders & Vizard*, for *Stanton & Sons*, Chorley.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 24; March 11.

In re WESTERN COUNTIES STEAM BAKERIES AND MILLING CO. (LIMITED). (*a.*)

*Company—Winding up—*De facto *auditor—Officer—Misfeasance—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

An auditor may or may not be an officer of a limited company; primâ facie *he is not. If he is appointed to an office under the company and acts in that office he will be liable under a misfeasance summons under section* 10 *of the Companies (Winding-up) Act,* 1890. *But a person is not an "officer" who fills no position either* de jure *or* de facto, *but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word.*

So held by the Court of Appeal (*reversing* Stirling, J., *ante, p.* 263).

Appeal of the auditors of the above-named company from a decision of Stirling, J. (reported *ante*, p. 263).

The facts sufficiently appear from the report in the court below and from the written judgment of Lindley, L.J.

Stirling, J., held, following *In re London and General Bank*, 44 W. R. 80, [1895] 2 Ch. 673, and *In re Kingston Cotton Mill Co.*, 44 W. R. 210, [1896] 1 Ch. 6, that two gentlemen who had acted as auditors of the company, though not formally elected to the office, were liable as officers of the company under the misfeasance section (section 10) of the Companies (Winding-up) Act, 1890.

The auditors appealed.

Eve, Q.C., and *Frank Evans*, for the appellants.

Buckley, Q.C., and *Edwin Ward*, for the liquidator.

Cur. adv. vult.

March 11.—LINDLEY, L.J., read the following judgment: This is an appeal by Messrs. Parsons & Robjent from an order of Stirling, J., refusing to stay proceedings taken against them by the liquidator of the above company, under section 10 of the Companies (Winding-up) Act, 1890.

The question raised by this appeal is whether Messrs. Parsons & Robjent are liable to be proceeded against under that section as "officers" of the company. To answer this question it is necessary to ascertain who Messrs. Parsons & Robjent are, and what they have done. They were accountants carrying on business in partnership, employed by one of the directors to audit the accounts of the company and to prepare a balance-sheet for the year 1889, to be laid before the shareholders of the company at their annual general meeting. This they did; the partners signed, *per pro.*, a certificate at the bottom, worded, "We have carefully examined the accounts of the Western Counties Steam Bakeries and Milling Co., and find the same to be in accordance with the above balance-sheet, which shows the correct financial position of the company." The accounts were, in fact, examined and the balance-sheet prepared by a clerk of the firm, and he signed the name of the firm at the bottom of the certificate; but no reliance was placed by the appellants upon this circumstance. They admitted their clerk's authority to act for them, and they admitted their own liability for what their clerk did. A similar course had been pursued the year before, but the

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

liquidator only proceeded against the appellants with reference to the accounts for 1889. Messrs. Parsons & Robjent were paid £12 12s. for their services in respect of the accounts of 1889 by a cheque of the company. Those are the whole of the facts.

Now if section 10 of the Winding-up Act, 1890, contained the word "auditor" it might well be that Messrs. Parsons & Robjent, having acted as they did, could not be heard to say that they were not auditors, and section 10 might well apply to them. I think this would be so, and the cases of *Gibson* v. *Barton*, 23 W. R. 858, L. R. 10 Q. B. 329, and *Coventry & Dixon's case*, 28 W. R. 775, 14 Ch. D. 660, are authorities to show that it would. But the word "auditor" is not in the section, and what has to be determined is whether Messrs. Parsons & Robjent are officers of the company, or have so acted that they cannot be heard to say that they were not. If all persons who did auditor's work for a company were officers of the company, the case would be easy; but no decision has yet gone this length; and if that were the law the careful examination of the Acts of Parliament and articles of association made in the cases of *In re The London and General Bank*, and *In re The Kingston Cotton Mill Co.*, would have been quite unnecessary. An auditor may or may not be an officer of a company. So may anybody else—*e.g.*, a banker or solicitor. *Primâ facie* such persons are not officers. See as to bankers, *In re Imperial Land Co. of Marseilles*, 19 W. R. 223, L. R. 11 Eq. 478; as to solicitors, *In re Carter*, 34 W. R. 516, 31 Ch. D. 496. But if appointed to an office under the company, and if they act in that office as officers of the company, they will be officers within section 10—*In re Liberator Building Society*, 71 L. T. N. S. 406, 43 W. R. Dig. 43 — and no irregularity in their appointment would, I conceive, avail them. But to be an officer there must be an office, and an office imports a recognized position with rights and duties annexed to it, and it would be an abuse of words to call a person an officer who fills no position either *de jure* or *de facto*, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word.

Turning to the articles of association of this company, we find that the office of auditor is provided for; appointments to it are made, not by the directors, but by the shareholders in general meeting; the office is annual; the remuneration is fixed by the shareholders; they can re-elect him on his quitting office; his duties are expressly stated; and large powers are conferred upon him in order to enable him to perform those duties. Messrs. Parsons & Robjent performed the duties which an auditor would have had to perform; but it appears to me that they were no more *de facto* than they were *de jure* officers of the company. They were simply accountants, called in by the directors to do a piece of work, and they never were and never pretended to be or acted as if they were anything else. In my opinion Stirling, J., has regarded the decisions in the cases of *In re The London and General Bank* and *In re The Kingston Cotton Mill Co.* as going considerably further than they did. They decided two points only—viz., first, that auditors might be officers within section 10, a proposition which in the first case was very stoutly disputed; and, secondly, that the auditors in those cases were officers of the companies then in question; that is, that the persons there had within section 10 really filled the office of auditor in those cases respectively.

The appeal must be allowed with costs here and below, and all proceedings against the appellants under section 10 of the Winding-up Act, 1890, must be stayed.

A. L. SMITH, L.J.—The question raised in this appeal is whether the liquidator of the Western Counties Bakeries and Milling Co. (Limited) can take proceedings in a summary way by means of what is called a misfeasance summons under section 10 of the Companies (Winding-up) Act against Messrs. Charles Edward Parsons and Frederick Pring Robjent, as being officers of that company. If they were officers of the company upon the 30th of January, 1890, when they certified the correctness of the company's balance-sheet for the year 1889, they may be proceeded against by means of such summons, otherwise they cannot be. Lindley, L.J., has stated the facts of the case, and I do not further allude to them.

It has been held by this court in the case of *In re Kingston Cotton Mill Co.*, following the case also in this court of *In re London and General Bank*, that where a company, having articles of association similar to those in the present case, has appointed a person to the office of auditor of the company, such person is an "officer" within the meaning of section 10 of the Companies (Winding-up Act) of 1890, which runs thus: "Where any director, manager, liquidator, or other officer of the company" has done certain acts he may be proceeded against as in the section mentioned by means of a misfeasance summons. It having thus been held that a person appointed by a company to the office of auditor of the company is an officer within the meaning of the section, we are now asked to take a step further, and to hold that a person who has never been appointed to the office of auditor or to any other office in the company at all, is nevertheless an officer of the company if he has performed work which, if he had been appointed by the company to the office of auditor, he would have undertaken and performed. The argument of the liquidator is that the undertaking to perform and the performance of auditor's work upon any given occasion makes a person an officer of the company within section 10, although he has never been appointed to that or to any other office in the company; and it is said that decided cases show this to be so. The first case which is relied upon is that of *Gibson* v. *Barton*, where Blackburn and Lush, JJ., held, Quain, J., dissenting, that a man who performed the work of manager of a company became thereby the *de facto* manager, and consequently was within the terms of an Act, which enacted that every "manager" who should knowingly and wilfully authorize or permit a default being made in forwarding a list of members to the registrar of joint-stock companies, should incur a penalty. These two learned judges held that "manager" in the Act meant manager *de facto*, and that a person who performed manager's work became thereby manager; but how does this establish that a person who performs auditor's work becomes an officer of the company? If the words of the section had included the word "auditor" the case would have been applicable, but no such word is in the section. I agree that performing the work of an auditor shows the person to be a *de facto*, though he may not be a *de jure* auditor, but to succeed the liquidator must show that the person is a *de facto* "officer." Some auditors are officers of a company and some are not. Those who are officers are within the section, not those who are not officers. It is no good showing that a person performs auditor's work; it must be shown that he is a *de facto* officer of the company. The next case is *Coventry and Dixon's case*. There two directors did the work of directors without being qualified to be directors. Sir George Jessel held them to be *de facto* directors though they were not *de jure* directors, and as such were liable to be proceeded against summarily by way

of a misfeasance summons as being directors of the company who are persons designated in the section to be proceeded against. When this case was under appeal (it was reversed upon another point) Bramwell, L.J., said if he (that is, the director) has done anything wrong as a *de facto* director no doubt he can be got at under the clause. In this I agree, and if Messrs. Parsons & Robjent had done anything wrong as *de facto* officers they could be got at; but they have done nothing of the sort, for the simple reason they have never become officers of the company at all. When examined *Coventry and Dixon's case* is only the case of *Gibson* v. *Barton* over again. I agree that doing the work of a director may make a person a *de facto* director, and the section enacts that a director may be proceeded against by summons. Doing the work of a manager may make a person a *de facto* manager, and the section enacts that a manager may be proceeded against by summons. So in the case of a liquidator. Doing the work of an auditor may make a person a *de facto* auditor, but the section does not make an auditor liable to be proceeded against; it is only when he is *de facto* or *de jure* an officer of the company that he can be proceeded against by summons under section 10. In this case Messrs. Parsons & Robjent were neither *de facto* nor *de jure* officers of the company; then how can they be said with truth to be officers of the company? All that this court has heretofore held is that an auditor may be proceeded against by summons if he is *de facto* an officer of the company. It has not held that a man may be proceeded against by summons when he is neither *de facto* nor *de jure* an officer of the company. For these reasons I think my brother Stirling went too far in holding these appellants liable. The question is not that which the learned judge put to himself—were the applicants *de facto* auditors? It is, were they *de facto* officers?

In my judgment the application to stay proceedings upon the summons should have been granted, and this appeal must be allowed.

RIGBY, L.J., said he had had an opportunity of reading the written judgment of Lindley, L.J., and concurred in it. He added that he could not see how from any point of view they could be officers of the company; they had no rights, and were simply servants who could be dismissed at any moment. If they had asked to be paid the directors could have said: "We dispense with your services." Officers must hold an office and could only be removed for just cause. Here they could be removed at the pleasure of the directors, who could have appointed any other man to do the work.

Appeal allowed.

Solicitors, *Woodcock, Ryland, & Parker*, for *Vaughan & Hornby*, Newport, Mon.; *Talbot & Tasker*, for *Dixon & Dixon*, Bristol.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 18, 19, 22; March 6.

In re THE CONSORT DEEP LEVEL GOLD MINES (LIMITED).

STARK AND ELLISTON'S CASE.

Company — Shares — Contract — Acceptance of offer — Notice of such acceptance — Underwriting letter.

S. signed a letter addressed to A. whereby he under took to underwrite, on or before the day after the day appointed for the closing of the list for subscriptions for shares—viz., the 20th of September, 1895—10,000 *shares, or such less number as might be accepted by A., in the C. Co., and he thereby, in the event of his failing to comply with the terms therein contained, authorized A. as his agent, on his behalf and in his name, to apply for such shares.*

On the 12th of September A. accepted the offer of S. for the whole 10,000 *shares, but gave no notice of this acceptance to S. On the 27th of September A. applied in S.'s name to the C. Co. for* 10,000 *shares, and was allotted* 9,000. *On the 28th of September A. informed S. of this allottment, but S., on the 30th of September, repudiated his offer. S. had not paid any deposit money for the shares.*

Held, (1) *that A.'s authority to apply for shares in S.'s name only arose in case of failure by S. to apply for shares after he had been informed that his offer had been accepted and the extent to which it had been accepted; that, S. not having been informed of the acceptance of his offer, A.'s authority never arose; and* (2) *that S. was not estopped from showing that A.'s authority had never arisen.*

Decision of North, J. (ante, *p.* 227), *reversed.*

Ex parte Harrison, 69 *L. T. N. S.* 204, *distinguished.*

Appeal by Messrs. Stark and Elliston from the decision of North, J. (reported *ante*, p. 227).

On the 29th of December, 1895, an application was made by Mr. Stark to have his name removed from off the register of shareholders in the Consort Deep Level Gold Mines Co. (Limited), upon which he has been placed as the holder of 9,000 £1 shares therein, upon the ground that neither he nor anyone authorized by him had ever applied for such shares; and consequently that he was entitled to have his name removed from the register.

In the month of September, 1895, a company called the Mines Acquisition and Development Co. (Limited) were promoting and bringing out, amongst other companies, the Consort Deep Level Co., and for this purpose the Mines Co. were obtaining signatures to underwriting letters from would-be underwriters of shares in the Consort Co. then about to be brought out. A Mr. Akerman at this time acted as secretary to the Mines Co.

Upon the 11th of September, 1895, Mr. Stark had this subject of underwriting shares in the Consort Co. brought before him by a Mr. Lambert, a financial agent, and who had had underwriting forms handed to him to get signed by underwriters in the proposed company, and Mr. Stark, after hearing what Mr. Lambert had to say upon the subject, upon the same day signed an underwriting letter in the following terms:

"The Consort Deep Level Gold Mines (Limited). Capital £120,000, in 120,000 shares of £1 each. To Mr. J. Akerman, secretary, Mines Acquisition and Development Co. (Limited), Bartholomew House, London, E.C. With reference to the prospectus of the above company offering 80,000 shares of the company for public subscription, and in consideration of your agreeing to pay to me a commission of 15 per cent., payable 5 per cent. in cash, 10 per cent. in shares, on the amount of shares for which you accept this contract as below, I hereby undertake to subscribe or find responsible subscribers to your satisfaction on or before the day after the day appointed for the closing of the list for subscriptions for shares, and on the terms stated in the same prospectus, or any reasonable modification thereof, for 10,000 shares of £1 each, or such less number as may be accepted by you, and to pay the instalments on the dates specified in the said prospectus, and I herewith hand you my

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

cheque for 2s. 6d. per share deposit. It is a condition of this agreement that, in the event of 40,000 shares being subscribed for by the general public on the issue of the said prospectus at or before the closing of the list, my guarantee is to cease, but all subscriptions by the public after the prospectus is publicly advertised to the date of first allotment shall be applied *pro rata* in reductions of the amount so guaranteed. It is agreed I am to receive the said commission upon the amount guaranteed by me within fourteen days of the completion of the purchase. It is further agreed that this underwriting letter is irrevocable, provided always that 40,000 shares are underwritten or applied for prior to the public issue of the said prospectus and allotment made on or before the 20th day of September, 1895. In the event of my failing to comply with the terms herein stated I authorize you as my agent, on my behalf and in my name, to apply for the number of shares (full or reduced, as the case may be), guaranteed by me as above, and to hand such application, together with my cheque, to the company, which application and agency I hereby undertake not to withdraw. My liability under this agreement shall continue, notwithstanding any variations between the prospectus shown to me and the prospectus issued to the general public, so long as the nominal capital of the company and the amount fixed for the purchase consideration shall remain the same." (A blank was left here for the signature, description, and address of the underwriter, and the date.)

At the foot of this was a form of acceptance in the following terms: "The above contract is accepted by me to the extent of 10,000 shares underwritten."

Mr. Stark did not then hand over his cheque for the 2s. 6d. per share deposit, nor did he ever pay anything upon that or any other occasion to Mr. Akerman, or the Mines Co., or to Mr. Lambert by way of deposit or otherwise on account of these shares.

Upon the 12th of September, 1895, Akerman filled up and signed in his own name the form of acceptance of 10,000 shares at the foot of the above-mentioned underwriting letter, but no notice of the acceptance was given to Stark.

The list of subscriptions closed on the 20th of September.

On the 27th of September a meeting of the directors of the Consort Co. was held, and Akerman, who was the secretary of that company, laid Stark's letter before the board, and in his name applied for 10,000 shares; and the directors resolved to allot to him 9,000 shares.

On the 28th of September Akerman, as secretary of the Mines Co., wrote to Stark stating that in accordance with the underwriting letter they had applied for 9,000 shares in the Consort Co., and he demanded a cheque for £4,500, being 2s. 6d. per share on application and 7s. 6d. on allotment.

On the 30th of September, 1895, Mr. Stark forthwith, through his solicitor Mr. Payne, repudiated his liability, pointing out that his offer to underwrite had never been accepted.

On the 11th of October, 1895, the 9,000 shares were allotted to Stark, and he was required to pay the allotment money.

On the 29th of December, 1895, Stark applied to have his name removed from the register of shareholders, and on the 21st of December, 1896, his application was dismissed with costs by North, J. (see the report *ante*, p. 227).

Messrs. Stark and Elliston appealed.

The facts in Elliston's case were similar to those in Stark's case, and the two cases were argued together.

Swinfen Eady, Q.C., and *W. F. Hamilton*, for the appellants. — It is said against us that we are estopped by the letter, by words, and by the offer. The only representation as to authority was that there was a conditional authority, the condition being acceptance by Akerman. If there was no contract, there was no authority. It depends on the construction of the letter. It is clear that there was no authority until acceptance. No specific number of shares was mentioned. The arrangement was only to take a certain number not exceeding £10,000. Nothing could be recovered on such an agreement. The duty of the Consort Co. was to find out whether the condition had ever been fulfilled. There never was a contract — the offer was never accepted. We never waived our right to notice of acceptance. The distinction between this case and *Ex parte Harrison*, 69 L. T. N. S. 204, is that there the offer was absolute, and it was unnecessary that any notice of acceptance should be given. It does not appear in the present case that the date of the acceptance was written in when Akerman signed. Another point is that if the representation was contradicted before being acted upon, there was no estoppel. The letter of repudiation of the 30th of September came to the notice of the board of directors of the Consort Co. Assuming that the company knew, it brings the case within *Freeman* v. *Cooke*, 6 D. & L. 187, 2 Ex. 654, and that class of case. Thus, the authority was contradicted before being acted upon, and there is no estoppel. This concludes the argument as to estoppel. Again, the underwriting letter was obtained by a representation which was in fact untrue. It is said that there was a representation that when Lambert brought the letters for signature, 25,000 had been taken in Germany. Lambert had repudiated his own underwriting on the ground that he had been misled by Mellor. He said we could rely on Mellor. The company cannot hold us to a contract obtained by misrepresentation, and we are entitled to repudiate the shares altogether. The appellant Stark never had a chance of performing his agreement. The persons to accept were those to whom the offer was made. We question Akerman's authority to accept for them: *Hindley's case*, 44 W. R. 630, [1896] 2 Ch. 121, at p. 125. [*Upjohn.*—That was reversed in the Court of Appeal.] No, not on this point. *Carmichael's case*, [1896] 2 Ch. 643, only shows that where there is a completed contract a party is to be held to it. *Harrison's case*, according to us, goes to the verge of the law. It goes too far as to estoppel: see 69 L. T. N. S., foot of p. 206; also the end of A. L. Smith, L.J.'s, judgment: and *per* Lindley, L.J., at top of p. 207, 1st col.

They also referred to *Jorden* v. *Money*, 5 H. L. Cas. 185.

[LINDLEY, L.J., to *Bigham, Q.C.*—We do not intend to trouble you about the representation; but must about the other point. Assume that the decision in *Carmichael's case* is sound, even though some of my statements there may go too far. Akerman knew all the facts, and he knew notice of acceptance had not been given, and therefore the Consort Co. must have known. You must address yourself to that.]

Bigham, Q.C., and *Upjohn*, for the respondents.—Knowledge of the common secretary of the two companies acting for one of them is not knowledge of the other: *Re Hampshire Land Co.*, *ante*, p. 136, [1896] 2 Ch. 743. We treat Akerman as the contracting party. [LINDLEY, L.J.—You may assume that. The question is, had he authority?] It was never intended by the contract that any notice should be given to

Stark. He expressly authorizes Akerman to apply, as his agent, for the shares; and further, the company had nothing to do with the underwriting contract. Underwriters never contemplate that they themselves shall apply for shares. On the question of estoppel *Harrison's case* is precisely in point. [LINDLEY, L.J. —There there was no such condition as there is in this case. You have to make out that the event on which the authority was to arise has happened.]

LINDLEY, L.J., said: These two appeals depend substantially on the same considerations, and the determination of Stark's case will determine Elliston's. The substantial question is whether the company is entitled to retain these gentlemen on its register of members in respect of shares allotted to them under the terms of underwriting letters signed by them. I will refer to Stark's case only, and will state no more facts than are necessary in order to make my own judgment intelligible. The Consort Deep Level Gold Mines Co. (Limited) was registered on the 13th of September, 1895. It was promoted by the Mines Acquisition and Development Co., of which Mr. Akerman was the secretary. The company had some underwriting letters for shares in the Consort Co. prepared, and on the 11th of September Stark signed one of these. [His lordship read the underwriting letter, and continued:] No cheque for the 2s. 6d. deposit money was given by Stark. The day for closing the list of subscriptions was the 20th of September. The 21st of September, therefore, was the day on or before which Stark was to subscribe or find subscribers for shares. But until informed of the number of shares for which he was to subscribe or find subscribers for, he could not perform his part of the bargain. On the 12th of September Akerman filled up the form of acceptance printed at the foot of the letter. No notice of this acceptance was sent to Stark. On the 27th of September the directors of the Consort Co. met. Akerman was its secretary, and he laid Stark's letter before the board and applied for 10,000 shares in his name, and 9,000 were resolved to be allotted to him. On the 28th of September Akerman informed Stark of what had been done. On the 30th of September, Stark, by his solicitor, Payne, repudiated the transaction. These two letters were written from and to the Mines Co. On the 10th of October their solicitors, Lucas & Ward, wrote to Payne saying that the Mines Co. would hold Stark responsible under his underwriting letter. On the 11th of October the shares (9,000) were nevertheless allotted to Stark, and he was required to pay the allotment money. This he refused to pay by a letter written on the 12th of October from Payne to Akerman as secretary of the Consort Co. Stark then applied to have his name removed from the register of shareholders and his motion was dismissed with costs. From this decision he has appealed to this court. He rests his application on the following grounds—viz., (1) That Akerman had no authority to apply for shares in his name; (2) that if Akerman had such authority it was obtained by misrepresentation of which the company cannot take advantage; (3) that Stark has done nothing which estops him from denying Akerman's authority. I have not alluded to the misrepresentations made to Stark, and on the faith of which he says he was induced to sign the underwriting letter; and I pass this part of the case over for the present.

I will first consider Akerman's authority to apply for shares in Stark's name. The 9,000 shares having been allotted to Stark on Akerman's application, Stark's obligation to accept them depends on the answers to be given to the following questions—viz., first—Had Akerman authority to apply for them in Stark's name? If not, then secondly, Has Stark so conducted himself as to be estopped from denying such authority? In speaking of Akerman I speak of him as the secretary and agent of the Mines Acquisition and Development Co. (Limited), and I use his name for the sake of brevity only. First, as to Akerman's real authority to apply for shares in Stark's name. The underwriting letter signed by Stark was so worded that it cannot be regarded as an acceptance by him of an offer made to him by Akerman so as to be binding on either or both of them when Stark signed it. The terms of the letter show that it was an offer by Stark, which required acceptance by Akerman in order to convert the offer into a binding contract. Further, it is familiar law that the mere acceptance of an offer, unless it is brought to the knowledge of the person making it, does not, as a rule, convert the offer into a contract. There are exceptions to this rule, based in some cases on the ordinary course of business and in other cases on special circumstances, which render notice unnecessary. Notice of performance by the other side is often all the notice of the acceptance of the offer which the person making it can require: see *Carlill* v. *Carbolic Smoke Ball Co.*, 41 W. R. 210, [1893] 1 Q. B. at p. 262. In my opinion this may often be the case with underwriting agreements. I do not accept the view that they are like bets and must be accepted before the event on which they are to become operative is known. Speaking generally, an underwriter of shares agrees to take so many not exceeding a certain number as a company may require in order to make up the total number, without which business cannot be commenced; and until the company knows how many it wants from the underwriter, I do not see how it can be in a position to accept his offer. Upon this point I concur with the view taken by Kay, L.J., in *Hindley's case*. But, of course, attention must be paid to the terms of the underwriting letter in each particular case. In the case of the *Bultfontein Sun Diamond Mines* (*Limited*), 13 Times L. R. 156, the terms were such that notice of acceptance was inferred from the retention of the letter by the person to whom it was addressed without more. But no such inference can be fairly drawn in this case, as the number of shares for which the letter was accepted had to be communicated to the underwriter. According to the terms of the letter signed by Stark it was essential that he should know on or before the 21st of September, 1895—*i.e.*, "the day after the day appointed for the closing of the list for subscriptions for shares"—how many shares he was to subscribe or find subscribers for. This stipulation rendered it essential that his offer should be accepted, if at all, before that date, and that he should be informed of the number of shares for which it was accepted. Further, Akerman's authority to apply for shares in Stark's name only arose on his failure to apply for the shares which he was bound to take. But until Stark was informed that his offer had been accepted and the extent to which it had been accepted it is impossible to treat him as having failed to perform his obligation to apply for shares. Akerman's authority, therefore, to apply for them in his name never really arose.

We were asked to infer from what took place on the 19th of September, when Stark called at the office of the company, that Stark then learned that his offer had been accepted. But the evidence does not satisfy me that he did, and there is no statement by any one that he was told to what extent the offer had been accepted. He denies that he was told anything about it, and the utmost that can be said against

him on this part of the case is that he went to learn how subscriptions were coming in, and that he was so far satisfied with the information which he obtained that he did not care to withdraw his offer. So far I agree with the view taken by North, J. He, however, decided that Stark was estopped from denying Akerman's authority to apply for shares in his name; and the learned judge came to that conclusion, on the authority of the decision of this court in *Ex parte Harrison*, which, however, was a very different case from the present. The facts in *Ex parte Harrison* may be shortly stated as follows: Harrison (who carried on business under the name of Pearson & Co.) had signed an underwriting letter which had been accepted by the person to whom it was addressed—*i.e.*, Lakeman. By that letter Harrison agreed to subscribe, or find subscribers for, 300 shares (neither more or less) in a brewery company, and to apply for them on a particular day; and, in the event of his not applying for them on that day, he empowered Lakeman to apply for them in his name. So far as appeared by that letter, there was no condition whatever for the exercise of this power, except (1) the non-application by Harrison for 300 shares on the day named; and (2) the acceptance by Lakeman of the offer made by the letter to him. Harrison had not applied for the shares, and the acceptance of the offer appeared from Lakeman's signed acceptance on the document itself. In another document (of which the company had no knowledge or notice) Harrison had stipulated that the acceptance of his offer by Lakeman should be communicated to him by a particular day. This was not done, nor was Harrison ever in fact informed before shares were allotted to him, that Lakeman had accepted his offer. The court held that Harrison was estopped from denying that Lakeman had authority to apply for 300 shares in his name. That case turned entirely on the private letter. The case was fought and decided with reference to that, and what was said about estoppel was addressed to the controversy there raised. Whether what was said about estoppel would have been applicable if there had been no private letter, it is unnecessary to consider. The point can be reconsidered when it arises; and *In re The Bultfontein Sun Diamond Mines (Limited)* can be considered with it. In the present case, as I have already pointed out, the apparent, as well as the real, authority conferred by Stark on Akerman to apply for shares in Stark's name only arose on the happening of a very important event, which is thus expressed in the letter itself—"In the event of my failing to comply with the terms herein stated." In order, therefore, to render the principle of estoppel applicable to this case the company must show that Stark has so conducted himself as to be precluded from denying that he had failed to comply with those terms. In other words, he must have in some way represented to the company that he had failed to comply with the terms mentioned in the letter, and that, consequently, Akerman's authority to act for him had arisen. But there is absolutely no proof whatever of any conduct on the part of Stark which amounts to any such representation. The doctrine of estoppel, therefore, appears to me inapplicable to the facts with which we have now to deal. This view of the case renders it unnecessary to consider whether Akerman's knowledge that Stark had not been informed of the acceptance of his offer would have prevented the Consort Co. from holding Stark estopped from denying Akerman's authority.

I stated in the early part of this judgment that Stark contended that he was induced to sign the underwriting letter by misrepresentation, and that the Consort Co. could not hold him bound by the letter, even if it would otherwise have been binding upon him. This contention cannot, in my opinion, be supported. I agree with North, J., on this point. The alleged misrepresentation was far too loose in its terms, and its untruth far too insufficiently proved to afford Mr. Stark any right to relief against the Consort Co. on this ground.

Upon the ground, however, that the shares were allotted to him without authority, and that he is not estopped from insisting that they were so allotted, I am of opinion that the appeal ought to be allowed. Mr. Stark's name must be removed from the register, and the company must pay his costs here and below, except so far as they have been increased by his charge of misrepresentation. These he must bear himself, and he must further pay the company's costs occasioned by that charge, and there will be the usual set-off of costs. Elliston's appeal will also be allowed with costs as above, and his name must be taken off the register also. His case is like Stark's.

A. L. SMITH, L.J., stated the facts and continued: The first question which arises is whether the undertaking to subscribe or find responsible subscribers when signed by Stark upon the 11th of September, 1895, "for 10,000 shares of £1 each, or such less number as may be accepted by you," then became a binding contract upon Stark, or was only an offer by him to subscribe when notice was given to him as to how many shares had in fact been accepted by the Mines Co. for which he was to subscribe, in which event he was bound to apply for the amount accepted.

The construction of each underwriting letter must depend upon its individual terms; they differ exceedingly, and it appears to me clear upon the face of this underwriting letter that there was no binding agreement until Stark had notice of how much of his proposal to the Mines Co. had been accepted by them; and that to create a binding contract upon Stark, this notice had to be given to him before the 21st of September, 1895, for how otherwise was it possible for Stark to perform his part of the contract unless he knew before the 21st of September for what number of shares the Mines Co. had accepted. I have no doubt that North, J., arrived at the right conclusion when he held that upon the true construction of the letter of the 11th of September, 1895, there was no contract binding upon Stark until notice of acceptance had been communicated to him, and that such notice must be given before the 21st of September, 1895.

It is, however, said on behalf of the Consort Deep Level Co. that Stark is estopped from saying that he is not bound by the underwriting letter. Now, what has Stark done either by conduct or representation to induce the Consort Co. to alter its position so as to estop Stark from proving the truth? To read the underwriting letter shortly it is this: Stark writes to the Mines Co. that he would underwrite shares in the Consort Co. about to be brought out up to £10,000, or any less number they might agree to accept, provided the Mines Co. before the 21st of September, 1895, gave him notice as to how many of the 10,000 shares should be subscribed for by him, and that if they did this and he was afterwards in default, the Mines Co. as his agents and on his behalf and in his name, might then apply for the number of shares they agreed to accept. What representation is there by Stark that he had received the contemplated and necessary notice of acceptance of his offer, or that whether he had received the notice or not, the underwriting letter was an agreement binding upon him to take the 10,000 shares or any other number in the Consort Co.? I cannot find it, and I do not agree with the learned judge when

he held that Stark was estopped from asserting that he was not in default in not subscribing for shares as against the Consort Co. I do not think that North, J., would have come to this conclusion had it not been for *Harrison's case*, which the learned judge felt himself bound by, and considered it governed this case, but the ground upon which that case was really decided, was very different.

The dispute before us in that case was this. Harrison, who traded under the name of Pearson & Co., had signed an underwriting letter, by which he had agreed with a Mr. Lakeman to subscribe or to find responsible subscribers for 300 ordinary shares of £10 each in a brewery company about to be brought out, in consideration of 7½ per cent. being paid to him in cash upon the nominal amount of the 300 shares then underwritten for by him, and had authorized Lakeman, in the event of his not applying for such shares, to apply for them in his name. It is true that at the foot of the agreement there was a clause: "This agreement is subject to your acceptance." On the same day Harrison (Pearson & Co.) wrote a letter to a Mr. Newberry, Lakeman's agent, as follows: "Dear Sir,—Herewith we beg to enclose you contract for underwriting 300 ordinary shares in Henry Bentley & Co. [*i.e.*, the brewery company] on the distinct understanding that we receive an acceptance from you of the same before 11.30 a.m. to-morrow, otherwise our underwriting is not to hold good.—Yours faithfully, PEARSON & Co." This letter was not communicated to Lakeman nor to the brewery company, nor was an acceptance given to Harrison before 11.30 the following morning (see judgment of Stirling, J., 69 L. T. N. S., p. 206). Harrison failed to apply for shares in the brewery company, and Lakeman subsequently applied in Harrison's name for 246 shares in that company, and he was placed upon the register of the company as shareholder of that amount of shares, and 246 shares were allotted to him. Harrison contested the case before us upon the ground that he had not received acceptance of his offer by 11.30 that morning, and the effect of what I then called, and will call again, the secret agreement between Harrison and Newberry, uncommunicated to Lakeman or to the brewery company, was the point discussed, and we held (affirming Stirling, J., who also decided upon the same ground) that, as Harrison had signed the underwriting letter for 300 shares, which was unclogged with the condition contained in the secret agreement, with the intention that it should be acted upon by the brewery company should he (Harrison) not perform his part of the undertaking by subscribing, when the time came, for these 300 shares, he was estopped as against the brewery company from setting up the condition in the secret agreement. This was, in my recollection, the ground upon which the case was decided. The point now taken—viz., that the offer contained in the underwriting letter had never been accepted so as to create a binding agreement was not the point argued or insisted upon before us, and as it appears from the judgment of Stirling, J., was not the point taken before him. What Harrison insisted upon was that he was not bound by the underwriting letter because he had received no acceptance before 11.30 the next morning. We held that as he had not placed this condition upon the face of the underwriting letter, which he was told was the document to be acted upon, but upon a separate document which was not communicated either to Lakeman or the brewery company, he as against the brewery company was by his conduct estopped from setting up the condition in the secret agreement.

A further point was attempted to be set up that Stark in fact knew before the 21st of September, 1895, that his offer to underwrite the 10,000 shares in the Consort Co. had been accepted, but I agree with North, J., that the evidence wholly failed as to this, and not a tittle of evidence can be pointed to to show that Stark knew for how many shares the Mines Co. had accepted his offer or for how many he was to subscribe.

As to the defence set up by Stark that he was induced by misrepresentation to sign the letter of the 11th of September, 1895, I agree that this wholly fails. But upon the ground that there is an estoppel in this case, I disagree with North, J., and I think that Stark is entitled to have his name taken off the register of shareholders.

As to the application of Mr. Elliston, his case is governed by that of Mr. Stark, and his name must also be expunged from the register.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitors, *W. J. Payne; Mellor, Smith, & May.*

High Court of Justice.

Chan. Div. } March 16.
Kekewich, J. }

JENKS v. VISCOUNT CLIFDEN. (a.)

Limitation, Statute of—Light—Obstruction—Administrator—Injury committed by deceased person—Continuing injury—Statute 3 & 4 Will. 4, c. 42, s. 2.

Where a person more than six months before his death erected a building which obstructed the plaintiff's ancient lights, and the plaintiff within six months of the grant of administration of the deceased person's estate, but more than six months after the death, brought an action against the defendants as administrators of the estate,

Held, following Woodhouse v. Walker, 28 *W. R.* 765, 5 *Q. B. D.* 404, *that the action might be maintained, and was not barred by section 2 of 3 & 4 Will.* 4, *c.* 42.

Action.

The plaintiff in this case was the owner of two freehold houses, Nos. 10 and 11, Cleveland-row, St. James's, and brought this action against the defendants, the administrators with will annexed of Viscount Clifden, deceased, claiming (1) Damages for obstruction caused to the access of light and air to the plaintiff's ancient lights by new buildings erected by, and by the acts of, Viscount Clifden, deceased; (2) an injunction to restrain the erection of further buildings, so as to obstruct or diminish the access of light and air to the plaintiff's ancient lights, together with a mandatory injunction for the removal of any building causing such diminution or obstruction; and (3) all necessary and proper accounts, inquiries, and directions, including, in default of admission of assets, administration of the real and personal estate of Viscount Clifden.

The defendants, in addition to other defences, pleaded and relied on section 2 of 3 & 4 Will. 4, c. 42, on the ground that the buildings complained of were erected more than six months previous to the death of Viscount Clifden.

The buildings complained of were erected opposite to the plaintiff's premises by Viscount Clifden between the month of April, 1894, and the 23rd of August,

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

1894, and were completed at the latter date. On the 28th of March, 1895, Viscount Clifden died. On the 5th of August, 1895, letters of administration with will annexed were granted to the defendants. On the 15th of January, 1896, the writ in the present action was issued.

Section 2 of 3 & 4 Will. 4, c. 42 provides that, *inter alia*: "An action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

Renshaw, Q.C., and *Rowden*, for the plaintiffs.—A fresh cause of action accrues by allowing the obstruction to remain: *Shadwell* v. *Hutchinson*, 2 Barn. & Ad. 97. A further question is, Can a man who dies injure through his executors? *Jones* v. *Simes*, 43 Ch. D. 607, 38 W. R. Dig. 158. In *Woodhouse* v. *Walker*, 28 W. R. 765, 5 Q. B. D. 404, permissive wrong was going on from day to day. Here the defendants are committing an injury from day to day, though the wrong was originally done seven months before the death of the testator: *Kirk* v. *Todd*, 31 W. R. 69, 21 Ch. D. 484.

Warrington, Q.C., and *Lawrence*, for the defendants.—This is purely a question of the construction of the statute. The damage was done when the building was erected: *Moore* v. *Hall*, 26 W. R. 401, 3 Q. B. D. 178; *Pennington* v. *Brinsop Hall Coal Co.*, 25 W. R. 874, 5 Ch. D. 769; *Battishill* v. *Reed*, 4 W. R. 603, 18 C. B. 696. The statute creates and limits a right by fixing it in time. In *Woodhouse* v. *Walker* the cause of action was no doubt permissive waste, but damages, from the nature of the case, could only be obtained for what was done up to the issue of the writ. *Kirk* v. *Todd* is not in point; and as to *Jones* v. *Simes*, it is only a *dictum* that applies. We say that the statute creates a right of action previously non-existent, and limits it (1) by defining the wrong and fixing the injury in respect of which the action can be brought within a certain period; (2) by defining the injury as something to be committed within a certain period. In this case the erection of the building is the wrong, and the diminution in the value of the plaintiff's property is the injury contemplated by the statute.

KEKEWICH, J.—The first point urged by the defendants is that the right of action claimed by the plaintiff is a creature of the statute; that is to say, is in the nature of a statutory right, and that no such action as the present can be maintained under the common law, and that consequently the statute must be examined critically in order to see that no action is brought under its authority unless expressly sanctioned by it. That contention seems to me to be correct, and upon that footing the question arises, Is this present action maintainable? It is not possible to raise any question on the words of the statute in section 2, "for any wrong committed by him in his lifetime to another." The offending houses in the present case were completed more than six months before the death of Viscount Clifden, and there may possibly be a question as to how far any wrong was committed by him within that time, but nothing turns upon that.

The question really turns upon the following words in section 2: "So as such injury" (not the wrong) "shall have been committed within six calendar months before such person's death." It is not a question when the wrong was committed, but when the injury was committed. Now, the injury was committed, not by the wrongful erection only, but by the continuance of the wrong done from day to day. Each day that the wrong continued an injury was done and continued, as I have already said, from day to day. That seems to be exactly what was decided in *Woodhouse* v. *Walker*, as was explained by Lush, L.J., who, it is to be observed, in quoting the statute (at the bottom of p. 407 in 5 Q. B. D.), left out the words which I have stated to be not material, and began with the words "so as such injury," &c. That is a direct authority upon the construction of the statute that any injury which gives a right of action, whether a continuing injury or not, if committed within six calendar months of the death, accrues *de die in diem*.

The answer suggested to this is, that damages for injury by obstruction of light must be assessed according to modern procedure, not with reference to the date of the issue of the writ—*i.e.*, damages up to that time—but with reference to the whole injury done, once for all, and that therefore no injury can be considered as being committed from day to day. In my opinion, however, that argument confuses damages with the injury which gives rise to the action. I put to Mr. Warrington the case of an action brought for obstruction to ancient lights, on the supposition that the offending house had been pulled down, and that there was a right to recover damages up to the time when the house was pulled down. Until the action is brought it is true that you cannot tell what the injury is, and when the action has been brought you can get at what the injury is by ascertaining the difference between the value of the house as it originally stood, and its present value as altered by the obstruction, and then you can get damages once for all. But that does not in the least interfere with the right of action in respect of a continuing injury.

Then Mr. Warrington says that this might lead to a great deal of trouble, because if there be delay in taking out letters of administration, the action may be brought long after the death of the deceased person. As long as it is not barred by the Statute of Limitations I see no reason why it may not be brought. The meaning of the statute is, that at common law this species of action fell within a class of actions which it was not permitted to bring against the representatives of a deceased person, and the statute was intended to correct that, subject to certain restrictions as to time, so that, for instance, a person whose light may be obstructed shall be entitled to bring his action against the representatives of the deceased as he might have done against the deceased himself had he been alive, and the executors and administrators are thus placed on the same platform as the deceased, subject always to restrictions, which are inserted in the statute in order to prevent the grievance of a want of right of action being succeeded by a grievance of an opposite character.

In my opinion, therefore, this action may be maintained.

Solicitors, *Lewis & Lewis; Foyer & Hordern.*

Chan. Div.
Romer, J. } March 19.

In re MARLBOROUGH (DUKE OF) AND THE GOVERNORS OF QUEEN ANNE'S BOUNTY. (*a.*)

Settled land — Sale of heirlooms and investment of proceeds in land—Liability to charges—Settled Land Act, 1882, *s.* 24, *sub-sections* 2, 5; *s.* 37.

Where land is settled and heirlooms are also settled to devolve with the land, the settled land being charged with jointures and portions for younger children, on a sale of the heirlooms and the investment of the proceeds in the purchase of land, the land so purchased is not subject to the charges.

By an indenture of settlement dated the 14th day of July, 1866, and made between John Winston, seventh Duke of Marlborough (deceased), of the first part; George Charles, late Duke of Marlborough, then Marquis of Blandford, of the second part; and George Graham and the Earl Vane, of the third part, the Blenheim Estates, apart from those portions of them which were permanently settled by Act of Parliament of the reign of Queen Anne, were re-settled after the death of the said seventh Duke of Marlborough and subject to a jointure payable to his wife, Frances Emily Anne, Duchess of Marlborough, to the use of the late Duke of Marlborough during his life, with remainder to the use of his first and other sons successively in tail male. By the same indenture certain pictures and other works of art were settled in trust, that the trustees thereof should allow the same to be used and enjoyed so far as the rules of law and equity would permit by the person or persons who should for the time being be in the actual possession or in the receipt of the rents and profits of the said settled estates. The said indenture contained a power for the late Duke of Marlborough to charge the settled estates with a jointure in favour of any woman whom he might marry, and with portions for his younger children.

In the year 1884 several of the said pictures were, under the authority of an order of the High Court of Justice, sold to the trustees of the National Gallery, and the purchase-money of the same was received by the persons who were then the trustees of the said settlement for the purposes of the Settled Land Act, 1882.

In the year 1885 a portion of the said purchase-money was, by the direction of the said Duke of Marlborough, invested in the purchase of the two freehold messuages, 97 and 98, Leadenhall-street, in the City of London, which were conveyed unto and to the use of the trustees of the settlement in fee simple upon the trusts and subject to the provisoes, provisions, agreements, and declarations contained in the said indenture of settlement, upon, with, and subject to which the same ought to be held as proceeds of trust moneys under the Act.

The late Duke of Marlborough was married first in 1869 to Lady Albertha Frances Anne Hamilton, and she having in the year 1883 obtained against him a decree for dissolution of their marriage he afterwards married Lily Warren Hammersley (widow).

The late Duke of Marlborough on the occasion of his marriage with his first wife, generally called the Marchioness of Blandford, charged the said settled estates with a jointure payable after his death to the Marchioness of Blandford, and with portions for his children other than the eldest or only son.

The late Duke of Marlborough on the occasion of his marriage with his second wife executed a deed purporting to charge the said settled estates with a jointure for her also.

The late Duke of Marlborough had four children only born of his first marriage, Charles Richard John, present Duke of Marlborough, and three daughters.

The present Duke shortly after coming of age in 1892 barred the entail in the settled estates and in the premises purchased with the proceeds of sale of the pictures, and these were subsequently conveyed to him in fee simple.

He had recently contracted to sell the premises, 97 and 98, Leadenhall-street, to the governors of Queen Anne's Bounty, and the chief point raised by the summons was whether the family charges affected in equity or otherwise the land purchased with the proceeds of sale of the said pictures.

E. L. Levett, Q.C., and *W. C. Druce*, for the vendor.—The lands purchased with the proceeds of the sale of the heirlooms should be treated as land bought with the proceeds of sale of land free from charges. By section 24, sub-section 5, of the Settled Land Act, 1882 land so purchased is not subject to the charges affecting the charged land.

W. E. Capron, for the purchaser.—Under section 24, sub-section 2, the land is subject to the uses of the settlement, and must therefore be released from the charges.

ROMER, J.—The heirlooms that were settled were not subjected at the time they were sold to the charges that the settled land was subject to. The heirlooms were sold under the provisions of section 37 of the Settled Land Act, 1882. The proceeds of sale admittedly before they became invested were not subjected in any way to the charges that the settled land was subject to, but a portion of the proceeds of sale has been invested in the purchase of the freehold lands which have been conveyed to the trustees of the settlement. I have looked at that conveyance and it is what I may call an innocent conveyance. It certainly does not in terms purport to render the freeholds bought with the proceeds of the heirlooms subject to the charges affecting the settled land. The words of the conveyance so far as they deal with the trusts upon which the trustees were to hold the purchased lands are as follows: "Upon the trusts, and with and subject to the powers, provisoes, agreements, and declarations contained in the indenture of resettlement upon, with, and subject to which the same ought to be held, having regard to the source from which the said sum (that is to say, the proceeds invested) has arisen." Clearly there is nothing in the conveyance itself to subject these lands purchased to the charges in question. Am I, then, in any way compelled to say that, notwithstanding this, the purchased land must be treated or ought to be settled or held as subject to the charges affecting the settled land, although the chattels, the heirlooms, were not subject, nor were the proceeds of sale of these heirlooms before the investment. The result, I think, if I were obliged so to hold, would be an extraordinary one. It would be, I cannot help thinking, a most extraordinary result, that whether one wished it or not, if you once sold heirlooms that were in no way subject to a charge affecting the settled land and invested the proceeds of sale in buying other land, that land must, whether you wished it or not, *ipso facto*, from the purchase become subjected to the charges affecting settled land, although the money which went to buy that land was in no way subject to the charge. I do not believe that the Legislature intended such a result, and I am bound to say I do not see when I carefully consider the Act that I am driven to any such conclusion.

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

The result would be the more extraordinary because when you look at section 24, sub-section 5, this is clear. If the settlement affected two estates, one subject to certain charges and the other free from them, though otherwise the two estates would be settled on the same uses and on the same trusts, if you sold the free estate and applied the proceeds in buying other land, that land would not have to be settled so as to be subjected to the charges affecting the charged estate. The Legislature has carefully prevented any difficulty arising with regard to such a case. It seems to me incredible to suppose that if when a settled estate is sold which is not subject to a charge the proceeds or the investment of those proceeds are free from any charges affecting another estate subject to the settlement or to the same uses, yet if it is heirlooms which are free from the charges which are sold, that then the proceeds, if invested in land, must be subject to the charges affecting the settled land. I do not think I am compelled to arrive at any such absurd conclusion, though section 37 declares that money arising from the sale of the heirlooms is to be regarded as capital money arising under this Act, and undoubtedly as capital money arising under the Act it can be invested in land which has to be settled. I turn to section 24, which determines upon what trusts and to what uses the purchased land is to be conveyed. Now, I find in section 24, sub-section 2, there is this provision: The freehold land purchased (and the land bought here was freehold land) "shall be conveyed to the uses on the trusts and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit." Then I will assume for the moment that the words settled land used there, in reference to the settlement now before me, do not refer in any way to the heirlooms, but only concern the settled land strictly speaking; but this sub-section does not compel a settlement abjectly, so to speak, on the trusts of the settled land, on the uses or according to the trusts on which the settled land is held. It very properly, and the circumstances of the case show how properly, added these words, "or as near thereto as circumstances permit." That is to say, you are to see all the circumstances of this case and only to settle the land purchased as nearly to the uses and upon the trusts of the settled land as the whole of the circumstances permit. Now, I think one of the circumstances which you have to bear in mind in the case before me is this, that this land is bought with the proceeds of the heirlooms which were not subject to charges at all, and in my opinion they ought not to be so settled as to subject the purchased land to charges to which the purchase-money was not subjected at all. I think that is a circumstance that has to be borne in mind, and that under the words "as near thereto as circumstances permit" you ought to settle the land bought, upon the uses and according to the trusts and subject to the powers and provisions affecting the settled land, bearing in mind this, that the purchased land is not to be subjected to these charges, seeing that the purchase money was free from them and that the purchased land therefore might be settled free from the charges.

I do not think, therefore, that there is anything in section 24, or indeed in any part of the Act, which compels me to say that this purchased land must be settled so as to make it subject to the charges affecting the settled land.

I need not again, perhaps, refer to sub-section 5 of the same section as showing what the Legislature intended, an intention which though in one sense according to the strict wording of the sub-section not covering the case immediately before me, yet does show the view the court takes of what ought to be done in an analogous case, and is a guide to what ought to be done in the case before me.

But there is another and a broader view that I think may fairly be taken of the case before me. Though this is a point of view about which there may be, I am bound to say, considerable doubt. It is by no means clear, especially having regard to what has been said by certain of the judges of the Court of Appeal, to which I shall refer. Section 37, which permitted the sale of the heirlooms, states that the money arising by the sale shall be capital money arising under the Act. Now, capital moneys arising under the Act, apart from section 37, were capital moneys arising from dealings with land, and, putting it shortly, I think that the meaning of section 37 was this, that the money arising from the sale of the heirlooms should be treated as capital money arising from the sale of land—that is to say, that for the purposes of this section the heirlooms are to be regarded as if they had been settled land. If that be a correct view then it will be found that the Act works well throughout.

There is no *casus omissus*. Take section 24, sub-section 5; that would in this case apply, because for the purposes of the Act regarding the lands that were settled and the heirlooms that were settled as being land constituting the whole of the settled land within the meaning of sub-section 5, it would follow that, having sold the heirlooms, which are to be regarded for this purpose as settled land, and seeing that the lands purchased with the proceeds of those heirlooms would be lands acquired by purchase with moneys arising from the sale of land which was not before the sale subject to the charges, the purchased land would not be affected by the charges affecting the property settled other than the heirlooms. I think that section 22, sub-section 5, can be dealt with on the same footing, and, indeed, I think that was the view of Lopes, L.J., in the case of the *Duke of Marlborough's Settlement*, 34 W. R. 377, 32 Ch. D. 1, at pp. 10, 13. I have not forgotten that Lindley, L.J., has not in his judgment taken that view, but I do not gather from his judgment that he intended to negative such a view conclusively. What he says with reference to section 22 is this: "It is true that money arising from the sale of heirlooms is not money arising from the sale of land; and that last part of the clause therefore seems to me to be inoperative; but the effect is plain enough." I gather that what he meant was this, though of course it is possible that I am mistaken, that it seemed to be inoperative so far as the language was concerned, but that the effect was plain enough that the section had the same effect as that given to it by Lopes, L.J. Lord Esher in his judgment does not deal precisely with the point. If this be the correct view, it seems to me one that makes the whole Act work easily with regard to the sale of heirlooms, and avoids difficulties; and then, as I have already pointed out, under section 24, sub-section 5, the question before me has been expressly provided for, and it could not possibly be contended that the land purchased in this case is subject to the charges in question.

On both these grounds, therefore, I hold that the land purchased, is not subjected and is not bound to be held subjected to the charges affecting the other settled land.

Solicitors, *Milward & Co.*, for *Milward & Co.*, Birmingham; *Solicitors for Queen Anne's Bounty.*

Chan. Div. }
Romer, J. } Feb. 23; March 16.

TADCASTER TOWER BREWERY CO. v. WILSON. (a.)

Vendor and purchaser—Public-house—Agreement for sale—Specific performance—Licence—Vendor's obligation in respect of—Licence indorsed or otherwise affected—Licensing Acts (9 *Geo.* 4, *c.* 61, *s.* 11; 5 *&* 6 *Vict. c.* 44, *s.* 1).

Unless the vendor of licensed premises specially contract that the licence shall be renewed at the general annual licensing meeting, or that he will obtain from the magistrates a transfer of the licence to the purchaser's nominee at the next special sessions, or interim *authority for the nominee to use the licence between the date fixed for completion and the next special sessions, the vendor does not take upon himself any of the above risks. All that he is bound to do, in the absence of any such special provisions, is to have a valid and effectual licence existing at the date fixed for completion of the purchase, which he can indorse in the usual way, and upon or in respect of which the purchaser could apply at once for* interim *protection and without undue delay under* 9 *Geo.* 4, *c.* 61, *s.* 11, *at the next special sessions.*

The statement in Dart's Vendors and Purchasers, 6th ed., vol. 1, *p.* 483, *to the effect that if the vendor could not, by the day appointed for completion, procure a transfer of the licence, the purchaser might repudiate the contract, is not justified by the cases.*

An option to determine a contract for the sale and purchase of licensed premises if the licence became affected,

Held not to become operative, on the magistrates refusing an irregular application by the purchasers for a temporary authority under section 1 *of* 5 *&* 6 *Vict. c.* 44.

Action.

By an agreement in writing dated the 31st of December, 1895, the defendants agreed to sell, and the plaintiffs agreed to purchase, a freehold house and shop with the off beer licence attached thereto, held by one of the defendants, being 28, Chapel-street, Eccleshill, together with two cottages, for the price of £725, the day of completion of the purchase being the 22nd of January, 1896, and it was agreed (clause 9) that if the licence or magistrates' certificate in respect of the said house and shop should be indorsed or otherwise affected prior to the completion, the said agreement should, at the option of the plaintiffs, be at an end.

It appeared that the plaintiffs postponed completion, and then—viz., on the 23rd of January, 1896, without previously consulting the vendors or obtaining any indorsement of the licence, or asking the vendors to attend or assist the plaintiffs, applied to the magistrates for a temporary authority until the next transfer day to carry on the licensed business in the name of a nominee of theirs; and that the application was adjourned, and refused on the 27th of January, 1896.

The plaintiffs stated that the application was refused on the ground that there was no necessity for the licence, and claimed to have the agreement set aside and the deposit money returned.

The defendants stated that upon payment of the purchase money they were willing to do everything that was usual to enable the plaintiffs to apply for the transfer of the licence or magistrates' certificate to the plaintiffs or their nominee, and counter-claimed for specific performance.

Farwell, Q.C., and *Butcher*, for the plaintiffs.—The licence has become affected within the meaning of clause 9 of the agreement, and the plaintiffs' option to determine has arisen. The principle of the decisions in *Day* v. *Luhke*, 16 W. R. 717, L. R. 5 Eq. 336, and *Claydon* v. *Green*, 16 W. R. 1126, L. R. 3 C. P. 511, applies here, and supports the contention that the defendants were bound to procure from the magistrates temporary authority for the carrying on of the business by the plaintiffs' nominee. The transfer of the right to carry on the business as the vendors carried it on is of the essence of the contract. The plaintiffs, having failed to obtain this, are entitled to rescind the contract and to have the deposit paid by them returned. The case is, at any rate, not one in which the court should decree specific performance.

Neville, Q.C., and *R. J. Parker*, for the defendants.—The application made to the magistrates was for temporary authority under section 1 of the Act 5 & 6 Vict. c. 44, and not for a transfer under section 11 of 9 Geo. 4, c. 61. It ought to have been made by the holder of the licence, which has to be indorsed by the magistrates pursuant to the Act, but the applicants here had not got the licence for the magistrates to indorse. The magistrates' discretion is absolute. A vendor in a case like this does not warrant the magistrates exercising their discretion in a particular way. The cases referred to decide nothing contrary to the defendants. Nothing has occurred to affect the validity of the licence, and the option to rescind under clause 9 has never arisen. The plaintiffs' application to the magistrates was misconceived. There has never been a proper application. The plaintiffs' claim therefore fails. On the other hand, the defendants were and are ready to join with the plaintiffs in a proper application for *interim* authority or a transfer of the licence, and there is no ground for refusing the counter-claim for specific performance of the agreement.

Farwell, Q.C., in reply.—If the vendor cannot, by the time for completion, procure a transfer of the licence, the purchaser may repudiate the contract: 1 Dart's Vendors and Purchasers, 6th ed., p. 483. That is the result of the authorities, and the principle goes beyond the plaintiffs' contention here.

ROMER, J.—The defendants were on the day fixed for the completion of the purchase, and they have ever since continued to be, the owners of the licence referred to in the contract of sale. And it is admitted by the plaintiffs that throughout this time the licence has been what is commonly called a clean licence—that is to say, it has has never been indorsed—and the defendants have done nothing to render it liable to be indorsed, and the tenant has never been proceeded against or convicted of any offence against the licensing laws. But the plaintiffs say that under clause 9 of the contract the licence became "affected" within the meaning of that word as used in the clause, by reason of the circumstances hereinafter stated, and that consequently they were entitled to put an end to the contract. In my opinion this contention fails.

The circumstances are these. [His lordship stated them as above.] The plaintiffs allege that the magistrates declined to give this temporary authority on the ground that there was no necessity for the licence. Thereupon, without more advice, the plaintiffs tried to put an end to the contract.

Now it appears to me that the plaintiffs have no right to rely on the result of an application so made as being something which "affected" the licence. The defendants have done nothing whatever to prejudicially affect the licence, and indeed in fact the licence to this day remains perfectly clean and a unaffected as it was at the date of the contract. Moreover, I am not surprised that the magistrate

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

should have refused the application, seeing the irregular way in which it was made. I see no sufficient reason for supposing that the magistrates would have refused it, if it had been made in the ordinary way under section 1 of the Act 5 & 6 Vict. c. 44, upon or immediately after completion, when the applicants could have made it clear to the magistrates that the application was the ordinary one by a purchaser merely asking for *interim* protection until the next transfer day. Having regard to the reasons said to have been given by the magistrates for refusing the application that was made, I cannot help thinking that they were under the impression that the application was one under section 14 of the Act 9 Geo. 4, c. 61. However, be this so or not, it appears to me that by what passed, the licence could not be said to be affected within the meaning of clause 9 of the contract. I ought to add, with reference to an argument that the words in clause 9 "or otherwise affected" would have no operation unless they extend to some such case as this, that those words were probably intended to cover cases where, though the licence had not in fact been indorsed, the vendors had done something which rendered it liable to be indorsed.

The plaintiffs next take up the position that under this contract the obligation rested on the vendors of procuring from the magistrates the temporary authority for the nominee of the purchasers to carry on the business until the next transfer day. Now in the first place, as already appears, even if this obligation had been cast on the vendors, the plaintiffs gave them no opportunity of discharging it. But, in my opinion, no such obligation rested on the vendors. The purchasers knew at the date of the contract that the licence was not like property of the ordinary kind, the full advantage of which could be assigned to them by the vendors without any other steps being taken, and doubtless it was this knowledge on the part of the purchasers which induced them to protect themselves by clause 9 of the contract, with which I have already dealt. For example, the purchasers knew that the licence might not be renewed at the annual brewster sessions (as, I believe, they are called), and, further, that the magistrates at the next special session after the completion of the purchase might not assent to the transfer of the licence to the purchasers' nominee when the ordinary application was made to them under section 11 of the Act 9 Geo. 4, c. 61, and, lastly, that if they wanted to use the licence by their nominee between the completion and the next special session, application would have to be made to the magistrates under section 1 of the Act 5 & 6 Vict. c. 44, and that that application might be refused.

Now, in the case of a contract of sale of a licensed house there may be special provisions showing that the vendor has taken upon himself the obligation of freeing the purchaser from all risks in respect of all or any of the above-mentioned matters—that is to say, the vendor may specially contract that the licence shall be renewed at the brewster sessions, or that he will obtain from the magistrates a transfer of the licence to the purchaser's nominee at the next special sessions, or *interim* authority for that nominee to use the licence between the date fixed for completion and the next special sessions. But in the absence of such special provisions (and there are none such in the case before me), in my judgment, the vendor does not take upon himself any of the above risks. All that he is bound to do is to have a valid and effectual licence existing at the date fixed for completion which he can indorse in the usual way, and upon or in respect of which the purchaser could apply at once for *interim* protection and without undue delay under section 11 of the Act of 9 Geo. 4, c. 61, at the next special sessions. I think the vendor is not bound to do more, except that, if asked, he should join with the purchaser, or authorize the purchaser to use his name, in the application to the magistrates for the *interim* protection and transfer of licence. Indeed, in the case before me the counsel for the purchasers did not venture to argue (and I think rightly) that, if the purchase had been completed on the day fixed, and *interim* protection obtained, the vendors would have been bound to obtain a transfer of the licence to the purchaser's nominee at the next special sessions; but they did argue that the vendors were bound to get the *interim* protection for that nominee. I cannot see why the vendors should be so bound. Suppose the magistrates refused *interim* protection, giving as a reason that they did not approve of the nominee, or suppose they gave no reason—and in this case they were not bound to give reasons—but their real ground, if it could be ascertained, was disapproval of the nominee, would that free the purchasers from their contract? I think it clearly ought not to do so, and I cannot see, on principle, why I should hold that there is anything in the nature of a warranty by the vendors of *interim* protection, or any obligation on them beyond what I have already pointed out.

And certainly the cases do not support the plaintiffs' contention, or justify the too widely-phrased statement at the bottom of p. 483 of Dart's Vendors and Purchasers, vol. 1, 6th ed. What the cases do decide is, that upon the sale of a public-house as a going concern, time is of the essence of the contract. And in *Day* v. *Luhke* that principle was held fatal to the vendors, because they did not hold a licence in respect of which the ordinary application for a transfer could be made without delay under section 11 of the Act of 9 Geo. 4, c. 61. So in *Claydon* v. *Green* the principle was applied where the vendor had no valid licence at all, and where, moreover, there were special provisions in the contract as to the transfer of the licence. And, lastly, the case of *Cowles* v. *Gale*, 20 W. R. 70, L. R. 7 Ch. App. 12, was one where, at the time fixed for completion, the vendors had no licence to hand over to the purchaser. I may add that the statements in *Day* v. *Luhke* and *Claydon* v. *Green* as to the practice on transfers of public-houses, appear to me in no way to support the argument on behalf of the plaintiffs in the case before me.

The result is that the plaintiffs have failed, and their action must be dismissed, with costs.

It is, however, said on their behalf that at any rate I ought not to decree specific performance on the counter-claim. I do not see any sufficient reason why I should not do so. The vendors are not to blame for the delay in any way, and still have a perfectly clean and valid licence; and having in no way broken their contract, but being always able, ready, and willing to perform it, I think they are entitled to specific performance, even if it turns out that the purchasers may not get the full benefit from the licence that they hoped for. The purchasers bought the house and its licence with its risks attaching, and even if the bargain proves a bad one for them, that is no sufficient reason for letting them escape from the contract to the injury of the innocent vendors.

I therefore, on the counter-claim, decree specific performance of the contract.

Judgment for the defendants on the claim and counter-claim.

Solicitors for the plaintiffs, *Emmet & Co.*, for *Leeman, Wilkinson, & Badger*, York.

Solicitors for the defendants, *Clarke & Blundell*, for *Joseph Richardson*, York.

Q. B. Div.
(Hawkins and Kennedy, JJ.) Jan. 28; Feb. 17.

MORRIS AND OTHERS (*Petitioners*) *v.* BEVES AND OTHERS (*Respondents*). (*a.*)

Election law—School Board—Ballot papers—Voting by crosses—Mode of counting—Ballot papers not officially stamped or cancelled—Elementary Education Acts—General Order of Privy Council on Education, 1st August, 1895—Ballot Act, 1872 (35 *&* 36 *Vict. c.* 33), *s.* 2.

In counting the numerical value of the crosses on the ballot papers at a school board election, at which voters can give all their votes to one candidate, or distribute them, and can vote by numbers in lieu of a cross, each cross must be counted as one vote and no more.

Ballot papers which bear no official mark, stamp, or perforation ought to be rejected under section 2 of the Ballot Act, 1872; *and ballot papers which have not been cancelled ought to be rejected, as there is no evidence they were ever in the ballot boxes.*

Case stated for the opinion of the court by order of Hawkins, J., made on the 16th of November, 1896, under section 93, sub-section 7, of the Municipal Corporations Act, 1882, in the matter of an election petition touching the election of members of the School Board for the United School District of Brighton and Preston, held on the 1st of October, 1896.

At the above election there were eighteen candidates for fifteen seats, and the returning officer declared the first fifteen candidates to be duly elected.

A petition was presented by the petitioners against the return of the last three successful candidates (the respondents, Beves, Stevens, and Roth), alleging that mistakes had been made by the returning officer and his assistants in the counting of the ballot papers and the votes recorded thereon, and that by reason of such errors and mistakes the result of the poll was not accurately ascertained and declared, and that the majority of votes declared for the respondents was only an apparent majority, and that the three unsuccessful candidates (Bartlett, Dodson, and Houghton) and each of them had a majority of lawful and valid votes. The petition asked for a recount of the votes, and that it might be declared that the respondents were not duly elected, and that the three unsuccessful candidates were duly elected, and ought to have been returned.

By order of Hawkins, J., the case raised by the petition was to be stated as a special case to be settled by Mr. Cooke, and the order directed that all the counted, tendered, and rejected ballot papers should be examined before him at the Election Petitions Office, and that the votes recorded thereon in favour of the three respondents and the three unsuccessful candidates should be recounted, and that he should state the result of such examination and recount in a special case, reserving for the consideration of the court such only of the ballot papers as might remain at the conclusion of the recount in dispute between the parties.

Such examination and recount took place accordingly before Mr. Cooke, who, so far as is now material, reported as follows:

There were seven ballot papers not bearing the official mark, stamp, or perforation. These papers contained fifty votes distributed among the parties to this petition; all these fifty votes Mr. Cooke disallowed in accordance with section 2 of the Ballot Act, 1872 (35 & 36 Vict. c. 33).

There were certain ballot papers upon which the voters had marked a cross or crosses; and in these cases a difficulty arose as to the numerical value to be attached to such cross or crosses.

For convenience these ballot papers may be classified as follows:

(*a*) Five ballot papers marked with a single cross opposite the name of a single candidate.

(*b*) Two ballot papers marked with a single cross opposite the name of each of three candidates.

(*c*) Ten ballot papers marked with a single cross opposite the name of each of five candidates.

(*d*) Eighteen ballot papers marked with a single cross opposite the names of two, four, six, seven, eight, nine, or ten candidates.

(*e*) Three ballot papers marked with more than one cross and for more than one candidate.

The returning officer counted the crosses described as follows:

In class	(*a*)	as	15	votes for each cross.	
,,	(*b*)	,,	5	,,	,,
,,	(*c*)	,,	3	,,	,,
,,	(*d*)	,,	1	,,	,,
,,	(*e*)	,,	1	,,	,,

In dealing with the above classes, Mr. Cooke acted upon the principle laid down by Lord Coleridge, C.J., in *Phillips* v. *Goff*, 35 W. R. at p. 200; 17 Q. B. Div. at p. 815, "that a voter must be taken to vote up to the full extent of his voting power." If and in so far as the value of these votes was a question of fact for him to decide, Mr. Cooke found upon the evidence before him that the voters intended to vote as follows:

Class	(*a*)	as	15	votes for each cross.	
,,	(*b*)	,,	5	,,	,,
,,	(*c*)	,,	3	,,	,,

In classes (*d*) and (*e*), as the crosses did not by any form of multiplication give a product of 15—that is, the full voting power, he therefore rejected them on the ground of uncertainty.

If Mr. Cooke were right in counting or rejecting the crosses as above described, then the totals were to be amended accordingly; but if he were wrong, then the additions or deductions consequent on the judgment of the court must be made.

In addition to the above-mentioned ballot papers there were ten ballot papers (class *f*) in dispute between the parties, under the following circumstances:

It was proposed at the recount to examine the contents of the packets which ought to have contained the unused and spoilt ballot papers; and which should have been sealed by each of the presiding officers at the twenty-two polling stations, and delivered by them to the returning officer (the mayor), and by that officer opened, verified, and resealed at the close of the poll.

No such packets were transmitted to Mr. Cooke by the town clerk; but he delivered together with the other documents a sealed envelope, which he had marked "Spoiled Ballot Papers," and which he stated (in a letter to Mr. Cooke) he had made up from the twenty-two above specified packets for the purpose of this re-count and special case.

This envelope contained certain ballot papers which had been duly cancelled and also contained the said ten ballot papers (class *f*) which bore a mark of cancellation. Of these ten, Mr. Cooke rejected one on the ground that the voter had marked an excess of votes. The remaining nine ballot papers appeared upon the face of them to be

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

valid, and upon the evidence before him Mr. Cooke found as a fact that they were valid, and not spoilt ballot papers. Certain irregularities occurred at the said election; for instance, it appeared that some ballot papers issued to voters and presumably placed by them into the ballot boxes were lost.

If Mr. Cooke were right in allowing the votes on these nine ballot papers, then the tables were to be amended accordingly; but if he were wrong then the additions or deductions consequent on the judgment of the court were to be made.

Amongst the papers annexed to the case were the instructions to voters at the election, and parcels of ballot papers in dispute.

The questions for the opinion of the court were: (1) Whether the election of the respondents or any of them was void; (2) whether the three unsuccessful candidates (Messrs. Bartlett, Dodson, and Houghton) or any of them was duly elected, and ought to have been so returned.

In the 2nd Schedule to the Elementary Education Act (36 & 37 Vict. c. 86) it is enacted respecting the election of members of a school board that—

"(1.) The election of a school board shall be held at such time and in such manner and in accordance with such regulations as the Education Department may from time to time by order prescribe . . . and revoke or alter any previous order, whether confirmed by or made in pursuance of this Act."

Provided that—

"Any poll so far as circumstances admit, be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and subject to any exceptions or modifications contained in any order of the Education Department made in pursuance of this Act, the Ballot Act, 1872, shall apply in the case of the election of a school board in like manner as if the provisions thereof were herein enacted with the substitution of 'School Board Election' for 'Municipal Election.'"

"An order made in pursuance of this schedule shall, save as otherwise provided by such order, apply to all School Boards."

On the 1st of August, 1895, the Lords of the Committee of the Privy Council on Education by virtue and in pursuance of the powers vested in them under the Elementary Education Acts, 1870-1893, published a "General Order regulating the Triennial Election 'of a school board in a borough,'" in which, *inter alia*, it was ordered—

"(16.) Subject to the provisions of this order, the poll shall be conducted in like manner as a poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted, and, subject as aforesaid the provisions of that Act shall apply to the election in like manner as if they were contained in this order, with the substitution of the term 'School Board Election' for the term 'Municipal Election.'"

Provided that—

"(a) Every voter shall be entitled to a number of votes equal to the number of members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit."

"(b) The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidates in lieu of a cross, and the rules of directions for the guidance of the voter in using contained in the Ballot Act, 1872, shall be altered accordingly."

S. H. Day (*Kenrick* with him), for the petitioners. The principle upon which these crosses ought to be counted is that laid down by Lord Coleridge, C.J., in *Phillips* v. *Goff*, 35 W. R. at p. 200, 17 Q. B. D. at p. 815, where he says that a voter must be taken to have intended to vote up to his whole voting power. Applying that to the present case, one cross opposite the name of one candidate must be counted as fifteen votes, against the names of each of three candidates as five votes, &c. This principle ought to be applied in all cases where it can be applied; but in those cases where it cannot be applied, then one cross ought to be counted as one vote. With regard to the lost ballot papers, they may have influenced the result of the election, and to invalidate the election at common law it is only necessary to show that the result might have been otherwise, not that it must have been so.

Corrie Grant (*J. A. Johnston* with him), for the respondents.—In counting the crosses the proper principle to go upon is to count one cross as one vote under any circumstances, and no more. Counting them in the mode adopted in this case, would lead to endless confusion and difficulty.

Day replied.

Cur. adv. vult.

Feb. 17.—The judgment of the COURT (HAWKINS and KENNEDY, JJ.) was read by

HAWKINS, J.—This case was argued before my brother Kennedy and myself on the 28th of January, when we took time to consider our judgment. At the triennial election of a school board for the United School District of Brighton and Preston, on the 1st of October, 1896, there were fifteen members to be elected and eighteen candidates. The respondents, Beves, Stevens, and Roth, against whom alone the petition was presented, were three of the successful candidates. As against their election it was alleged in the petition that the returning officer had erroneously counted the ballot papers and the votes recorded thereon, and that by reason of such errors the result of the poll at the election was not accurately ascertained, and that three other of the candidates—namely, Bartlett, Dodson, and Houghton, ought to have been returned. By an order made by me on the 16th of November it was directed that the questions involved in the petition should be raised by a special case to be settled by Mr. Edwin C. Cooke, and that there should be a recount by him of the votes recorded for the respondents and for the said Bartlett, Dodson, and Houghton. Such recount has accordingly been made, and this special case stated for our consideration. The facts found by Mr. Cooke are very clearly stated in it. As to seven ballot papers they did not bear the official mark, stamp, or perforation. The votes recorded in them were, therefore, rightly disallowed in accordance with the second section of the Ballot Act, 1872 (35 & 36 Vict. c. 33).

The most important question discussed before us was as to the principle upon which certain crosses upon some of the ballot papers should be counted. In the second schedule to the Elementary Education Act, 1873 (36 & 37 Vict. c. 86), it is enacted that "the election of a school board shall be held at such time, in such manner, and in accordance with such regulations as the Education Department may from time to time by order prescribe," provided that "any poll, so far as circumstances admit, be conducted in like manner in which the poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted." On the 1st of August, 1895, the Lords of the Committee of the Privy Council on Education, by virtue and in

pursuance of the powers in them vested under the Elementary Education Acts, 1870-1893, published a general order regulating the triennial election of a school board in a borough, in which, amongst other things, it was ordered that, subject to the provisions of that order, the poll shall be conducted in like manner as a poll at a contested municipal election is directed by the Ballot Act, 1872, to be conducted. Provided that "(a) Every voter shall be entitled to a number of votes equal to the number of members of the school board to be elected, and may give all such votes to one candidate, or may distribute them among the candidates as he thinks fit." "(b) The voter may place against the name of any candidate for whom he votes the number of votes he gives to such candidate in lieu of of a cross; and the form of directions for the guidance of the voter in voting contained in the Ballot Act, 1872, shall be altered accordingly." By section 2 of the Ballot Act, 1872, "the ballot of each voter shall consist of a paper (called a ballot paper) showing the names and description of the candidates." The ballot paper marked with prescribed official mark is to be delivered to the voter within the polling station; and the voter, having secretly marked his vote on the paper and folded it up so as to conceal his vote, shall place it in a closed box, in the presence of the presiding officer, after having shown to him the official mark at the back. Schedule 2 of the Act provides for placarding outside any polling station and in every compartment thereof a form of directions for the guidance of the voter in voting. The form of directions adopted in the present election (so far as is material to the question before us) ran thus: "Every voter is entitled to fifteen votes, and may give all such votes to one candidate, or may distribute them among such of the candidates as he thinks fit. The voter will first obtain a ballot paper from the presiding officer. The voter will then go into one of the compartments, and with the pencil provided in the compartment place in the right hand side of the ballot paper against the name of any candidate for whom he votes the number of votes he gives to such candidate." Appended to these directions were examples of ballot papers with votes marked. In each example opposite the name of each of the several candidates in a column headed "Number of votes for each candidate" the number of votes intended to be given for such candidate is recorded in figures. In neither of the examples, however, is there any mention made of the option given to the voter to record his votes by crosses instead of figures, nor of the mode in which he can by crosses indicate the number of votes he desires to give to any particular candidate. It seems to us that this form of directions may be usefully amended in any future election.

Upon the recount of the votes it was found that a great number of the ballot papers were marked and the votes distributed by figures in the form above-mentioned. No question has arisen with regard to these. Many others, however, were marked with crosses only, some with a single cross against one name only, others with a single cross against several names, and others with several crosses opposite the names of particular candidates. As regards these, very important questions have arisen as to how they should have been counted by the returning officer. The seventh paragraph of the case very conveniently classifies them as follows: "(a) Five ballot papers marked with a single cross opposite the name of a single candidate." These were counted by the returning officer as fifteen votes for each cross. "(b) Two ballot papers marked with a single cross opposite the name of each of three candidates." These were each counted by the returning officer as five votes for each cross. "(c) Ten ballot papers marked with a single cross opposite the name of each of five candidates." These were each counted by the returning officer as three votes for each cross. "(d) Eighteen ballot papers marked with a single cross opposite the names of two, four, six, seven, eight, nine, or ten candidates." These were each counted by the returning officer as one vote for each cross. "(e) Three ballot papers marked with more than one cross and for more than one candidate." These were counted by the returning officer as one vote for each cross. Mr. Cooke, as regards (a), (b), and (c), finds that the returning officer was right, and that the voters intended to vote as he counted the votes; but as regards (d) and (e) he finds that the returning officer ought to have rejected them altogether upon the ground of uncertainty, inasmuch as these crosses do not by any form of multiplication give a product of fifteen—that is, the full voting power of the voters. It is right to mention that in dealing with these ballot papers and in finding as he has done in regard to the intentions of the voters, Mr. Cooke has not acted upon his own independent judgment, but in deference to the views of Lord Coleridge expressed in *Phillips* v. *Goff* as to the principle upon which the votes recorded upon them should be counted — viz., "that a voter must be taken to vote up to the full extent of his voting power." That was a school board election case similar to the present, with this difference only, that the number of members to be elected was eleven instead of fifteen. In some of the ballot papers a single cross appeared opposite the name of one candidate only. This cross the returning officer had counted as eleven votes for that candidate. In reference to these papers Lord Coleridge expressed himself thus: "It may be said that the voter, knowing that he might cumulate his votes, and desiring to do so, meant to plump for that candidate; or it may be said that this interpretation of his intention would be breaking into the principle that a single cross indicates a single vote, and therefore that the voter ought to be taken to have meant to give one vote only to the candidate, leaving his other ten votes undisposed of; or it may be said that, the putting a single cross opposite the name of one candidate being as consistent with the one of these views as the other, the commissioner ought to reject the voting paper as void for uncertainty. My own opinion is that the first view is the correct one. It seems to me exceedingly unlikely that a man who takes the trouble to vote at all should not vote up to the full extent of his voting power. I do not think that is the right inference to draw, and I should, therefore, myself arrive at the conclusion that the voter intended to give all his eleven votes to the one candidate opposite whose name he had put the cross. At the same time that view is not so clear to my brother Denman as it is to me, and no doubt either the second or the third of the views I have mentioned might not unreasonably be adopted by the commissioner. I think the question whether the single cross means one thing or another is a question not of law but of fact, which the commissioner is the proper authority to determine. We must leave it to him to say whether in his opinion the single cross meant one vote or eleven votes, and if he has a real doubt upon the matter, he must act upon it, and reject the voting paper as void for uncertainty." Denman, J., thought "the single cross put opposite the name of a single candidate indicated an intention to give one vote only," but he agreed with the Lord Chief Justice that the question was not wholly one of law, and he expressed an opinion that it could be better dealt with at the place by the commissioner, with his experience and know-

ledge of the habits and ways of the class of persons who vote at such elections.

We do not doubt that the actual intention of the person who performs any act, whether it be voting or anything else, is a question of fact, and if the duty of ascertaining it is by law cast upon any tribunal or official person, such tribunal or officer must endeavour to discharge that duty upon such evidence as is available, and, naturally, the best evidence—assuming it to be credible—would be that of the individual whose intention is in question. In order to determine the result of an election by ballot the returning officer has no duty cast upon him to inquire into or determine the real intentions of the voters whose ballot papers he is required to count. He has no machinery at his command for doing so. The ballot paper alone is all he has to do with. If, on the face of it, it is marked in the manner required by the Ballot Act and no ambiguity is apparent upon it, we consider it to be his duty to count the votes as they appear upon it, and it is beyond his duty or power to alter the effect of a mark or a figure upon it—even though, from circumstances outside the voting paper, he were sure in his own mind that the voter intended to vote differently. The voter is secretly himself to mark the vote or votes he intends to give, and deposit his paper in the sealed ballot box. The returning officer's duty is to count what he finds in that box after the poll is closed, and in doing so not to speculate on what the voter intended. "Counting" is the only thing he has to do, so far as relates to the ascertainment of the numbers of votes recorded for the several candidates (see section 31 *et seq.* of the Ballot Act, 1872), and we are of opinion that he cannot look beyond the face of the ballot paper. It must not be forgotten that in these school board elections the voter, having the option to use either crosses or figures, has every facility afforded him by the use of figures unmistakably to indicate on his ballot paper the number of votes he desires to give for any particular candidate, and if he chooses to use crosses instead of figures, it being common knowledge that ordinarily each cross means only one vote, he should take care to make as many crosses as he intends to give votes to his favoured candidates. The form of directions expressly points to his marking the number of votes he gives. It seems to us that to allow the returning officer, whose plain duty it is, simply to count the votes as they appear recorded before his eyes on the face of the ballot paper—acting upon a questionable presumption (admittedly not one of law) that the voter must be taken to have meant to exhaust his voting power—to multiply a single cross by the number of members to be elected, or to multiply two or three single crosses against the names of as many candidates by a proportionate number of such votes, would be to introduce an element of uncertainty in the value of the marks upon the ballot paper never contemplated by the Ballot Act itself. As well might it be said that if a voter placed opposite the name of a single candidate thirteen crosses only the returning officer ought to count two more to make up the full voting power of the voter. This multiplication, however, is what the returning officer did in classes (*a*), (*b*), and (*c*) abovementioned. In this particular case, the number of persons to be elected being fifteen, there would be no difficulty in applying the presumption to ballot papers where single crosses were marked against single names, nor where single crosses are marked against three or five names only, for fifteen is divisible by three or five. But with regard to ballot papers where single crosses were marked against two or four or six or seven names, inasmuch as fifteen is not divisible by any of those numbers, each cross could only be counted as a single vote. The same result would, of necessity, attend single crosses against every number of candidates between seven and fifteen. A moment's consideration will suffice to show that a single cross against two, four, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen names would only make it absolutely impossible to exhaust the voting power among them, and wasted votes would be the inevitable result. To test this let us assume in this case a single cross against the names of four candidates. Fifteen cannot, for voting purposes, be divided by four so as to exhaust the voting power of the voter. It is true twelve of the fifteen votes might be exhausted if three votes were counted for each cross, but then there would be three wasted. As, however, according to our view, each ought to have been counted as a single vote eleven would be wasted. It is obvious that if the returning officer were, in such cases as above discussed, called upon to consider and determine the intent of the voter, and according to such intent to give to single crosses a value not ordinarily attributed to them, that would entail upon him the necessity of inquiries and calculations not involved in the mere duty of counting.

For the guidance of the returning officer in counting votes we feel it right to note that, subject to what we have said, we do not think a ballot paper ought to be altogether rejected, because it may be doubtful on the face of the paper whether the voter intended by it to give one vote or fifteen votes. In such cases, where the intention to give at least one vote is clear, such vote ought to be counted, and it would be wrong to reject it for uncertainty simply because it was doubtful whether the remaining fourteen votes ought not to be added to it. In our opinion it is far more in accordance with the spirit and object of the Ballot Act, and far more reasonable and practical to take the crosses made by the voter himself, whether one or more, according to the ordinary interpretation, "one vote for each cross," than that the value of a cross should be variable according to presumptions or inferences as to the voter's intentions, the accuracy of which must be always open to question, for the voter cannot himself be examined as to them, and may have had his own reasons for doing that which to others may seem strange, unwise, or unintelligible.

We think, therefore, that if there be nothing on the face of the ballot paper to indicate to the contrary, whether the voter gives his votes by crosses or by figures, that which he has marked upon his ballot paper shall be taken as absolute proof of his intention to do that which he has done and no more. Uniformity will at least be attained by this. By adopting one uniform rule facility will be given to the returning officer in discharging his duty of counting. This is a great deal when the votes of some 24,000 or 25,000 electors have to be dealt with, as in this case. This disposes of all the ballot papers comprised in classes (*a*), (*b*), (*c*), (*d*), and (*e*).

As to the ten ballot papers comprised in class (*f*) and referred to in paragraph 10 of the case, we are of opinion that, as to the one which has no mark of cancellation, but was marked with an excess of votes, the propriety of its rejection is not open to doubt. As to the remaining nine which on the faces of them were valid, and were found by Mr. Cooke to be so as a fact, we think they ought to be rejected, not because we are satisfied they were spoilt ballot papers, but because, being ballot papers which, to give the votes recorded in them any effect, ought to have been placed by the voter in the ballot box, there was nothing to show or raise a presumption that they were ever inside the ballot box at all. Irregularities, no doubt, occurred at the election, but they do not explain the matter by any facts, but merely suggest the possibility that they may have been placed in the box and have

either accidentally escaped or been wilfully taken from it. We have no proof, however, that such was the case; it is a mere speculation; and we therefore think they ought to be rejected. We do not at this moment feel justified in declaring the election valid, nor could we declare it void altogether, for the petition only affects the three respondents; but there must be a recount of the votes on the principle we have enunciated, and our final judgment on the petition must be deferred until the result of such recount is made known to us.

Solicitors for the petitioners, *Clarke & Calkin*, for *George Cheesman*, Brighton.

Solicitors for the respondents, *Prince & Co.*, London and Brighton.

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — March 23.

WHITE *v.* SOUTHEND HOTEL CO. (*a.*)

Landlord and tenant—Lease—Covenant running with land — Covenant by lessee to buy exciseable liquors only from lessor or his assigns—Assign of lessee not named—Assign whether bound—Proviso for abatement of rent on observance of covenant—Assign of lessee whether entitled to benefit of covenant after lessor has assigned his wine and spirit business.

A covenant by the lessee of a hotel (the assign of the lessee not being named) to buy exciseable liquors only of the lessor or his assigns runs with the land, and is binding upon the assign of the lessee. Such assign, therefore, if in fact he has bought exciseable liquors only of the assigns of the lessor's wine and spirit business, is entitled to the benefit of a proviso for an abatement of rent on due observance of the covenant.

Appeal from Kekewich, J.

In 1882 Sir Thomas White, whose trustees and executors were the plaintiffs, granted to William Fuller a lease for thirty years, at a rent of £1,500 per annum, payable quarterly, of certain premises which were to be used as a hotel, the lessee covenanting with the lessor, his heirs and assigns "that he, the lessee, shall not nor will during the term hereby granted buy, receive, sell, or dispose of, either directly or indirectly, in, upon, out of, or about the said premises, or any part thereof, any foreign wines, or any spirits, except gin, or other exciseable liquors whatsoever, other than shall have been *bonâ fide* supplied by or through the lessor or his successors or successor, assigns or assign, provided the said person or persons shall be willing to supply the same of good and proper quality to the lessee at the fair current market prices thereof." The lease also contained the following proviso: "Provided also, and it is hereby agreed and declared, that so long as the lessee shall well and truly observe the covenant lastly hereinbefore contained [*i.e.*, the covenant already set out], then the lessor will allow to the lessee an abatement of £75 from each quarterly payment of the rent hereinbefore reserved, but immediately upon any breach of the said covenant such abatement shall cease."

Sir Thomas White died in 1882, and in 1883 the plaintiffs assigned the goodwill of his business (which was that of a wine and spirit merchant) to persons who were still carrying it on.

It was admitted, for the purposes of this case, that the lessee, and the defendant company, who were his assigns, had in fact observed the covenant by buying liquors only of Sir Thomas White and his assigns.

On a summons taken out by the plaintiffs to have it determined whether the defendant company were in these circumstances entitled to the benefit of the proviso, Kekewich, J., without deciding whether or not they were bound by the covenant, held that they were so entitled.

The plaintiffs appealed.

Farwell, Q.C., and *Lyttelton Chubb*, for the appeal, cited *Vyvyan* v. *Arthur*, 1 B. & C. 410, 414; Smith's L. C. (10th ed.) p. 566; *Doe d. Calvert* v. *Reid*, 10 B. & C. 849, 856.

Eve, Q.C., and *Martelli*, for the defendants.—The covenant is binding on the assignee of the lease, who is therefore entitled to the benefit of the proviso.

They cited *Clegg* v. *Hands*, 38 W. R. 433, 44 Ch. D. 503; Smith's L. C. (10th ed.), p. 65; *Hinde* v. *Gray*, 1 M. & Gr. 195, 208 (note); *Tatem* v. *Chaplin*, 2 H. Bl 133; *Fleetwood* v. *Hull*, 37 W. R. 714, 23 Q. B. D. 35; Redman & Lyon on Landlord and Tenant (4th ed.), p. 442.

Farwell, Q.C., in reply, referred to *Thomas* v. *Hayward*, L. R. 4 Ex. 311, 17 W. R. C. L. Dig. 73, and *Stevens* v. *Copp*, 17 W. R. 166, L. R. 4 Ex. 20.

LINDLEY, L.J., stated the facts, read the covenant, and continued: The object of that covenant is plain enough: indirectly to compel the lessee to get all his wines and spirits from the lessor or his successors. The plaintiffs, the executors of Sir Thomas White, have assigned the goodwill of his business to persons who are still carrying it on. The first question which appears to arise is whether the burden of this covenant runs with the tenant's interest under the lease; in short, whether it runs with the land, as distinguished from the reversion. We have now to deal with a claim for rent by the lessor's legal personal representatives, and the question is whether the burden of this covenant, which does not purport to bind the "assigns of the tenant," runs with the tenant's interest. Such questions are always a little troublesome and a little difficult; but, having regard to the authorities to which our attention has been called, and especially to *Tatem* v. *Chaplin*, *Clegg* v. *Hands* and *Fleetwood* v. *Hull*, it appears to me impossible to say that the assigns of the tenant are not bound by the covenant. I think this is clearly a covenant restraining the lessee and his assigns (though not named) from using any part of the property here designated in the manner which is forbidden. This is a covenant touching the land. That is plain, not only from what was said by this court in *Clegg* v. *Hands*, where, no doubt, we had a somewhat different problem to solve, but also from the decision of Charles, J., in *Fleetwood* v. *Hull*. On those authorities it is clear that this covenant does touch the land, and that the defendants are bound by it. Of course the defendants are being sued, not by the purchasers of the spirit business—who could not maintain any action of the kind—but by the executors of the lessor, who are in no worse position than the lessor himself would have been. I do not see that there could be any answer to an action brought by the executors for a breach of this covenant. What the damages might be in such an action I do not know; but I do not think it follows that they would be merely nominal, because the covenant says that the

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

liquors are to be supplied "by or through" the lessor or his successors, and it might be worth while for him or them to have the purchase made "through" them. But the amount of damages is immaterial. What is material is to see whether an action would not lie against the assign of the lessee for a breach of the covenant. If that is so, another clause of the lease becomes important. [The lord justice read the proviso, and continued:] That is not a provision for a set-off against rent, it is an offer of an abatement of rent. It appears to me it is a provision which enures for the benefit of the assign, just as the covenant binds the assign. Mr. Farwell made a point which seemed plausible, that the covenant is a personal covenant only. I do not think it is. He also said that there was now no covenant which the assign could observe. If the tenant, simply for his own convenience, happened to buy spirits of the person who had acquired the lessor's business, I should have grave doubts whether that would entitle the tenant to an abatement. But the whole difficulty disappears when you come to the conclusion that in such a case the tenant is still bound by the covenant. Then the proviso applies in actual terms, without any difficulty at all. We are asked to say whether, inasmuch as the present tenants have bought their liquors from the assignees of the lessor's business, they are entitled to this abatement. I have come to the conclusion that they are, though they did not rest their case on the ground that they were bound by the covenant, but on the ground that they were entitled to the abatement, whether or not they were bound, if they had in fact bought of the lessor's successors. I am not inclined to go as far as that, but I think the result of the learned judge's decision was correct.

A. L. SMITH, L.J.—I am of the same opinion. The first question to be determined is whether the burden of this covenant by the lessee runs with the land. Many authorities have been cited to us, and particularly three cases: *Tatem* v. *Chaplin*, *Clegg* v. *Hands*, and *Fleetwood* v. *Hull*. On those cases I come to the conclusion that this is a covenant running with the land, and that it binds the assignee of the lessee. Once you arrive at that conclusion the case is over, so far as the appellant is concerned. Therefore I think that Kekewich, J., arrived at a right result when he held that the only rent which could be demanded, it being proved that the assignee of the lessee was willing to perform the covenant, was £1,200 a year.

RIGBY, L.J.—In my judgment Mr. Farwell has not succeeded in displacing the cases which have been cited against him as showing that a covenant of this sort does in ordinary circumstances run with the land, so as to impose a burden upon the assign of the covenantor. Here the question turns upon whether or not such a covenant runs with the land, far more than on whether or not the assign is mentioned. There are some intermediate cases, where, for instance, there is a covenant not to assign without licence, that, I think, is differently construed according as you do or do not mention assigns. Where the lessee only covenants not to assign without licence, if afterwards the licence is given, the assignee is not bound by the original covenant. Here, of course, the lessors have assigned the business, and their assigns or successors can have no right to sue, nor could such a right be given them. Though the benefit of the covenant had been assigned in the most express manner by the lessors, the lessees would not be bound. But that is not the point. The question is, Is it an existing covenant, which Sir T. White's executors could enforce against the present tenants of the premises under this lease? I think it is. I am rather inclined to think that they could enforce it; if for no other reason, because the covenant provides that the lessee is to sell the exciseable liquors therein mentioned only when supplied "by or through" the lessors, their successors or assigns.

Then it is provided that so long as the lessee shall truly observe the covenant there is to be a reduction of the rent. For the purpose of this argument it is admitted that he has duly observed that covenant, if it be an existing covenant, that he has taken his wines and spirits from the successors in business of Sir T. White. I think the declaration made by the learned judge in the court below is correct; and I feel the more satisfaction in so deciding because I think the rent of £1,500 was never intended to be the rent of the property. I think it is very likely that the rent really agreed upon was £1,200, and that it was put in the form of a rent of £1,500 with a conditional abatement of £300 in order to make more certain the observance of the terms about the wines and spirits.

Appeal dismissed.

Solicitors, *Hewitt & Chapman; Mossop & Rolfe.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — March 12.

FLOYD v. LYONS & CO. (a.)

Landlord and tenant—Covenant by lessor to pay water rate—Water supplied for domestic use—Water supplied for trade purposes—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *s.* 3—*The New River Company's Act,* 1852 (15 & 16 *Vict. c. clx.*), *ss.* 35, 38, 40.

A covenant by the lessor of premises intended to be used as a café that he will pay all water rate "now or hereafter to be imposed or assessed upon the said premises, or on the lessor or lessees in respect thereof,"

Held, not to apply to a sum payable by the lessees, in virtue of a special contract under section 40 *of the New River Company's Act,* 1852, *for the supply of water for trade purposes.*

Appeal from Kekewich, J.

The plaintiff was owner and lessor of certain premises in Walbrook, in the city of London, the ground floor and basement of which premises were let to the defendants, Lyons & Co. (Limited), refreshment contractors, for a term of thirty years. By the lease the defendants covenanted "not to carry on any noisome or obnoxious trade or business," but it was agreed that the sale of refreshments on the premises should not be considered a breach of their covenant. The lessor covenanted "to pay all rates, taxes, assessments, water rate, and other outgoings, except the gas and electric light, now or hereafter to be imposed or assessed upon the said premises, or on the lessor or lessees in respect thereof." The premises in question, together with the adjoining premises in Budge-row, were used by the defendants wholly as a café, for the sale and consumption thereon of tea, coffee, and other light refreshments; and the defendants annually paid the sum of £47 8s. to the New River Co. for water consumed in respect of the café. £16 10s., part of the £47 8s., was for water for domestic purposes, 18s. was a special item for two water-closets, and £30 was payable by virtue of a special contract under

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

section 40 of the New River Co.'s Act, 1852, for the supply of water for trade purposes. The defendants, when they paid their rent, deducted half of the total sum of £47 8s. as being the proportion of water rates payable in respect of the Walbrook premises, and therefore, as they contended, payable by the plaintiff under her covenant. The plaintiff objected to being charged with any of the item of £30 for water for trade purposes; and took out a summons to have it determined whether she was liable to pay the sum charged by the New River Co. for the supply of water for the trade carried on upon the premises in question by the defendants.

Kekewich, J., decided that the plaintiff was so liable; and the plaintiff appealed.

Cutler, Q.C., and *R. F. MacSwinney*, for the appeal.

Alexander, Q.C., and *Ribton*, for the defendants.

Cutler, Q.C., replied.

LINDLEY, L.J.—The question is whether the covenant which the plaintiff has entered into binds her to pay that part of the water rate which is charged for water supplied for trade purposes, as distinguished from domestic purposes. It has been contended that the plaintiff is liable for all water rate whatsoever; but the concluding words of her covenant are important as showing the real nature of the charge which the parties intended to create. [The lord justice read the concluding words of the covenant, and continued:] Now, it is not strictly correct to speak of any water rate as being imposed upon the premises, but it is reasonably clear that the water rate to which the covenant is intended to apply is the rate payable under section 35 of the New River Co.'s Act, 1852, and does not include a charge like this now in question for the supply of water for trade purposes. Kekewich, J., seems to me to have given too little attention to those important concluding words of the covenant, and for that reason he has gone wrong. The appeal must therefore be allowed.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors, *T. G. Bullen; Edward Lee & Davis.*

High Court of Justice.

Chan. Div. North, J. — Feb. 26; March 2.

HUDDERSFIELD CORPORATION *v.* RAVENSTHORPE URBAN DISTRICT COUNCIL. (*a.*)

Water supply—Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *s.* 52 — *Alteration of boundaries — Local Government Act*, 1888 (51 *& 52 Vict. c.* 41), *s.* 57— *Local Government Act*, 1894 (56 *& 57 Vict. c.* 73), *s.* 36 (2).

Previous notice to a statutory water company of an extension of existing waterworks by a local authority into a new district added to its old district under the Local Government Act, 1888, *is not necessary even when the limits of supply of the water company include the new district. Such extension by the local authority is not "constructing waterworks" within the Public Health Act*, 1875, *s.* 52.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Motion.

The defendants were the Urban District Council of Ravensthorpe, which was formerly part of the parish of Mirfield, in the West Riding of Yorkshire. Their predecessors were many years ago formed as a local board. In 1867 the Ravensthorpe District Board, under section 75 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), contracted for a supply of water from the borough of Dewsbury, and laid mains so as to distribute it to customers in their own district.

The plaintiffs were the Huddersfield Municipal Corporation, suing as a water authority, and they were empowered by the Huddersfield Water Act, 1869 (32 & 33 Vict. c. cx.), as extended by the Huddersfield Waterworks Act, 1871 (34 & 35 Vict. c. xxiii.), to supply "the township of Mirfield, in the parish of Mirfield." In 1873 the portion of the parish of Mirfield which was not included in the Ravensthorpe Urban Sanitary District was formed into a local government district called the Mirfield Urban Sanitary District. Under the Local Government Act, 1894, the two divisions of Mirfield would become separate parishes unless the county council directed otherwise.

The West Riding Boundaries Committee (by delegation from the county council) made an order on the 11th of July, 1894, that—no special reason existing why each of the parts of the said parish should not be a separate parish—the part of the existing parish of Mirfield within the Mirfield local government district should be known as "Mirfield," and the part within the Ravensthorpe local government district should be known as "Ravensthorpe," and that the new parish of Mirfield should have the custody of the existing documents.

On the 13th of March, 1895, the committee made an order under section 57 of the Local Government Act, 1888 (duly confirmed by the Local Government Board), an area of about twenty acres was transferred from the urban district of Mirfield to the urban district of Ravensthorpe.

In January, 1897, the defendants began to extend their mains into the added area without giving notice to the plaintiffs under the Public Health Act, 1875, s. 52, and the plaintiffs now moved for an injunction to restrain the defendants from constructing any waterworks in the township of Mirfield or elsewhere within the limits of supply within which the plaintiffs were empowered to supply water by the Huddersfield Waterworks Acts, 1869 and 1871, without the consent of the plaintiffs, so long as the plaintiffs were able and willing to supply water proper and sufficient for all reasonable purposes for which it was required by the defendants.

Section 52 of the Public Health Act, 1875, is as follows: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament, or by any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which, and (as far as may be practicable) the extent to which, water is required by the local authority. It shall not be lawful for the local authority to construct any waterworks within such limits, if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority; and any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable or (if and so far as the charges of the company are not regulated by Parlia-

ment) as to the terms of supply, shall be settled by arbitration in manner provided by this Act."

Balfour Browne, Q.C., Swinfen Eady, Q.C., and *A. Glen*, for the plaintiffs.—The limits of our area are definite, and are not altered by the division of the parish under the Local Government Act, 1894. The transfer of the area could only be made subject to our rights, and the defendants have no right to construct waterworks without giving us notice under section 52 of the Public Health Act, 1875.

Vernon Smith, Q.C., and *R. C. Glen*, for the defendants.—The plaintiffs' limits of supply are the township of Mirfield, in the parish of Mirfield. No part of our district is within the present parish of Mirfield. The plaintiffs had no exclusive rights over Mirfield: see the Halifax Water and Gas Extension Act, 1870 (35 & 36 Vict. c. xcv., s. 11). An addition to existing waterworks is not a construction of waterworks within section 52 of the Public Health Act, 1875: *Cleveland Water Co.* v. *Redcar Local Board*, 43 W. R. 90, [1895] 1 Ch. 168; *West Surrey Water Co.* v. *Chertsey Union*, 43 W. R. 6, [1894] 3 Ch. 513.

Browne, Q.C., replied.

NORTH, J.—The Huddersfield Water Acts, which fix the plaintiffs' limits of supply, do not give them an exclusive right of supply within those limits, but merely declare within what limits water may be supplied. The limits defined in the schedule include "the township of Mirfield, in the parish of Mirfield." That is merely a geographical description of a definite area, and cannot be considered as equivalent to "the township of Mirfield, in the parish of Mirfield, for the time being." The Local Government Act, 1888, s. 57, sub-section 1 (*c*), enables a county council to make an order for the transfer of the whole or any part of one urban or rural district to another, such order being subject to confirmation by the Local Government Board, and by section 59, sub-section 4 (*a*), the abolition, restriction, or establishment or extension of jurisdiction of any local authority in or over any part of the area affected by the order is provided for. Then the Local Government Act, 1894, known as the Parish Councils Act, was passed. Section 36, sub-section 2, provides that "where a parish is, at the passing of this Act, situate in more than one urban district, the parts of the parish in each such district shall, as from the appointed day, unless the county council for special reasons otherwise direct, . . . be separate parishes, in like manner as if they had been constituted separate parishes under the Divided Parishes and Poor Law Amendment Act, 1876, and the Acts amending the same."

The contention of the defendants is that the Local Government Act, 1894, s. 36, altered the limits of supply of the plaintiffs, and made them different from those fixed by the Huddersfield Waterworks Act, 1871. With that I do not agree, the limits remained exactly the same as before the Local Government Act, 1894, came into operation, and the Act effected no alteration in local area. The boundaries committee might have united the old parish of Mirfield to Dewsbury, and called it Dewsbury, and in that case the parish of Mirfield would have disappeared altogether. It cannot reasonably be supposed that such a course would have altered the plaintiffs' limits of supply. The order of the boundaries committee of the 13th of March, 1895, was confirmed by the Local Government Board on the 31st of August, 1895. The urban district of Ravensthorpe was increased by that order, which took away from the urban district of Mirfield a little plot of about twenty acres. The defendants are the local authority for the urban district of Ravensthorpe as it now stands. Their duties apply to the whole of such district, including the added area—that is to say, they have the same duties with respect to the added area as with respect to the rest of the district. They are now proceeding to extend their existing water system into their new district, and to lay down additional mains in order to provide such new district with water. The whole district is within the plaintiffs' limits of supply, and they now seek to restrain the defendants, upon the ground that they have not complied with section 52 of the Public Health Act, 1875. The point is absolutely covered by the authority cited, which is precisely in point. The judgment in *Cleveland Water Co.* v. *Redcar Local Board*, 43 W. R. 90, [1895] 1 Ch. 168, pp. 173-175, might be read as part of my judgment in this case. It draws a distinction between the extension of existing waterworks and the construction of new waterworks. In that case very much more had been done than has been done here. As a matter of construction I am not satisfied that section 52 applies to more than section 51 (1), but it is not necessary to go into that. The defendants have had a system of pipes through their district for many years, and are now extending that system. It does not matter whether the existing system constitutes "waterworks" or not, for if it does not, neither does the new system; if it does, the new system is only an extension of those waterworks. An attempt has been made to distinguish *Cleveland Water Co.* v. *Redcar Local Board*, upon the ground that in that case there was only one district from the first, whereas here the district has been increased in area, but I do not see that that makes any difference. The defendants' duties apply to their present district as it stands, the fact that it has been increased can make no difference. Is there any difference made by the terms of the order of the 13th of March, 1895?

It is argued that the defendants took the added area subject to the rights, liabilities, and obligations which were attaching to the Mirfield Urban District Council in respect thereof. But I cannot see that the Mirfield Urban District Council were under liability to take water from the plaintiffs, and if this is so, no liability passed to the defendants. But even supposing that the Mirfield Urban District Council were under an obligation not to construct waterworks without notice to the plaintiffs, and that liability passed to the defendants, the answer is that the defendants are not constructing waterworks.

The point raised by the evidence, whether the plaintiffs are in fact able and willing to supply pure water, does not arise. As there is nothing to compel the defendants to give notice under section 52, so it is unnecessary to consider whether, if such notice were given, it could be complied with. In any case it would be a matter for arbitration as provided by the Act.

The plaintiffs are apprehensive of a large loss of income, but in my opinion their fears are not justified. They have the advantage of possession of the present water supply; but even if they do suffer loss I cannot go behind the law as it stands. The plaintiffs have mistaken their rights and the application must be dismissed.

Solicitors for plaintiffs, *Riddell, Vaizey, & Smith*, for *F. C. Lloyd*, Huddersfield.

Solicitors for defendants, *Jaques & Co.*, for *Watts & Son*, Dewsbury.

Chan. Div. } March 7, 20.
Stirling, J. }

LEWIS v. POWELL. (a.)

Practice—Discovery—Production of documents—Documents in possession of former solicitor—Solicitor's lien—Dispute as to bill of costs—R. S. C., ord. 31, *r.* 14.

The principle that it is not a good defence on a summons for production of documents to say that the documents are in the possession of a former solicitor of the person called on to produce, who has a lien on them for his bill of costs, applies also to a case where it is alleged, in addition, that the bill of costs is disputed and that there is a good defence to it. An order for production will be made in such a case with liberty to apply, in order to prevent any hardship.

Rodick *v.* Gandell, 10 *Beav.* 270, *and* Vale *v.* Oppert, 23 *W. R.* 780, *L. R.* 10 *Ch. App.* 340, *applied.*

This was a summons by the defendant to compel production of documents, and was resisted by the plaintiff on the ground that the documents were in the possession of former solicitors of his, and were subject to their lien for a bill of costs which he disputed.

On the 1st of January, 1897, the plaintiff filed an affidavit of documents and stated that certain documents mentioned in the schedule thereto were in the possession of his former solicitors.

On the present summons being taken out for a further and better affidavit of documents and for discovery, the plaintiff on the 26th of February filed a second affidavit to the effect that he had applied to the solicitors for the documents, but his application had been refused. In paragraph 6 of this affidavit he stated that he was unwilling to discharge the lien of the solicitors, as he believed that he had a good claim against them for negligence in the conduct of his business, which claim could be more easily dealt with in an action for negligence after the hearing of the present action. He accordingly declined to take any further steps to recover possession of the documents in question.

Grosvenor Woods, Q.C., and *Lacy Smith*, for the summons.—The rule laid down in *Ex parte Shaw*, Jac. 270, that, in litigation between two parties when one of them resists discovery on the ground that the documents are in the hands of his former solicitors, it is no defence that the solicitors have a lien upon them and decline to hand them over until they are paid, has been recognized in *Taylor* v. *Rundell*, 1 Ph. 222. In *Rodick* v. *Gandell*, 10 Beav. 270, an order for production was made and leave was given to the defendant to apply if he found any difficulty in complying with the order. *Liddell* v. *Norton*, Kay, Appx. xi., 2 W. R. Ch. Dig. 71, and *Hope* v. *Liddell*, 3 W. R. 581, 7 De G. M. & G. 331, are also authorities. *Goodchap* v. *Weaving*, 16 Jur. 586, also applies. In *Vale* v. *Oppert*, 23 W. R. 780, L. R. 10 Ch. App. 340, an order for production was made, though there had been a change of solicitors during the litigation; and *Ex parte Shaw* was there cited by James, L.J.

They also referred to Seton, vol. 1, p. 68, Cordery on Solicitors, p. 301.

Graham Hastings, Q.C., and *E. Ford*, for the respondent.—The documents are not in the plaintiff's power, and can only be obtained by paying a disputed claim. [STIRLING, J.—Is it enough for the plaintiff to say, "I have a claim for negligence against my solicitor?"] We submit that it is. *Rodick* v. *Gandell* has nothing to do with this case. *Liddell* v. *Norton* is in our favour because it shows the difference between the case of a mortgagee and the case of a solicitor. *Hope* v. *Liddell* and *Goodchap* v. *Weaving* only come to this, that where you have no defence to the bill of costs it ought to be paid. The order in *Vale* v. *Oppert* would never have been made if there had been a defence to the bill in that case: *Wroughton* v. *Barclay*, 11 Jur. 274, and *Kettlewell* v. *Barstow*, 20 W. R. 621. [STIRLING, J.—*Kettlewell* v. *Barstow* appears to me to be entirely contrary to *Vale* v. *Oppert*.] The court is asked to extend the doctrine of *Ex parte Shaw* to a case in which it has never yet been applied. The authorities simply come to this, that it is not sufficient to say there is a bill and it is unpaid, but they do not apply at all to the case of a disputed bill.

Grosvenor Woods, Q.C., replied.

Cur. adv. vult.

STIRLING, J., after stating the facts, continued:—In this state of facts what is the right of the defendant to production of the documents in question. It is not said that the plaintiff has not given full information as regards the documents now in his possession or power, but the question is how far the lien of the plaintiff's former solicitors precludes the court from making an order for discovery in the usual form. This question has been repeatedly before the courts. The case usually referred to as stating the rule which applies where documents are held by a solicitor subject to his lien for costs, is *Ex parte Shaw*. Lord Eldon there says: "Where a motion is made for a party to produce papers in his custody, possession, or power, the order made is for him to produce them, and if they are in the hands of his solicitor, and he cannot produce them without paying his bill of costs, he must pay it." This statement has been repeatedly cited in subsequent cases without a word of disapproval, and is expressly approved by Turner, L.J., in *Goodchap* v. *Weaving*; but questions have arisen from time to time as to how far the court would go in compelling discovery where documents were in possession of a former solicitor who insisted upon his lien. One of those cases was *Rodick* v. *Gandell*, where the defendants who became bankrupt after the filing of the bill put in an answer by which they admitted that there were in the possession of their solicitor two pass-books, but alleged that they had come into his possession before the bankruptcy, and that he had a lien thereon for costs incurred prior to that date, and the plaintiff moved for production of the pass-books. Lord Langdale there said: "The defendants are bound to produce these documents if they can; and if they find a difficulty they must come to the court to give them an opportunity of taking such proceedings against their solicitor as may be proper to compel the production. I cannot think that the solicitor will oppose any difficulty in allowing an inspection of the documents in his possession; and it is to be observed that the objection to production is now made, not by the solicitor, but by the clients," and he made the order, but left it open to the defendants to make any application to be relieved if they should be prevented from complying with it. In *Vale* v. *Oppert* a similar question arose. There the defendant shortly after filing an affidavit as to documents entered into liquidation of his affairs by arrangement. The plaintiff applied for production of the documents, and this was resisted by the defendant on the ground that they were in the possession of his former solicitors, who claimed a lien on them. Bacon, V.C., made an order for the

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

production, and James, L.J., n affirming the order, said: "If an order for production were refused, we should be enabling defendants to resort to the device of delivering documents to their solicitor, changing him, and then refusing production on the ground that they were unable to pay his bill. That is a device which the court cannot encourage. The order of the Vice-Chancellor must stand, but the defendant must have liberty to apply if it turns out that he really cannot get the documents produced. He will not, however, be excused on the ground of his making a mere formal application to Messrs. Elmslie & Co., as if he did not care whether he got them or not; he must satisfy the court he has done his best to comply with the order; and the plaintiff must not issue attachment without the leave of the court." These cases show that the mere fact that documents are in possession of a former solicitor, who claims a lien upon them, is not a sufficient answer to the application in the usual mode for discovery; but the court takes care in applying the rule that the client shall not be subjected to oppression, and in former times the order for discovery was qualified by reserving liberty to apply, and by imposing a condition that attachment should not be issued without the leave of the court. That provision in the order is, however, not now necessary, because since the Judicature Act a writ of attachment cannot be issued without the leave of the court.

If there was nothing more in this case I should have thought that the order ought to be made. But the question which I have to consider is, whether the statement in paragraph 6 of the plaintiff's second affidavit makes any difference. In substance the plaintiff disputes the bill of costs which has been delivered, and says he has a good claim for negligence against the solicitors. Ought this to be allowed as an answer to an ordinary claim for production? It is said that in the former cases there was no dispute as to bill of costs, and no case of negligence made against the solicitors, and that the rule of the court is based upon the theory that it is desirable to discourage collusion between a solicitor and his client for the purpose of defeating an application for discovery, and therefore does not extend to a case where the client is disputing his solicitor's bill. I shall assume that that is the foundation of the rule as it was unquestionably the foundation of the judgment of James, L.J., in *Vale* v. *Oppert*. Now, I do not desire in the slightest degree to say that I in any way suspect the statements in the plaintiff's affidavits to be unfounded, but I must point out that nothing is more common than for a client who quarrels with his solicitor and leaves him, to be dissatisfied with the mode in which the solicitor has conducted his business. If I were to accede to this argument, that is an answer which would be resorted to in almost every case where there had been a change of solicitors, and it would throw upon the court the burden of considering whether an action for negligence against the solicitor would succeed. I decline to entertain any such question. The test in every case is whether the person called upon to make production has done his best to get possession of the documents claimed by his solicitor. The court has the means of judging that question; it has not the means of judging whether an action for negligence against the solicitor will succeed or not. Therefore I think that the mere statement by the client that he has a claim of negligence against the solicitor ought not to be accepted as releasing him from his obligation. But I must say that, at all times, and still more at the present time, the court is desirous that orders for production should not be made an instrument of oppression. Therefore the court, in making the order for production, gives liberty to apply, to provide for the contingency of the party called upon to produce the documents finding a difficulty in obtaining them. Of course it will form part of the order in the present case. I was desirous of ascertaining what view the plaintiff's solicitors took, and I therefore directed the matter to stand over for a fortnight. The plaintiff stated that he was perfectly willing that these documents should be produced if the solicitors were willing to give them up. An application has now been made to the solicitors, and it appears that they simply desire to adhere to their legal position until their lien is discharged. I cannot blame them for taking up the position. It is no part of my duty to say what can be done by the plaintiff to enable production to be obtained, but when a client is desirous of getting possession of documents in the hands of his solicitors, for his own purposes, it is usually not difficult to come to some arrangement by which a substantial guarantee may be substituted for the somewhat shadowy one of keeping the documents, which the solicitors happen to have in their possession. At all events, it does not appear to me to be impossible for the plaintiff to obtain production of the documents in question. I think, therefore, that the order, qualified in the way I have mentioned, ought to go.

Solicitors, *Woodham Smith; Hanbury, Whitting, & Nicholson.*

Chan. Div. Kekewich, J. } March 19.

In re HAYWARD.
HAYWARD *v.* HAYWARD. (*a.*)

Bankruptcy—Life interest—Forfeiture on bankruptcy—Colonial bankruptcy—English domicil—Property not "vested in or payable to" colonial trustee.

A colonial bankruptcy, where the debtor still retains his English domicil, will not of itself be sufficient to work a forfeiture of his life interest under an English will determinable on his becoming bankrupt or doing or suffering something whereby his interest, if belonging absolutely to him, would become vested in, or payable to, some other person or persons.

In re Blithman, *L. R.* 2 *Eq.* 23, 14 W. Ch. Dig. 51, *followed.*

Adjourned summons.

By her will made in 1882, Josephine Elizabeth Hayward bequeathed to her trustees the sum of £4,000 (reduced by codicil to £3,500) upon trust, to invest the same and pay the income to her son, Frederick Berger Hayward, the defendant, "during his life, or until he shall be outlawed, or become bankrupt, or file a petition for liquidation of his affairs, or shall assign, charge, or incumber, or attempt or affect to assign, charge, or incumber the said interest, dividends, or income, or some part thereof, or shall do or suffer something whereby the same or some part thereof would, through his own act or default, or by operation or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons." After the determination of this trust there was a gift over of the principal sum on trusts similar to those declared of the residuary estate of the testatrix.

The testatrix died in 1892. For some years subsequent to the testatrix's death, the defendant,

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Frederick Berger Hayward, was temporarily resident in New Zealand, still retaining his English domicil. The trustees from time to time sent the income of the fund to him, and the last instalment was forwarded to him by them on the 13th of March, 1896.

On the 16th of March, 1896, the trustees received a letter from the official assignee in bankruptcy in Auckland, New Zealand, giving them notice that Frederick Berger Hayward had been adjudicated bankrupt at Auckland on a creditor's petition on the 16th of December, 1895, and claiming the funds belonging to him. In December, 1896, the bankruptcy was annulled, all the debts having been paid in full. The trustees of the will took out the present summons asking whether the defendant Frederick Berger Hayward's interest in the fund had been determined by his bankruptcy in New Zealand.

Section 55 of the Bankruptcy Act, 1892, of New Zealand enacts that "Upon adjudication the property of the bankrupt, whatsoever and wheresoever situate, shall vest in the official assignee of the court in which the order of adjudication was made, as such official assignee," and the word "property" as defined by the same Act, "means and includes land, money, goods, things in action, goodwill, and every description of property whether real or personal and whether situate in New Zealand or elsewhere, also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

Freeman, for the trustees.

Mark L. Romer, for the defendant Frederick Berger Hayward. — This colonial bankruptcy does not work a forfeiture of this interest. The bankrupt had never lost his English domicil, and the bankruptcy did not vest *ipso facto* in the official assignee the debtor's property, but the assignee, in order to validate and perfect his title, would have had to come over to this country and obtain the help of the English court: *In re Blithman*, L. R. 2, Eq. 23, 14 W. R. Ch. Dig. 51. The case of *In re Davidson's Settlement Trusts*, 21 W. R. 452, L. R. 15 Eq. 383, does not apply, for in that case the debtor was made bankrupt on his own petition, and the assignee came over here and asked for payment. These cases are referred to in Mr. Westlake's book on Private International Law, par. 134.

Ball, for another defendant who was entitled to the next life interest in the fund in question, expectant on the determination of Frederick Berger Hayward's interest.—The clause in the will means any bankruptcy which is recognized: *In re Aylwin's Trust*, 21 W. R. 864, L. R. 16 Eq. 585, and a colonial bankruptcy will be recognized in England under section 118 of the Bankruptcy Act, 1883. The question of domicil is not the true test to apply in a case like the present.

KEKEWICH, J.—Upon the proper construction of the clause in the will there is no determination of the defendant Frederick Berger Hayward's life estate until he has become subject to the bankruptcy laws, so that this interest would be payable to someone else.

Now, having regard to this colonial bankruptcy, could the New Zealand trustee in bankruptcy sue over here on a bill and get a declaration in his favour? I mean of course but for this forfeiture clause. That seems to me to depend upon the question whether this was a good New Zealand bankruptcy. By the law of that colony the personal property of the bankrupt became vested in the trustee in bankruptcy. I am dealing with the question of the ownership of the property, and I should have jumped to the conclusion that *possessio bonorum* in New Zealand was equivalent to a general assignment for value and passed to the trustee all that the bankrupt could pass himself. There is, however, authority on this point —namely, *In re Blithman*, where Lord Romilly puts his judgment on the ground of domicil, and says: "I am of opinion upon examining all the cases which have been cited to me, and considering it as carefully as I can, that this is a question of domicil and depends upon domicil alone; and that if Henwood was a domiciled Australian at the time, then that this property passed to the assignees, but that if he was not, then it passes to his legal personal representative, and she is the person entitled to receive it." So that there can be no question that Lord Romilly would have held in the present case that this interest did not become payable to the trustee in bankruptcy, but continued payable to the defendant himself. That case was commented on by James, L.J., sitting for Wickens, V.C., in *In re Davidson's Settlement Trusts*, and the learned judge there said it was not necessary to consider *In re Blithman*, for in the former case the debtor had been adjudicated bankrupt on his own petition. In the present instance that is not the case, for the defendant was made bankrupt behind his back, he was domiciled in England, and *In re Davidson's Settlement Trusts* is not adverse so as to overrule *In re Blithman*. I found in my reports a note referring to the recent case of *In re Lawson's Trusts*, 44 W. R. 280, [1896] 1 Ch. 175, and I looked at that case, but it does not help us. North, J., there followed *In re Davidson's Settlement Trusts*.

In paragraph 134 of his book on Private International Law, Mr. Westlake gives the general rule with regard to the personal property in England of bankrupts domiciled abroad; and then in the note to that paragraph the author goes on to point out the decisions in *In re Blithman* and *In re Davidson's Settlement Trusts*.

I have before me Story on the Conflict of Laws, and so far as I can see, the domicil question was never really discussed. There seems to have been a foreign domicile in all the cases of foreign bankruptcies, and an English domicil in all cases of English bankruptcies.

I think I must decide this case according to *In re Blithman*. If that case is wrong it must be overruled. It was not open to James, L.J., sitting as a judge of first instance, to overrule it. I think, therefore, that this adjudication did not make the property payable to the trustee in bankruptcy.

Solicitors, *Frank Richardson & Sadler*.

Chan. Div.
Kekewich, J. } March 3, 4.

In re HAWKER.
DUFF *v.* HAWKER. (*a.*)

Settled land—Application of capital money—Works outside the Settled Land Acts—Repairs—Jurisdiction—Salvage—Infant tenant in tail in possession—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 25—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13.

Where settled land is vested in an infant tenant in tail in possession, the court still has power under its original general jurisdiction, notwithstanding the Settled Land Acts, to sanction, with the consent of the next remainder-

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

man, the expenditure of capital money upon works not coming within the scope of those Acts, but such expenditure will not be sanctioned unless a case of salvage is clearly proved.

Adjourned summons.

This was a summons by the trustees of a settlement comprising certain freehold estates at Longparish and Bullington, Hants, and Spitalfields, London, made by the will of the late Colonel Peter Hawker, deceased, and dated the 21st of November, 1843, for the determination of (*inter alia*) the following questions—namely, whether the applicants as trustees of the above-mentioned settlement for the purposes of the Settled Land Acts could apply the capital moneys in their hands or under their control, consisting of a sum of £2,442 3s. Consols, or any part thereof, in or towards the carrying out on the above-mentioned Spitalfields and Longparish and Bullington estates of certain works and improvements enumerated in specifications and reports prepared by the surveyors therein named, and recommended by them to be done.

The specifications and reports included improvements which fell within the scope of the Settled Land Acts, and also certain repairs which avowedly did not fall within the purview of those Acts, but which, as the evidence showed, were required to be executed in order to keep the property advantageously let.

Upon inquiry in chambers the expenditure of £652 on the Spitalfields property, and £800 on the Hampshire property was allowed in respect of those improvements which fell within the Settled Land Acts, and the summons was adjourned into court for the argument of counsel upon the question whether the court had jurisdiction to sanction the further expenditure of capital money upon the repairs and works not coming within the scope of the Settled Land Acts.

The defendant was the infant tenant in tail in possession of the settled estates. The remainderman had not been made a party to the summons.

S. Dickinson, for the trustees.—The jurisdiction of the court has often been exercised in sanctioning expenditure similar to that now asked. The court exercised its general jurisdiction and allowed expenditure of money on settled property in the interests of infants in *Frith* v. *Cameron*, 19 W. R. 886, L. R. 12 Eq. 169, and *In re Jackson*, 21 Ch. D. 786, 31 W. R. Dig. 204, and your lordship sanctioned the outlay of settled money under the original jurisdiction of the court in *Conway* v. *Fenton*, 37 W. R. 156, 40 Ch. D. 512. An advance of settled money was allowed in *In re Household*, 27 Ch. D. 553, 33 W. R. Dig. 105, on evidence that the outlay would be to the advantage of the infant remaindermen. The jurisdiction was recognized in *In re Hotchkys*, 34 W. R. 569, 32 Ch. D. 408; and in *In re De Teissier's Settled Estates*, 41 W. R. 186, [1893] 1 Ch. 153, the question of jurisdiction was left open; Chitty, J., did not decide it.

T. Arnold Herbert, for the infant tenant in tail.—Whatever jurisdiction the court may have had to expend capital money prior to the Settled Land Acts, the effect of those Acts is to confine the jurisdiction of the court to the expenditure within those Acts. *In re De Teissier* and *In re Lord Gerard's Settled Estates*, [1893] 3 Ch. 252, 42 W. R. Dig. 63, are in favour of that contention. The general jurisdiction of the court was not recognized in *In re Ormrod's Settled Estates*, 40 W. R. 490, [1892] 2 Ch. 318, nor in *In re The Twyford Abbey Settled Estates*, 30 W. R. 268, nor in *Brunskill* v. *Caird*, 21 W. R. 943, L. R. 16 Eq. 493. Even assuming that I am wrong on the question of jurisdiction, there is no case where the court made such an order, where there was a tenant in tail in remainder, without his consent, and there is no case where the court sanctioned the expenditure except where the infant was living on the land.

KEKEWICH, J.—This summons was adjourned into court so that I could hear the argument of counsel upon the question of the jurisdiction of the court and its extent and limit in cases like the present. In chambers it was said on the one hand that this case was within *Conway* v. *Fenton*, 37 W. R. 156, 40 Ch. D. 512, and on the other hand that it fell within *In re De Teissier's Settled Estates*, but I was not then satisfied with either contention.

I have before me the infant tenant in tail in possession; there is no contingency, he is the actual tenant in tail now, and the trustees have powers of management over the settled estates. There are several remainders over, and I am told that I can have the next tenant in tail in remainder added as a party if necessary. [His lordship then referred to the various other questions in the summons which had been determined in chambers, and continued:] Then comes the question of the repairs to the agricultural estate in Hampshire and to the urban property at Spitalfields. I was prepared to direct the application of a competent part of the money in hand towards any improvements which fell within the Settled Land Acts, and I directed an inquiry for that purpose. The result of that inquiry shows that it is proposed to spend in respect of those improvements £652 on the Spitalfields property and £800 on the Hampshire estates. In addition to these sums, the evidence goes to show that there is need of a considerable expenditure upon repairs which avowedly do not fall within the Settled Land Acts, not even within sub-section 2 of section 13 of the Settled Land Act, 1890, because as these properties are already let to tenants they do not fall within the description there given.

It was, however, said that independently of the Settled Land Acts, I could, under the general jurisdiction of the court, direct the outlay of capital money, and *Conway* v. *Fenton* was referred to. That was an extremely peculiar case, and I did not decide such a question as arises here, it was impossible in that case to deal with the land without first of all incurring some expenditure.

The case of *Conway* v. *Fenton* does not touch the question with which I have now to deal, but the other cases cited to me are in point, and the summary of cases compiled by Mr. Kenyon Parker in *In re Jackson*, 21 Ch. D. at pp. 787-8, 31 W. R. Dig. 204, is also extremely useful. I am asked to sanction under the general jurisdiction of the court the expenditure of capital money upon these repairs which are outside what the Settled Land Acts allow. My impression is that if I were satisfied that the repairs were necessary and for the benefit of the infant, then, with the assent of the tenant in tail in remainder, I might assent to an application of capital money in a manner which otherwise would not be strictly right or permissible. I do not intend so to decide, but such is my impression.

It has been argued that I have no jurisdiction under the Act to sanction this outlay; to that proposition I do not accede. Nothing short of express words will suffice to take away the general jurisdiction of the court, and I ought not to infer that it has been taken away unless I find express words to that effect. It is said that the words of section 21 of the Settled Land Act, 1882, are imperative, but I think the words of that section refer only to the Act itself and are not sufficient to take away the general jurisdiction which existed prior to the Act.

I do not comment upon the decision of Chitty, J.,

in *In re De Teissier's Settled Estates*, but I do concur entirely with what he says concerning the operation of the Settled Land Acts, as summed up in the last paragraph to the head-note [1893] 1 Ch. on p. 153, "that whether the Settled Land Acts did or did not exclude or fetter the general jurisdiction of the court—as to which no opinion was expressed—they were of great assistance in guiding the court to a proper conclusion as to what repairs and improvements should be allowed." I find the provisions of the Act a great assistance in the present case. It was open to the Legislature in its subsequent enactments to have provided for the decision in *Conway* v. *Fenton* if it had thought fit, but it did not do so, and the Act of 1890, in sub-section 2 of section 13, limits the application of capital money to "additions to or alterations in buildings," as Chitty, J., points out in *In re De Teissier*.

The court looks with jealousy upon repairs done for a tenant for life. The repairs should be done by the tenant for life. The court does not regard with so much jealousy the case of a tenant in tail, but still I am not in a hurry to spend capital money in repairs. I do not think I can go beyond this; Chitty, J., would not go so far. For this to be a proper case for such expenditure it should be one of salvage, and one in which the land would be lost unless the expenditure were made. If the trustees had spent their own money, they would have a strong case upon which to come to the court and ask to be repaid, or if they had spent trust money they would have got an inquiry as to how far the trust money had been properly expended.

I think it is a simple step to say that the court might, with the concurrence of the tenant in tail in remainder, sanction the expenditure of an infant's money when it was a case of saving the estate—that is, a case of salvage. Salvage cases are always extremely difficult to determine, because one does not know what would happen if the money was not expended. Cases which arise under sanitary authorities, or cases of premiums on policies, do not admit of doubt, but other cases do; as, for instance, the case of a farm which it was impossible to let to a particular tenant at a particular rent without the execution of repairs, but it does not follow that the same farm could not be let to another tenant without any previous expenditure on repairs. I should want very clear evidence that the money expended would bring in its equivalent, either in the improved value of the estate or in increased income, so as to bring the case within the principle of salvage. If I had proper evidence I should be inclined to say that the court had jurisdiction to sanction the expenditure of the infant's money so as to debar the infant from hereafter calling on the trustees to replace it. In a case where the infant was absolutely entitled I think the expenditure might be sanctioned, and also in the case of an infant tenant in tail with the consent of the remainderman.

In the present case, however, I have not sufficient evidence and I am not satisfied that, after the sums of £800 and £652 already allowed have been spent, any further sums would come within the salvage rule. I accordingly shall only make an order sanctioning the expenditure certified by the chief clerk as coming within the scope of the Settled Land Acts.

Solicitors, *Garrard, James, & Wolfe.*

Chan. Div. Kekewich, J. — Feb. 9, 10.

PRIESTLEY v. ELLIS. (*a.*)

Settlement—Trust for payment of debts—Deed of family arrangement—No notice to creditors—Death of settlor—Binding trust—Liability of estate.

Where a father and son by deed appoint property to trustees upon trust (subject to the father's life interest therein) to sell the same or any part thereof with the consent of the father and son during their joint lives and of the survivor of them during his life, and after the survivor's death at the discretion of the trustees, and out of the proceeds of sale and out of the rents and profits until sale to pay the father's debts owing during his life or at his decease, and to pay the surplus proceeds and convey the unsold property to the trustees of a settlement of even date under which the father was tenant for life and the son tenant in tail in remainder, a binding trust in favour of the father's creditors will arise upon his death although the purport of the deed has not been communicated to them, and the unsold part of the property comprised in the deed will remain charged with the unsatisfied debts of the father notwithstanding the fact that it has been conveyed to the settlement trustees.

Synnot v. Simpson, 5 *H. L. Cas.* 121, *and* Garrard v. Lord Lauderdale, 2 *Russ. & M.* 451, *distinguished.*

At the date of the deed of family arrangement hereinafter set out, Richard Lloyd-Edwards was indebted to his sister, Catherine Wynne-Edwards, in a sum of £2,266 13s. 4d., and continued so indebted to her until his death. By the said deed of family arrangement dated the 16th of October, 1867, Richard Lloyd-Edwards and Francis William Lloyd-Edwards, as part of a family arrangement and in exercise of a joint power of appointment by deed vested in them by virtue of a disentailing assurance dated the 15th of October, 1867, appointed that the hereditaments described in the schedule thereto, forming part of the hereditaments comprised in the said disentailing assurance and containing forty-nine different lots, should, immediately after the execution thereof, but subject and without prejudice to such charges and incumbrances as were then subsisting upon the said hereditaments, remain to the use of Richard during his life, and after his decease to the use of the said John Griffith Wynn Griffith and Hugh John Ellis Nanney their heirs and assigns upon trust that they and their assigns or other the trustees or trustee thereof (thereinafter called the trustees or trustee) should, with the concurrence of Richard and the consent in writing of Francis William during their joint lives and with the concurrence or like consent (as the case might be) of the survivor of them during his life, and after the death of the survivor at the discretion of the trustees or trustee sell the said hereditaments or any part thereof respectively in manner therein mentioned and should stand possessed of the moneys to arise from any such sale (including in case any such sale should be made in the lifetime of Richard such part of the said moneys as should represent his life estate) and also of the rents and profits thereof until such sale (and which said moneys, rents, and profits were thereinafter referred to as "the trust funds") in trust in payment in such order and in such manner as the trustees or trustee should (with the concurrence of Richard during his lifetime) order and determine, of all debts or sums of money which should from time to time during the lifetime of Richard or at the time of his decease be due and owing from Richard upon

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

specialty, simple contract, or otherwise to any person or persons whomsoever and all interest and arrears of interest due in respect thereof; and after satisfying all the trusts aforesaid should stand possessed of the surplus which should remain of the trust funds and also of so much of the said hereditaments as should then remain unsold, as to such surplus trust funds upon trust to pay over the same to the trustees for the time being of the next thereinafter mentioned indenture of settlement to be held by such trustees upon the trusts upon which such surplus trust funds would be held in case the same were moneys arising from any exercise of the powers of sale and exchange contained in the said indenture of settlement which bore even date with the said deed of family arrangement and was made between the said Richard Lloyd-Edwards of the first part, the said Francis William Lloyd-Edwards of the second part, and the defendant Benjamin Thomas Ellis and Richard Edwards Priestley of the third part, and as to such unsold hereditaments and premises upon trust to convey the same to the last-mentioned trustees, to the uses and upon the trusts in and by the said indenture of settlement expressed and declared concerning the several hereditaments thereby appointed or such of them as should then be subsisting or capable of taking effect, but not so as to increase or multiply charges or powers of charging. And it was thereby provided that in case the said hereditaments or any part thereof should be sold in the lifetime of Richard under the aforesaid trust the same should be sold as an estate in possession, and it was thereby provided that the trustees or trustee should stand possessed of the said hereditaments upon trust to permit the rents and profits thereof or of any portion thereof for the time being remaining unsold (after providing for the payment of the interest upon any mortgages) to be received by the person or persons for the time being entitled to the receipt of the rents and profits of the hereditaments comprised in the said indenture of settlement as tenant for life or in tail under the limitations of the said settlement.

Under the limitations of the said indenture of settlement Richard was legal tenant for life, with remainder to the use of Francis William for life, with remainder to the use of his first and other sons in tail, with remainders over.

The contents of the deed of family arrangement were never communicated to Catherine Wynne-Edwards or to any other creditor of Richard.

None of the lands comprised in the deed of family arrangement were sold in the lifetime of Richard, and he died on the 18th of January, 1876, having by his will, dated the 22nd of December, 1875, devised all his real estate (subject to certain annuities charged thereon) to Francis William in fee simple, and bequeathed the residue of his personal estate (subject to the payment of his just debts) to Francis William absolutely, and appointed him and Robert Carreg and the defendant, Benjamin Thomas Ellis, executors thereof. The said will was proved by Francis William alone. At the time of his death Richard was indebted in a considerable amount to creditors.

Interest on the said sum of £2,266 13s. 4d. had been duly paid to Catherine Wynne-Edwards by Richard during his life.

On the 29th of August, 1888, the said trustees of the deed of family arrangement exercised their power of sale under that deed and sold some of the lands comprised therein, and out of the proceeds of sale paid all the debts of Richard, except the debt of £2,266 13s. 4d. owing to Catherine Wynne-Edwards, of which debt, as they alleged, they were then unaware, and by an indenture of conveyance dated the 12th of November, 1889, and made between the said trustees of the first part, the said Francis William Lloyd-Edwards of the second part, and the defendants, Benjamin Thomas Ellis and Owen Lloyd Jones Evans (who were then the duly-appointed trustees of the said indenture of settlement) of the third part, and indorsed on the deed of family arrangement, the said trustees of the deed of family arrangement thereby conveyed the lands specified in the schedule thereto, comprising forty-two out of the original forty-nine lots, and all other, if any, the hereditaments comprised in the deed of family arrangement and then remaining unsold, but subject and without prejudice to such charges and incumbrances as were subsisting upon the same, unto the said defendants, to be held by them upon the then subsisting trusts of the said indenture of settlement.

Francis William died on the 20th of January, 1890, having by his will, dated the 16th of February, 1876, and codicil thereto, dated the 29th of June, 1889, appointed his wife, Georgina Sarah Lloyd-Edwards, Blanch Helen Trench, the plaintiff, William Thomas Trench, and the defendant, Benjamin Thomas Ellis, his executors, but without having disposed of his real estates otherwise than by charging the same with the payment of four annuities.

The plaintiff, William Thomas Trench, alone proved the said will on the 21st of July, 1890. The infant defendant, Claude Henry Lloyd-Edwards, was the only son and heir-at-law of Francis William, and became tenant in tail of the said settled estates.

Catherine Wynne-Edwards died on the 13th of February, 1890, having by her will, dated the 8th of February, 1890, appointed the plaintiffs, Henry Samuel Priestley and Christopher Fearne Priestley, her executors and trustees, who proved her said will on the 3rd of September, 1890. At the time of her death the sum of £2,302 3s. 7d. was due to her in respect of Richard's debt, interest on the same having been paid by Francis William since his father's death.

Actions were subsequently commenced for the administration of the estates of Richard and Francis William and (so far as concerns this present report) resulted in the reduction of the said debt from £2,302 3s. 7d. to £1,719 17s. 1d. by payments made to the plaintiffs, Henry Samuel Priestley and Christopher Fearne Priestley, by the plaintiff, William Thomas Trench, out of the personal estate of Richard.

The plaintiffs, Henry Samuel Priestley and Christopher Fearne Priestley, by this action claimed that the residue of the said debt should be raised and paid out of such parts of the hereditaments comprised in the deed of family arrangement as were conveyed to the defendants by the indenture of conveyance of the 12th of November, 1889; and the plaintiff, William Thomas Trench, claimed that the whole of such debt of £2,302 3s. 2d. was expressly charged upon such hereditaments in exoneration of the real and personal estate of Richard, and was payable to him as legal personal representative of Richard for the purpose of paying the whole of the said debt.

Renshaw, Q.C., and *F. T. Procter*, for the plaintiffs.—This case is quite distinguishable from that class of cases the principle of which is to be found in *Garrard* v. *Lord Lauderdale*, 2 Russ. & M. 451. The facts of this case are similar to those in *Synnot* v *Simpson*, 5 H. L. C. 121, and the case falls rather within the principles laid down in *Synnot* v. *Simpson*, and acted upon in the subsequent cases of *In re Fitzgerald's Settlement*, 36 W. R. 385, 37 Ch. D. 18; *Godfrey* v. *Poole*, 13 App. Cas. 502; 36 W. R. Dig. 65, and *Frewen* v. *Law Life Assurance Society*, 44 W. R. 682, [1896] 2 Ch. 511, than within the principle of *Garrard* v. *Lord Lauderdale*.

Warrington, Q.C., and *Robertson-Macdonald*, for the defendant trustees.—This was an arrangement for the resettlement of the family estates by Richard and Francis. It was an arrangement for the benefit of Richard, and as the trust was not acted on nor communicated to the creditors, a binding trust in their favour was not created (*Garrard* v. *Lord Lauderdale*). The remaindermen take by virtue of the settlement and not by the bounty of Richard. It was in the power of Francis to prevent the sale during his life. The creditors were not specified in a schedule to the deed. In all these respects this case differs from that of *Synnot* v. *Simpson*. Richard and Francis could have revoked the deed of family arrangement.

W. B. Heath, for infant defendant, adopted a similar argument.

Procter in reply.

KEKEWICH, J.—The question which I have to decide may be stated thus: Is this case within the principle of *Garrard* v. *Lord Lauderdale* or of *Synnot* v. *Simpson*? I refer to *Garrard* v. *Lord Lauderdale*, though it by no means stands alone, and it was not the first case which affirmed the principle which was laid down by Lord Eldon in *Walwyn* v. *Coutts*, 3 Sim. 14, and again in *Acton* v. *Woodgate*, 2 My. & K. 492.

Even if *Synnot* v. *Simpson* stood alone it might be treated as constituting a class by itself illustrating *Garrard* v. *Lord Lauderdale*, as it shows what are the limits of that principle and the cases to which it does not extend. I have to consider those principles; what are they? I am not dealing with the question whether by specifying the creditors or communicating to them the trusts declared in their favour, a binding trust is created or not.

The broad principles are found in *Garrard* v. *Lord Lauderdale*, and they are to be found in other cases—for instance, in *Walwyn* v. *Coutts* and in *Synnot* v. *Simpson*. Without pretending to enunciate these principles so well as they are there laid down, I will, nevertheless, state them in my own way: A debtor minded to provide for his creditors, and with that intent vesting property in another for payment of those debts does not thereby constitute an irrevocable trust in favour of his creditors during his life; the trustee is only the debtor's agent and the creditors are not in consequence *cestuis que trustent*; in such a case the arrangement is merely for the benefit of the debtor and is revocable by him at will. Where, however, the trust for creditors is followed by a further settlement for the benefit of the settlor or on objects of the settlor's bounty, then at any rate after the death of the settlor there is a binding trust in favour of the creditors. It was so decided by the House of Lords in *Synnot* v. *Simpson* and in *Montefiore* v. *Browne*, 7 H. L. Cas. 241. In giving judgment in the latter case Lord Cranworth says on p. 266: "My lords, this case can hardly be distinguished in principle or, indeed, in the very facts upon which the principle rests from that of *Synnot* v. *Simpson* in this House. There, as here, a conveyance was made of estates creating, in terms at least, a trust for creditors who were not in that case parties to the deed, and subject to this trust there was a settlement for the mutual benefit of the father and the son. And what your lordships then held was this, that at all events after the death of one of the parties to that arrangement that trust became an absolute trust, which the creditor, in whose favour it was made, might insist upon being enforced." This present case differs from *Synnot* v. *Simpson* in some respects, but even so, does it fall within the principle of that case? In *Synnot* v. *Simpson* there was a settlement by the father and the son, and that is so here. It seems to me that it cannot be of importance whether the settlement was made between one or more settlors or for their mutual interest or not. On the question whether they were tenants in common with a power of appointment over this property, or successive owners, I think that the two were owners and could dispose of it as they chose. As regards the creditors it makes no difference whether there was a bargain or not, for in *Synnot* v. *Simpson*, on p. 141, Lord Cranworth says: "I doubt whether the doctrine acted on in *Garrard* v. *Lord Lauderdale* and in the other authorities which I have adverted to applies to a case where the trust is to come into operation only on the death of its author, and where, subject to the trust for payment of debts, the lands charged are conveyed by way of bounty to a third person. I think it at all events open to argument that in such a case the settlor must *primâ facie* be understood to be dealing with his property as if he was disposing of it by will, and therefore as contemplating bounty throughout; or if it be contract, so far as the party taking the estate is concerned, I think it must still be construed as bounty in favour of the plaintiffs named as incumbrancers." Therefore I think it makes no difference whether the bargain was between two or one. The creditors are equally strangers in either case.

Having now shown the difference between the principles of *Garrard* v. *Lord Lauderdale* and *Synnot* v. *Simpson*, I will apply that to the facts before me. Here there were two gentlemen who had a power of appointment over an estate by virtue of a disentailing assurance; they were father and son, Richard Lloyd-Edwards and Francis William Lloyd-Edwards. The trust is to sell either immediately or after the death of Richard, or with his consent during his lifetime, and out of the proceeds to pay his debts. These debts are not only charged (if there is a charge at all) on the proceeds of sale, but there is an express provision for their payment out of the rents and profits until sale, so that there is a charge upon the *corpus* as much as there is upon the proceeds of sale. Subject thereto there is another settlement on Francis, with remainders over, under which the infant defendant now claims. Therefore, I think this case comes within the principle of *Synnot* v. *Simpson*, subject, however, to the two following observations—namely, that the deed of family arrangement might have been put an end to by the father and son, and that the creditors here described were not necessarily creditors to be ascertained at the death of Richard Lloyd-Edwards, but creditors who were such during his life, or became such subsequently. In this latter respect there is a distinction between this case and *In re Fitzgerald's Settlement*, for in that case the creditors were to be ascertained after the death of the settlor; but this is a distinction which I do not think is material in the present case. Here you have a trust for creditors before the settlor's decease.

But the other point seems to me to deserve more consideration. The two settlors were Richard and Francis William, and it is quite possible that they may have had power to have cancelled the provision for payment of debts, and so oust and defeat the creditors, and to have assured the estate to the uses coming in subsequent to the provision for creditors. That point I must leave open, because it does not arise, owing to the fact that Richard died before any attempt was made to satisfy the creditors, and Francis William took the estate. In this way I think that, according to *Synnot* v. *Simpson*, the defendants and Francis William took the estate subject to the rights of the creditors, unless it can be said that the provision for creditors has been revoked by the later

deed of 1889. On his father's death Francis William became tenant of the estate and executor of his father, and so it is said that, acting in both characters, he could have done what both Richard and Francis could have done in their joint lives. I do not think so. They could have concurred in revoking the provision during their joint lives; but such power of revocation did not become vested in the executor of one of the parties. As soon as Richard died, Francis's estate became an estate in possession, but he could not exercise as executor the power vested in Richard while alive. Therefore, I do not think the arguments of the defendants can be upheld, and I must hold the present case to be within the principle of *Synnot* v. *Simpson*, and I think the creditors must be paid. I will not now decide the question of the exoneration of Richard's real and personal estate, that matter will have to be determined in the administration actions.

Solicitors for the plaintiffs, *Ullithorne, Currey, & Currey*, for *J. Rice Roberts & Laurie*, Llangefni.

Solicitors for the trustees, *Robbins, Billing, & Co.*, for *Cledwyn Owen*, Pwllheli.

Solicitors for the infant defendant, *Western & Sons*.

Chan. Div. }
Romer, J. } March 31.

FINLAY v. DARLING. (a.)

Settlement—Covenant to settle after-acquired property—Investments of income and of accumulations of income of such investments.

By a covenant in a marriage settlement it was agreed and declared that if during the coverture the intended wife or the intended husband in her right should become entitled to property above a certain value, then and in every such case the intended husband and wife should assure the property to or otherwise cause the same to be vested in the trustees upon the trusts of the settlement. The trustees claimed certain investments of more than the specified value admittedly purchased by the wife out of income derived by her under the settlement.

Held, on the construction of the above covenant, that it was not intended to bind the married woman's income arising from the settled property, and that the investments ought to be regarded as accumulated income, and therefore were not bound by the covenant.

Lewis v. Madocks, 8 *Ves.* 150, 17 *Ves.* 48, *distinguished.*

In re Bendy, Wallis v. Bendy, 43 *W. R.* 345, [1895] 1 *Ch.* 109, *not followed.*

Special case.

By an indenture of marriage settlement dated the 20th of September, 1872, and made between J. Finlay of the first part, the defendant C. Darling (then C. Finlay, spinster), who shortly afterwards became the wife of J. Darling, of the second part, J. Darling of the third part, and trustees of the fourth part, personal property was settled or covenanted to be settled upon the usual trusts for the wife, husband, and issue of the marriage, the first life interest being to the wife for her separate use. And in the same indenture was contained a covenant for the settlement of the said defendant's after-acquired property in the following terms: "And it is hereby agreed and declared that if during the said intended coverture the said C. Finlay or the said J. Darling in her right shall become seized, possessed of, or entitled to any real or personal property of the value of £200 or upwards for any estate or interest whatsoever (except jewels, trinkets, ornaments, plate, pictures, prints, and books, and other articles of the like nature, as to which it is hereby declared that the same shall belong to the said C. Finlay for her separate use), then and in every such case the said J. Darling and C. Finlay, and all other necessary parties shall, as soon as circumstances will admit, and to the satisfaction of the settlement trustees or trustee for the time being, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be vested in the settlement trustees or trustee upon trust," the trusts being in effect for sale and conversion of the said property, with the usual exception from the covenant, of annuities for life or other life interests of the said defendant.

The plaintiffs were the present trustees of the settlement.

There were now living (besides the defendant) her husband and seven children of the said marriage.

The defendant from time to time invested in her own name income derived by her under the settlement and accumulations of the income derived by her from such investments, and there were standing in her name divers stocks, shares, and securities representing such investments largely exceeding £200 in value.

H. Terrell, for the plaintiffs, relied on *In re Bendy, Wallis* v. *Bendy*, 43 W. R. 345, [1895] 1 Ch. 109, and *Lewis* v. *Madocks*, 8 Ves. 150, 17 Ves. 48.

J. Dixon, for the defendant.

ROMER, J.—The question is whether these investments are subject to the covenant for the settlement of after-acquired property contained in the settlement?

It is reasonably clear on the words of the covenant that it was not intended to bind the income of the married woman from the settled property, or that the covenant should apply to capital coming to her after the date of the settlement to an amount not exceeding £200.

If the income would not be bound, it does not seem right on principle to hold that, because the married woman accumulates it and does not spend it, she thereby makes that bound which was not bound before. Why should the accumulations pass from her? If accumulations of income in her hands or in the hands of her bankers are not bound, why should they become bound when invested? I fail to see the reason.

That being my view—viz., that the covenant and principle clearly point to the property not being bound, am I obliged by the authorities to give a decision in the contrary sense?

There are two cases in point. The first is *Lewis* v. *Madocks*. That was a decision on a covenant by a man on marriage to settle all the personal estate of which he should at any time be possessed. Such a covenant is of an entirely different character from the covenant here, and different considerations might well apply in construing it. Lord Eldon appears to have thought in that case that income would not be bound by the covenant as income, but that it might be so dealt with as to become capital, in which case, having acquired the character of capital, it would be bound as capital: see 17 Ves. at pp. 55, 56. But I think that his observations must be limited to the circumstances of the case before him. I doubt if Lord Eldon meant more than this, that capital so held as to indicate an intention that it should be bound would be bound. Even if Lord Eldon's observations

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

bound me at all in a case like this, I should require evidence of the circumstances here in order to see if his observations applied to them. All I know is that the married woman invested the income and did not spend it, and I decline on that alone to regard it as ceasing to be her income, or to hold, as I must on the contrary view, that she parted with her right to deal with the moneys as accumulated income.

With regard to Kekewich, J.'s, decision in *In re Bendy, Wallis* v. *Bendy*, I should ordinarily follow the decision of a judge of co-ordinate jurisdiction. But, if the report in the Law Reports is complete and correct, with deference to Kekewich, J., I cannot follow his decision in that case. But I think that there must have been other circumstances there, material to the decision which are not in the report. However that may be, having a clear opinion on the question of principle and on the covenant in this case, I ought to give effect to my view, and I decide accordingly that the investments of income are not bound by the covenant.

Solicitors for the plaintiffs, *Pitman & Sons*, for *H. Russell*, Lichfield.

Solicitors for the defendant, *Rowcliffes, Rawle, & Co.*

Q. B. Div.
Vaughan Williams and Kennedy, JJ. — April 12.

ATTORNEY-GENERAL *v.* BROWN. (*a.*)

Inland revenue—Succession duty—Partnership deed—Contract for valuable consideration in money or money's worth—Succession Duty Act, 1851 (16 & 17 *Vict. c.* 51), *s.* 2.

A father admitted his son into partnership for a term of five years. The assets of the business were then valued at about £62,000, of which two-thirds was to be deemed the father's share, and one-third the son's; and one condition of the partnership was that in the event of the father dying within five years the son was to take the whole of the business and pay to the father's executors or administrators £10,000. By a contemporaneous deed the son agreed to pay to the father and his executors a rent-charge of £139 per annum in respect of the freehold property of the partnership.

The son brought no capital into the business, and the father died before the term of the partnership had expired.

The Inland Revenue Commissioners claimed succession duty from the son in respect of the then estimated value of the business, less the £10,000 to be paid to the father's representatives, and less the son's one-third share of the business, on the ground that although in form the partnership arrangement was a sale of part of the business to the son, it was substantially a settlement by the father under which at his death the son benefited, the property being admitted worth more than £10,000 at that date.

Held, that, taking all the circumstances in consideration, the £10,000 to be paid by the son was a fair commercial value to place upon the business for the purposes of the partnership. The transaction could not be regarded, therefore, as in substance a "settlement," and the son was not liable to pay succession duty on acquiring the whole of the business on the death of his father.

Information by the Attorney-General.

The following were the facts of the case as stated in the information:

The defendant, Thomas Brown, had for many years managed the cotton spinning business of his father, George Brown. For certain reasons the father considered it desirable that the son should become a partner with him in the business; and, on the 31st of March, 1881, they entered into a contract of partnership for a term of five years. At that time the business was valued by them at £62,445. The son, on being made a partner, brought no capital into the business. Of the then estimated value of the business it was arranged that the sum of £41,630 should be considered as having been brought into the partnership by George Brown, and the remaining £20,815 by the defendant Thomas Brown.

The material terms of the deed, in the events which happened, were contained in paragraph 29, which ran thus: "If the said George Brown shall die during the partnership, the said Thomas Brown shall be absolutely entitled, for his own use and benefit, to the whole or entirety of the capital of the partnership. . . . And the said Thomas Brown shall, within six calendar months next after such death, duly execute and deliver unto the executors or administrators of the said George Brown a bond . . . for the payment to them of the principal sum of £10,000, with interest after the rate of 4 per cent. per annum. . . . But if the said Thomas Brown shall die during the partnership, the said George Brown shall be absolutely entitled, for his own use and benefit, to the whole of the capital of the partnership, and the said George Brown shall, within six calendar months next after such death, duly execute and deliver unto the executors or administrators of the said Thomas Brown a bond . . . for the payment to them of the principal sum of £15,000."

There was also another contract of even date, drawn up and executed in relation to the freehold property of the firm, in which it was provided that £139 per annum was to be paid by the son to the father.

The contract of partnership was carried into effect, and the two carried on business together until October, 1884, when George Brown died.

According to the partnership books, the assets of the business at the death of George Brown were of the value of £67,810, of which sum £45,894 was the share of George Brown in the same, and the whole of that amount passed on his death (less the sum of £10,000) to the defendant Thomas Brown absolutely.

The commissioners, on these facts, considered that the provisions of clause 29 did not constitute a "sale and purchase," but were in effect a family arrangement by which the defendant, on his father's death, succeeded to the whole of the deceased partner's interests in the business (less the sum of £10,000) in the same way as if the father had left them to his son by will.

A claim for succession duty was then put in by the Crown in respect of the capital of the partnership passing to the defendant, less his original share therein and the sum of £10,000 payable to the estate of the deceased.

Sir R. B. Finlay, S.G. (with him *Vaughan Hawkins*), for the Crown.—The question is whether the transaction as disclosed by the partnership deed itself is in fact a sale or a settlement by which the father desired to benefit his son. If, as the Crown contends, it was the latter, then to the amount which the son has benefited therefrom, succession duty is payable: *Crossman* v. *The Queen*, 35 W. R. 303, 18 Q. B. D. 256; *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675; *Floyer* v. *Banks*, 12 W. R. 28, 3 De G. J. & S. 306; *The Attorney-General* v. *Baron Wolverton*, *ante*, p. 236, [1896] 2 Q. B. 389, [1897] 1

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Q. B. 231. The fact that there may have been some consideration moving from the son to the father is *not of itself* evidence that the transaction is a "contract for valuable consideration in money or money's worth" of such a kind as would exempt the son from the payment of succession duty: *Lord Advocate* v. *Sidgwick*, 14 Scot. L. R. 543. See report also in Hanson's Death Duties, last ed., p. 548.

Haldane, Q.C. (with him *Danckwerts*), for the defendant.—The arrangement does not come within section 2, and if it does it is exempted from succession duty by the proviso in section 17 of the Act of 1851. [VAUGHAN WILLIAMS, J.—If the transaction falls within section 2, then section 17 does not help you. If it does not fall within section 2 you do not require section 17 at all.] Under the deed of even date with the partnership deed, the freehold property of the business was sold to the partnership, which was to pay to the father and his executors a rent-charge of £139 a year. If the father survived the son that was practically inoperative, but if the son survived the father it created a heavy burden on the business, and the undertaking of that liability constituted a valuable consideration, and probably accounted for the fact that the son was only to pay £10,000 for the share of his father in the event of the latter dying during the partnership. If both partners survived the period of five years fixed for the continuance of the partnership under the deed, the business was then to be divided equally.

Oldfield v. *Preston*, 10 W. R. 257, 3 De J. F. & J. 398, and *Attorney-General* v. *Dowling*, 28 W. R. 673, (1880) 5 Ex. D. 139, were referred to.

VAUGHAN WILLIAMS, J.—Shortly the question we have here to decide is whether the right which the defendant, as the surviving partner, has to the money, property, stock-in-trade, and assets of the business is a right which has accrued to him by way of succession from his father or whether it is a right which accrues to him by reason of his having purchased this interest for some money consideration. It is admitted that if it is the former—that is, if the transaction is in substance a gratuity by the father to the son—then the contention of the Crown is right. If, on the other hand, the son has bought this interest, paying a full and fair commercial value for it, then there is no succession within the meaning of section 2 of the statute of 16 & 17 Vict. c. 51. That section defines a "succession" as follows: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession." Now, I agree with the contention of the Solicitor-General that one must look at the substance of the transaction, and it is not because a deed on the face of it appears to be treating of a commercial transaction, or that it contains stipulations for a gratuity or stipulations that upon the father's death the son shall be entitled to a certain property, that, therefore, the possibility of a "succession" is excluded. One must not only look at the bargain as a whole, but one must also look at each part of it and see and inquire as to each portion, if it is a commercial bargain or whether it is merely a stipulation outside such a bargain altogether. I have come to the conclusion that this particular clause 29, like the rest of the deed, is part and parcel of an honest commercial transaction. I should have assumed that for myself looking at the partnership deed as such, with the provision of the sort there is here, setting out what is to take place in the case of the death of the father and of the son respectively, during the continuance of the partnership, unless there was something in the deed to negative the presumption that it was to be a purely commercial transaction between the parties. What do we find? In clause 29 there is a proviso which is certainly a very remarkable one, and which was the foundation of the Solicitor-General's contention for the Crown that this was never intended to be by the parties themselves a commerical bargain at all. It is this—that we now know that whereas the father took two-thirds of the business and the son only one-third, we find that in the case of the death of the father—that is, in the event of his two-thirds accruing to the son by reason of the provisions of the partnership deed—the son is only to pay to the representatives of the father the sum of £10,000; whereas, in the event of the son dying during the lifetime of the father, then the father is to pay £15,000 for the one-third of the son. That is a larger sum than that payable by the son. If that were all, it would make me conclude that the arrangement under which the father's two-thirds so passing to the son was in the nature of a gratuity to the son to the extent of the excess of the value of this two-thirds over and above the £10,000 which was payable by the son, and was in substance a settlement of that amount on the son, and as such, duty would be payable as on succession. Mr. Haldane pointed out, however, that these figures were fixed in the deed in a purely commercial spirit, and that the son in certain events might have found he had made a very bad bargain and yet would be compelled to stand by it. He also drew our attention to the terms of the deed of even date, under which there are provisions practically inoperative in the event of the father surviving the son, but which would be a very serious incumbrance on the estate if the son survived. Moreover, whichever of the two survived, the obligation to take the business, even if it were at that time being carried on at a loss, was certain and absolute. It was an unconditional obligation to take the business with all its liabilities. From the returns of the profits of the last few years it is obvious that this was a business of a speculative character. There was also a binding undertaking that the surviving partner should indemnify the estate of the deceased partner in respect of the debts and liabilities of the business. Taking all these circumstances into consideration, which have only come to light during the argument, I think the partners were right in fixing the amount to be paid at a less sum than the then estimated value of the property which at first sight seemed to be its fair commercial value. I prefer entirely to discard the estimated value of £62,000 as the true figure at which the property ought then to have been returned at. I consider, for the reasons above stated, that very possibly, in the case of the father succeeding to the son, the one-third interest of the son would have been worth to him £15,000. In the event of the son surviving the father then that the father's two-thirds would be worth to the son £10,000. The fact, as I have before said, that these figures were fixed and payable under any circumstances gave rise, *primâ facie*, to the contention of the Crown that on the transfer of the father's interest to the son, the amount so passing to the son under clause 29 was liable to succession duty. For the reasons I have mentioned, I have satisfied myself that these figures may be regarded as having been properly arrived at as the real commercial value of the partners' respective shares in the business. It is so stated in answers to the information and in the affidavits of the defendant, and although the defendant's witnesses were present

and ready to be examined on this point they were not cross-examined by the Crown. I think, therefore, the Crown has failed to establish its contention that this was not a commercial transaction.

KENNEDY, J.—I agree. The transaction, in my opinion, was nothing more than a genuine commercial bargain, and was not in substance, any more than in form, a settlement of so much made by the father on his son. For the Crown it was admitted that if it was the former no duty would be payable, nor would the question be raised that the valuation placed on the property was not a fair and reasonable one.

Information dismissed with costs.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendant, *Rowcliffes, Rawle, & Co.*, for *Richard Jackson & Son*, Chorley.

Q. B. Div.
(Wills and Grantham, JJ.) April 7.

THE MERSEY DOCKS AND HARBOUR BOARD *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp duty—Annuity secured by bond —"Conveyance on sale"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, 87 (2), *schedule* 1—*Mersey Dock Acts Consolidation Act,* 1858.

A dock company had statutory powers to borrow money for certain purposes, and "all money so borrowed by the board of directors was to be secured either by bonds or by annuities." The company having by deed granted a large number of annuities, the question was raised by the Commissioners of Inland Revenue at what rate the instruments by which they were secured to the annuitants should be charged with stamp duty under section 87 (2) *of the Stamp Act,* 1891, *the annuity deeds having been presented to the Commissioners stamped as securities on an* ad valorem *duty of* 2*s.* 6*d. per cent. under the head "Mortgage, Bond, Debenture Covenant, &c."*

Held, that, as the annuities were payable for an indefinite period, and could only be redeemed or extinguished by the board purchasing them at the then market price, the deed securing such an annuity was in the nature of a "conveyance on sale" and not a bond to secure the repayment of an advance or loan to the company, and was therefore chargeable at the rate of 10*s. per cent. as a contract of sale and purchase.*

Case stated by the Commissioners of Inland Revenue.

The appellants the Mersey Docks Co. had power given them by the Mersey Dock Acts Consolidation Act, 1858, to borrow money. This the company was empowered to do in one of two ways—either as loans repayable with interest within a fixed period, or by the granting of annuities.

The question for the decision of the court was whether the bonds given by the company to secure these annuities should under section 87 (2) of the Stamp Act, 1891, be stamped as contracts of sale and purchase at 10s. per cent. or as securities for sums advanced at 2s. 6d. per cent.

The Commissioners were of opinion that the contract between the appellants and the annuitants was one of sale and purchase, and that the annuity was not granted by way of repayment of any loan intended to be so repaid as to render the instrument chargeable with the lesser stamp duty under the above-mentioned section of the Stamp Act, 1891, and that, therefore, the instrument was chargeable with duty at the rate of 10s. per cent. as "a conveyance or transfer on sale."

The material facts stated in the case were shortly these: The deed out of which the question arose contained this clause: "This indenture witnesseth that on consideration of £300 the board do hereby . . . covenant and grant with and to the annuitants that the board and their successors will pay to the annuitants an annuity or yearly sum of £8 5s. . . . and the annuitants do hereby agree to accept the said annuity or yearly payment in full satisfaction and discharge of the said sum of £300 advanced and lent as aforesaid, provided always that the said annuity shall in all respects be subject to the provisions of the Mersey Dock Acts Consolidation Act, 1858, in relation to Mersey Dock annuities."

The annuity was payable for an indefinite period—*i.e.*, until purchase or extinguishment or redemption under the Acts.

By section 308 of the Mersey Dock Acts Consolidation Act, 1858, if at any time there should not be any bonds or other securities granted by the board, or for the payment whereof they might be liable, and if there should not be an annuitant willing to sell to the board the amount of the annuity so held by him, it should in that case—but in such case only—be lawful for the board to redeem so much of the Mersey Dock annuities as the amount of the surplus [of the specially set apart fund] thereinbefore directed to be so applied might permit at a rate equal to the average market price of such annuities during the six months immediately preceding.

Section 309 directed that the order in which the board shall be entitled to redeem such annuities should from time to time be decided by a ballot.

The following sections of the Stamp Act, 1891, are material:—

Section 54.—"For the purposes of this Act the expression 'conveyance on sale' shall include every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser."

Section 60.—"Where, upon the sale of an annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, . . . the bond or other instrument is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale."

Section 87.—"(2) A security for the payment of any rent-charge, annuity, or periodical payments by way of repayment or satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of money so lent.

Joseph Walton, Q.C. (*Carver* with him), for the Mersey Docks Co.—The instrument was not a conveyance or transfer on sale of any property within the meaning of schedule 1 of the Stamp Act, 1891, for the £300 was paid to the appellants as a loan or advance, and received by them under their borrowing powers, to be repaid, satisfied, and discharged by the annuity granted. It was therefore chargeable under section 87 (2) of the Stamp Act, 1891, with the lower duty as a covenant for the payment of the loan of £300.

Sir R. Webster, A.G. (*Danckwerts* and *Peacock* with him), for the Crown.—The transaction was that of the sale of an annuity, the instrument was a conveyance on sale, and ought to be stamped at the higher rate.

WILLS, J.—I admit that this case is not free from

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

difficulty, but I feel no hesitation in giving judgment for the Crown. It seems to me that we must look in the first place at the Mersey Dock Acts and see, if we can, what the true nature of the transaction is by which these annuities are created. The foundation of the appellants' argument is that by clause 286 of the company's private Act of 1858, all money borrowed by the board shall be secured either by bonds under their common seal, or by annuities, and, therefore, that this is in fact money borrowed. That is accurate to a certain extent, but when one comes to look into the various sections of the Act, it is clear that the annuities are treated as annuities granted for money paid. It is unnecessary to go into the different sections at length, but there are some in which these annuities are contrasted (section 290 for example) with the case of money borrowed on bonds. Further on we find that the deed is described as a deed of grant. Moreover, the statutory form of the model certificate speaks of the purchaser as the "proprietor" of the annuity. The particular language of the particular instrument in this case cannot alter the power given to it by the Act of Parliament.

We have been frankly told that the certificate was not drawn up in the exact form given by the statute and was expressly framed to meet the point now at issue and to make the transaction, if it could be made so, one of mortgage and not sale. [His lordship having read section 54 of the Stamp Act, 1891, continued:] The deed in this case vests in the person who made the payment the property in the annuity. It makes him the proprietor, and therefore there must have been within the meaning of this 54th section "a conveyance on sale," and the grantee becomes the purchaser. He is also, I think, the purchaser within the words of section 60. If there is any real inconsistency between the language used in those two sections and that of section 87 it must be dealt with, but it is not for the court to raise an inconsistency if none exist. In my opinion section 87 really relates to terminable annuities, which, in the ordinary sense of that expression, this kind of annuity we are now considering is not. This loan was really never meant to be repaid. It was in very much the same position as consols. Except by redeeming the loan it could never be paid off by the Dock Co., no matter how long the company continued to pay the annuity. It is therefore wrong to say that the £8 5s. a year paid the annuitant by the company was paid in "satisfaction and discharge of the loan." For these reasons I think the contention of the Crown ought to be upheld and duty paid on the higher scale.

GRANTHAM, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *A. T. Squarey*, Liverpool.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

House of Lords.

From C. A. (England). } Feb. 23.

BLOOMENTHAL *v.* FORD. (*a.*)

Company — Winding up — Shares — Contributory — Estoppel—Certificate—Fully paid-up shares.

A company borrowed money from the appellant on the security of certain fully paid-up shares, and delivered to him certificates under their common seal to the effect that on each of these shares the full amount had been paid, and this was believed to be so by the appellant. As a matter of fact these shares were not paid up at all, neither had any contract been registered under section 25 of the Companies Act, 1867.

Held, that the company were estopped from alleging that the shares were not fully paid up, although upon inquiry and investigation the appellant would have discovered otherwise; and, consequently, that he was not liable to be put on the list of contributories.

Decision of the Court of Appeal, 44 *W. R.* 577, [1896] 2 *Ch.* 525, *reversed.*

This was an appeal by F. Bloomenthal from an order of the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.), reported under the name *In re Monnier (Veuve) et ses Fils (Limited), Ex parte Bloomenthal*, 44 W. R. 577, [1896] 2 Ch. 525, which affirmed an order of Vaughan Williams, J.

The facts are given in the report below, and are shortly these.

Bloomenthal lent money to the Company Monnier (Veuve & Fils) and received as security for his loan 16,000 shares; he was registered as holder and received certificates that these shares were fully paid up. No cash had ever been paid for the shares, nor had any contract been registered under section 25 of the Companies Act, 1867. The company went into liquidation, and Bloomenthal took proceedings to have his name removed from the register. The circumstances attending the loan are discussed at length in the judgments.

The Court of Appeal came to the conclusion that the appellant must have known that nothing had been paid for the shares, and that he was liable to be put on the list of contributories for the full amount.

Bloomenthal appealed.

Sir R. T. Reid, Q.C., and *Astbury, Q.C.* (*M. L. Romer* with them), for the appellant.

Eve, Q.C., and *Martelli*, for the respondent.

Pickard v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cooke*, 2 Ex. 654; *Parbury's case*, 44 W. R. 107, [1896] 1 Ch. 100; *In re Railway Time Tables Co.*, 37 W. R. 531, 42 Ch. D. 98; *Oakes* v. *Turquand*, L. R. 2 H. L. 325, were cited or referred to.

Lord HALSBURY, C.—In this case I should have felt very great regret indeed if I had been compelled to affirm the judgments which have been appealed against. I think that I can hardly imagine a greater scandal to the administration of justice than would be involved in affirming that a person could be treated with such grievous injustice as would have been inflicted upon the appellant here if those judgments had been affirmed. With the greatest possible respect to all the learned judges who have taken part in this discussion, it appears to me that they have all been affected by the circumstances of the case, which they describe as circumstances of great hardship. For my own part I am unable quite to follow that view. It seems to me that it is a somewhat illogical view. If the appellant here was, as some of their lordships seem to think, put upon an inquiry, or, as some others of them seem to think, actually knew the true condition of things, he is not an object of sympathy at all; he has simply entered into an adventure in which he has been unfortunate, and he must take the consequences of his own rashness. I should sympathise with him very much if I thought this judgment could be affirmed, because I should regard him as being a person who had been "entrapped," which I think is the phrase which is used in one of the judgments, or had "fallen into a pitfall," which is

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

the phrase used in another judgment, by those persons who have got his money by a misrepresentation (whether a wilful misrepresentation or not it is immaterial to inquire), and they having got his money, he is called upon not only to lose the money, but to incur an enormous liability which to most persons (I am sure I do not know whether to him or not) would be absolute ruin. The narrative is a very short one. A company, of which he is the stationer, is in want of money, and they apply to him to lend the money, and they promise to give him, as security for the money he lends, "fully paid-up shares." I shall say a word in a minute as to what that phrase means. That is what they promise to give him, and relying upon that promise he lends them £1,000. Afterwards the same process is renewed (I do not think anything really turns upon any difference in the terms), and he lends £600 more. Then the company is wound-up, and he finds himself made responsible for £16,000. I cannot imagine a more pitiable narrative, if it were possible in point of law to establish the claim against him to that extent. I am of opinion that no such claim can be established against him; because it appears to me that the company who obtained his money upon the distinct representation that what they were about to give him were "fully paid-up shares," obtained it by a misrepresentation of a fact which he had a right to believe and act upon, and in my view did believe and did act upon, and he parted with his money upon the belief that he had got that security. It appears to me that it is hopeless to contend that after a representation made by the company for the purpose of inducing a man to act upon it by parting with his money, it is competent for them to turn round and say, "You should have inquired, you should have observed certain circumstances, and if you had done that, you would have been better advised than to advance the money, because you would have known that fully paid-up shares did not mean what the words themselves signify, but meant that no further liability should be insisted upon in respect of them." I suppose if one is to expand the meaning of these words in the sense which the respondent now insists upon, one must say that that is what they substantially mean—namely, that there was to be no liability upon the shares, and that the respondent would not be called upon to supply anything further to the funds of the company upon them.

Now, the ground upon which that is suggested appears to be partly a question of law, and partly a question of fact. As to the question of law, I confess for myself I entertain a doubt whether it is ever true, in a case where one person has been induced to act by the misrepresentation of another, that you can go beyond the fact whether it is so or not. In arriving at a conclusion upon this question of fact, like every other question of fact, all the circumstances must be considered. A statement may be made so preposterous in its nature that nobody could believe that anyone was misled, and in considering these questions, as in *Freeman* v. *Cooke*, 2 Ex. 654, and other cases which might be cited on the subject, the learned judges discussing questions of fact together with questions of law, not unnaturally sometimes point to this or that circumstance as being a circumstance from which people would naturally infer that a man did not believe what he professed to believe; but when once the conclusion is arrived at that the belief was induced, and intentionally induced, by a misstatement of fact intended to operate upon the mind of another, upon which the man has acted, then I do not think any case can be found in the books in which it has been suggested that the legal consequence does not follow—namely, that there is estoppel, and that it is not open to the person who has made the representation to say, "I told you so and so, but you ought not to have believed me—you were too great a fool—I had a right to mislead you because you were too great a fool." I do not believe that any such case can be brought forward, or that there is any authority for such a proposition.

Now, dealing with it as a question of fact, and there being no other question of law to be disposed of, I come to an exactly opposite conclusion from that which the learned judges in the court below have arrived at. The circumstances are simple; they speak for themselves—*res ipsa loquitur*. Here is a company, which is not too flush of money, applying to their stationer and printer for a loan of money. Can anybody believe that if the appellant had known the true state of the facts—namely, that instead of getting a security he was getting a liability to the extent of £16,000, he would have acted as he did? Then, why am I to go out of the natural and ordinary meaning of those phrases which were used between the parties? He agrees to give a loan if he gets "fully paid-up shares." Now, what is the meaning of "fully paid-up shares"? I admit, though I am not at all certain that the admission does not go a good deal beyond what has been proved as a fact, that occasionally the phrase "fully paid-up shares" may be used somewhat colloquially and loosely as meaning shares upon which no further liability can be enforced by the company. I will take that to be so for the sake of argument. But what then? Why am I to cut down and override the natural meaning of the words by suggesting that there were fresh facts in this case which would have led this gentleman to take them in the narrower sense which I have indicated? When I look at what was the original contract between the parties, what they were doing, and what they were discussing, and when I look at the language used, it seems to me that it certainly lies upon the persons insisting upon giving an unnatural meaning to the words "fully paid-up shares" to prove that they can bear no other meaning. I confess that for myself I am unable to see one single particle of evidence which suggests such an interpretation of the words. The words used in the original contract are, as I have said, "fully paid-up shares." The language of the certificate is this, that Mr. Frederick Bloomenthal "is the registered proprietor," and so on, of such and such shares, "and that on each of such shares the full amount has been paid." Upon what possible ground can they suggest "You ought not to have believed that statement, you ought to have believed that it was only an arrangement that the company were issuing their own shares"?

The argument in the courts below appears to have turned upon what, I venture to suggest, is a mistake. It was said, "That could not be true"; but it could be true. It cannot be denied that there are circumstances under which shares, although in the possession and under the dominion and control of the company itself, are fully paid up either by means of actual money or by means of such matters registered under the Companies Acts, as would have made them fully paid-up shares. And I am asked to assume that because the appellant was the stationer of the company (for that appears to be the argument on this part of the case) he must have known that these were not fully paid-up shares in that sense, and that they could not be. There are one or two hypotheses on which they could be. One is the suggestion of vendor's shares. Another is that a shareholder who had taken shares in the company might be desirous of helping the company to borrow money upon the shares he had taken. One need not go into any other

hypothesis, because the logical force of the argument must go to this extent, that they could not be fully paid up; if they could be, it fails. So far, therefore, as the proposition which was insisted upon in the Court of Appeal is concerned, my answer is, I am bound to take the language of the parties unless the facts show that it was not used in its proper and natural sense, in the sense it would bear to any ordinary mind.

Now, that being the state of facts, what is the evidence of the gentleman himself, as to whom it may be truly said that all the judges—perhaps Vaughan Williams, J., may be an exception, but certainly all the judges in the Court of Appeal—seemed to assume that he was not juggling with the facts, but that he was intending to tell the truth? His statement is unequivocal—he thought that they were fully paid-up shares. I know the sort of gloss that has been put upon that statement. It is said that he must have understood something different from what the words signify. I have already dealt with the logical argument upon that subject, but speaking of it as a popular phrase, I do not know why people should not mean what they say when they speak of fully paid-up shares. People who know anything about limited liability companies know that there is a certain liability upon their shares, and that from time to time the company calls up such and such a proportion of the money due upon those shares, and I should have thought that without being a lawyer or discussing questions which have been raised in the courts, a person would ordinarily understand that fully paid-up shares mean shares upon which the whole amount that could be called had been called up. That is the meaning of "fully paid-up shares," and in strictness it is the only meaning. Then, this case appears to have been started by the liquidator under the impression that the appellant had received express notice of the actual state of things, and I think that one of the learned judges says in terms, that it was not a question of constructive notice, but that he had received express notice. All I can say is, that the appellant himself absolutely denies it—and he is not cross-examined in any sense which, in my opinion, ought to shake his evidence—his *bonâ fides* has at least been affirmed by three judges. And then, when one looks at the other side, how is he contradicted? I think that there is no real contradiction at all. The first witness who was called says that he assumed that he knew what was meant, but that he will not undertake to say that he ever said a word about it. With that exception the evidence of the appellant goes uncontradicted, that he did not know, and had no reason to think that the representation made to him was not perfectly true. If that is the state of the facts at which one arrives in considering the evidence in this case the legal conclusion cannot be doubted. There is a long series of cases, no one of which is important to quote, because the proposition of law has never been doubted, so far as I am aware, to prove that if a man is induced to act upon a statement, and acts upon it because he believes it, and that statement is untrue, it is not competent for the person who has made the representation to say afterwards: "I will show another state of facts than that which I represented, and you ought not to have believed what I said." I believe no such proposition can be affirmed upon any authority, and it would be a very lamentable thing indeed for the course of business—and indeed for the course of human life—if the law did not recognize the responsibility of persons who make statements and induce others to act upon them so that they should not afterwards be permitted to turn round and say that what they stated was untrue, having altered the position of those whom they deceived by the statements they made.

This being the state of facts established in this case, I move your lordships that the appeal be allowed, and that the respondent do pay to the appellant the costs both here and below.

Lord HERSCHELL.—I am of the same opinion. In differing, as I do with all respect, from the learned judges in the court below, I do not think I am differing from them upon any question of law. The doctrine of estoppel to which my noble and learned friend has referred appears to me entirely admitted by the learned judges in the Court of Appeal. The decision against the appellant has arisen from the conclusion that the doctrine of estoppel does not apply in the present case so as to preclude the company, or the liquidator representing the company, from contending that the liability upon these shares exists. Now, the transaction is not one of an application to a company by a member of the public for an allotment of shares and the acceptance of an allotment under the impression that it created no liability, when in truth according to law it did create a liability. The transaction was one of loan to the company, and for that loan the company were to give as security "fully paid-up shares." I do not think that it can be doubted that the company represented to the appellant that the shares which they were handing to him by means of the certificates in return for his loan, and which he was to receive as security, were fully paid-up shares. On the meaning of those words I shall have something to say in a moment. That he acted upon that representation there can equally be no doubt. He was not content to lend his money without security. The security, which he bargained for and was to receive, was the security of "fully paid-up shares." The money was lent; and under those circumstances if the representation in the sense in which it would be naturally understood and was understood by the appellant, was untrue, then there appears to me to be all the elements of an estoppel.

In more than one of the judgments in the court below it was said that the question was, whether the appellant was a *bonâ fide* purchaser or transferee of those shares for value without notice of the state of things which existed. I do not myself think that that is an element which it is necessary at all to consider. The doctrine of estoppel is a common law doctrine, and needs no assistance from the equitable doctrine of *bonâ fide* purchasers for value without notice. And more than that, I think there is a tendency perhaps to mislead — to draw the consideration away from the true questions at issue—when we begin to talk of "purchasers for value without notice." It is not to my mind a question of notice at all.

Now, the statement having been made that he was to receive "fully paid-up shares" in exchange for his money, he gets a certificate, on the face of which it is stated that on each of such shares the full amount has been paid. It was argued by counsel for the liquidator that the money was parted with by the appellant on the faith of the statement that the shares were fully paid up, and that he could not rely upon the form of words to be found in the certificate, which it is said is more explicit and unequivocal. I do not think that in any case such a contention could be maintained; because, although it is quite true that he parted with his money in exchange for this certificate and lent the money before he actually got the certificate, yet the loan in the first instance was only for a limited period. A bill was given which fell due in the month of August, and that bill was renewed, and he most assuredly acted upon representations which

he had received prior to that time or the effect produced by them, by leaving his money, as he was not bound to do, for a considerable time after that, as a loan to the company. This bill was renewed in the month of November. I suppose it had been renewed at an earlier date for the first time; but at all events it is stated in the affidavit that both bills were renewed in the month of November. Therefore, I do not think there is anything in the point sought to be made that you are not entitled to look at the certificate as part of the inducement by the company to let them have or retain his money; at all events, the certificate can be looked at for the purpose of seeing what was the meaning, or what was regarded as the meaning of "fully paid-up shares," because the representation to him having been that the shares he was to get were fully paid up, the certificate distinctly and unequivocally represents that on each of them the full amount had been paid. Now, in point of fact they were not fully paid up, they were not paid up at all, and it is sought to make him liable for the whole amount. It is said that he is under this liability, and that the law of estoppel does not apply, because, if he had thought the matter out, if he had put two and two together, if he had reflected on the circumstances he would have seen, and must have seen that the shares were not fully paid up. I cannot myself think that where an unequivocal statement is made by one party to another of a particular fact, the party who made that statement can get rid of the estoppel which arises from another man's acting upon it by saying that if the person to whom he made the statement had reflected and thought all about it he would have come to see that it could not be true. Of course, if the person to whom the statement was made did not believe it, and did not act on the belief induced by it, no doubt there is no estoppel. But supposing he did believe it, and did act on the belief induced by it, then it seems to me you do not get rid of the estoppel by saying, "If you had thought more about it you would have seen it was not true." The very person who makes a statement of that sort has put the other party off making further inquiry. He has produced on his mind the impression that further inquiry would be unnecessary or useless. Therefore, I confess that I do not think it legitimate to speculate what is the conclusion at which a man would have arrived, if he had put together—pieced together—all the considerations that might have occurred to a reflective mind cogitating on the whole subject, and then to say that, because he would have come to the conclusion that the statement made to him could not have been true, he is not entitled to act upon it as if it had been true, when in point of fact he did not enter into those considerations, but did believe it and did act upon it. Now, on what grounds is it said that he could not have believed this, or ought not to have believed it? The case is put, as I understand it, in this way. It is said "fully paid-up shares" is a term frequently used when the shares have not been fully paid up, as meaning shares which are to be treated as being fully paid up, and on which there is to be no further liability. Now I very much doubt whether those words baldly used, without anything further from one party to another, would convey that meaning. No doubt under certain circumstances people may talk of shares on which nothing has been paid as "fully paid-up shares," because they are to be treated as such where there has been neither money nor money's worth given for them. I think that certainly would be a rare case, but whether people might so speak of it or not, that is not the actual ordinary meaning of "fully paid-up shares." It is not the primary idea that would be conveyed to anybody who was told he was to get fully paid-up shares.

But then it is said that in this case the appellant must have known that he was getting these shares from the company; that, if he got them from the company he was getting them as allottee from the company; that if he got them as allottee from the company he must have known that nobody could have paid the company, because they were then being for the first time allotted; and that as he had not paid upon them, nothing had been paid upon them; and under those circumstances he must have understood, if he had thought about it at all, that when they were spoken of as "fully paid-up" the expression was used in the sense to which I have just referred, and not as representing that they had really been paid up. It seems to me that the learned judges in the court below have overlooked the fact that a company might deal just as this company dealt with these shares, and in a manner consistent with every fact that exists in the present case, and that those shares might have been fully paid up. I will not go through all the cases that might be put—many cases might be put. For example, the case, which is a very common one, of shares which are allotted to the vendors or their nominees; very often the names of the nominees of some of these vendors' shares are not given for a considerable time afterwards. It is not an uncommon thing to see a provision that the vendors shall not put their shares upon the market for a certain time. There is nothing impossible in a vendor coming to the assistance of a company which is in necessity, and on whose prosperity so much for him depends, if he is the holder of a large number of shares, by allowing a certain number of his shares to be used for the purpose of raising a loan. Or again, persons who are allottees of the company of shares already issued, may find it to their interest to assist the company if it is in necessity by transferring their shares so as to enable the company to raise money upon them as security. Although they have executed a transfer it does not follow that the transferee under such circumstances as these would be asked to execute it. They might execute transfers and hand them to the company, and the company might issue certificates to the transferees for this purpose as collateral security; and it is quite conceivable that those who allowed such use to be made of their shares might even desire that their names should not appear in the transaction. I put those instances, but other instances might be put. It is said the appellant did not think of all this. I daresay he did not think of it, he did not think anything about it; it was enough for him to be told they were fully paid up and he believed it. I only put these cases for the purpose of showing that it is not correct to say that, knowing the fact as he did, that these shares had come from the company, he must, if he had thought of it, have known that they were not fully paid up. He might have thought about it, and if he had the knowledge which seems to me to be somewhat unreasonably attributed to him, he might very well have come to the conclusion that there was nothing inconsistent with those shares being fully paid up in the fact that he got the shares from the company, and was at the request of the company, if he got paid part of the mortgage money, to retransfer a proportionate part of them to the company. That appears to me to be the answer to a good deal of the reasoning that is found in the judgments in the court below.

One of the learned lords justices comes to the conclusion that he did in point of fact think that these were shares issued by the company; that he did in point of fact think that nothing had been paid upon

them, but at the same time he thought, erroneously in point of law, that, although nothing had been paid upon them, they might be treated as fully paid up. I do not see anything to justify those conclusions in point of fact. What the appellant in effect says is quite satisfactory to my mind: that he did not think about it at all; he was told that these shares were fully paid up; he believed it, and that was enough for him; he did not care to inquire or to think; on that belief he acted; that belief was a false belief; that false belief was induced by the company. If so, there is every element necessary to make an estoppel and justify the appellant in this appeal.

Lord MACNAGHTEN.—I am of the same opinion. Mr. Bloomenthal accepted the position of a registered proprietor of certain shares upon the faith of the statement of the company under its common seal that on each of those shares the full amount had been paid. The whole of the evidence on the subject has been read to your lordships, and has been commented upon very ably by the learned counsel for the respondent, but there is nothing in the evidence, or in the circumstances of the case, which leads me to suppose that Mr. Bloomenthal did not honestly believe and rely upon that statement. And I quite agree that if he had thought the matter out, as it is said he ought to have thought the matter out, and if he had been qualified to think the matter out, it might have occurred to him, as it has occurred to many of your lordships, that it is quite conceivable that persons who were shareholders in the company, and were entitled to shares in the company, and were interested in the company and were desirous of preserving it might for the benefit of the company, and their own benefit, have placed at the disposal of the company shares which had been to all intents and purposes actually paid up.

For these reasons, and the reasons which have been so fully explained by the noble and learned lords who have preceded me, I agree in thinking that the appeal ought to be allowed.

Lord MORRIS and Lord SHAND concurred.

Orders appealed from reversed. The respondent to pay to the appellant the costs both here and below.

Solicitors for the appellant, *Romer & Haslam.*

Solicitors for the respondent, *Gush, Phillips, Walters, & Williams.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Jan. 12.

ROBINSON *v.* MAYOR, &c., OF WORKINGTON. (*a.*)

Local government — Sewers — Sewers not sufficient to drain district—Special damage—Action against local authority—Statutory remedy — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 299.

Where a local authority has neglected to make such sewers as are necessary for effectually draining their district, and special damage is thereby caused to an individual, no action will lie against them, the sole remedy being by complaint to the Local Government Board as provided by section 299 *of the Public Health Act,* 1875.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Application by the plaintiff for a new trial.

The plaintiff was the owner of certain houses in a street in the defendants' district. When the houses were built a sewer was made along the street to carry the sewage from them into a main sewer. Subsequently, owing to new houses being built in the locality and new sewers made by the builders to connect with the main sewer, the latter became inadequate to carry off all the water and sewage sent into it, and in consequence the water overflowed into the plaintiff's houses, which were at the bottom of a dip.

The plaintiff brought this action to recover damages for the injury so caused.

At the trial before Cave, J., and a jury the learned judge held that there was no evidence of misfeasance, but only of nonfeasance, and that the defendants were not liable, the only remedy being by application to the Local Government Board, under section 299 of the Public Health Act, 1875, or by prerogative writ of *mandamus.* He accordingly directed a verdict for the defendants.

A. Henry (*Shee, Q.C.*, with him), for the plaintiff.—The doctrine that no action will lie against a public body for nonfeasance applies only to local authorities in their capacity as surveyors of highways. The defendants are sued here as the owners of the sewers in their district, and they have committed a breach of a statutory duty in not keeping the sewers in proper order, as required by sections 15 and 19 of the Public Health Act, 1875. They are therefore liable in that capacity where their negligence causes special damage to an individual: *White* v. *Hindley Local Board*, 23 W. R. 651, L. R. 10 Q. B. 219; *Blackmore* v. *Vestry of Mile End Old Town*, 30 W. R. 740, 9 Q. B. D. 451; *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256, 27 W. R. Dig. 139; *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400, 39 W. R. Dig. 233; *Touzeau* v. *Slough Urban District Board*, 60 J. P. 103. In *Glossop* v. *Heston and Isleworth Local Board*, 28 W. R. 111, 12 Ch. D. 102, the action was for an injunction to restrain the defendants from permitting sewage to flow into a stream. Section 299 of the Public Health Act, 1875, was intended to apply where the local authority neglected to provide sufficient sewers for the district, and did not affect the case of special damage to an individual. The remedy provided by that section is not applicable.

Bigham, Q.C. (*Mattinson, Q.C.*, and *S. Mayer* with him), for the defendants.—This is admittedly a case of nonfeasance. The only duties alleged to have been neglected by this public body are those which are imposed upon them by the Public Health Act, 1875, and that Act, in section 299, specifies the means for enforcing those duties. That, therefore, is the only remedy. Sections 15 and 19 do not create any duty towards an individual; the duty is, so to speak, towards the community. The duty suggested is to make new sewers to meet the altered nature of the locality. That comes within section 299. An action will not lie for mere nonfeasance: *Glossop* v. *Heston and Isleworth Local Board; Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 41 W. R. Dig. 85.

He also referred to *Thompson* v. *Mayor, &c., of Brighton*, 42 W. R. 161, [1894] 1 Q. B. 332.

Henry replied.

Lord ESHER, M.R.—In my opinion this appeal fails. It is important to consider, first of all, what is the complaint. An endeavour was made to show that what was complained of was the non-repair of the sewers. It is clear, however, that the sewers were properly built at the time when they were laid, and there is no evidence that they were out of repair. Therefore there is no evidence that the sewers were

out of repair. The real complaint is that the defendants have not caused such sewers to be made as are necessary for effectually draining the district. Whether or not any application could be based upon that complaint I express no opinion. I will assume that the case is brought within section 15 of the Public Health Act, 1875. If so, the defendants are in default for not doing something which they ought to have done. That is mere nonfeasance. If it had not been for the statute there would have been no duty upon the defendants to do anything. There would have been no obligation at common law to drain the district. That duty is imposed by statute alone. If, then, the Act creating the duty gives a remedy for that default, that is the only remedy. The complaint, as I have said, is for not providing sufficient sewers for the district, and that complaint is provided for specifically by section 299, and the remedy there given applies to section 15. The remedy there provided is the only remedy. There is no remedy by way of an action for damages.

In my opinion, if the Act had specified a particular remedy for acts of misfeasance, that would have been the only remedy. But the Act gives no remedy for acts of misfeasance. It follows that there is a remedy for that outside the Act. The decision in *Glossop* v. *Heston and Isleworth Local Board*, and Lord Herschell's opinion in *Cowley* v. *Newmarket Local Board*, bear out my view of the matter.

The application must therefore be dismissed.

LOPES, L.J.—I am of the same opinion. The plaintiff's complaint arises under section 15 of the Public Health Act, 1875, and it is to the effect that the defendants have not made such sewers as are necessary for effectually draining the district. That is a mere case of nonfeasance. There is no duty upon the defendants except such as is imposed by the statute. There is no duty imposed by the statute towards an individual; there is a duty towards the locality. The law is clear that no right of action is given against a public body for an act of mere nonfeasance. I think that that is so independently of any Act of Parliament. But when I find a special remedy given in the Act, then I can have no hesitation in saying that the remedy so given is the only remedy, though the remedy so given is applicable more for the benefit of the locality than for the benefit of the individual. Section 299 provides a remedy where there has been default in providing sufficient sewers for a district. If an action for damages were allowed at the suit of an individual the local authority would have to pay heavy damages, but the necessary works might remain unexecuted. In my opinion this case is not distinguishable from *Glossop* v. *Heston and Isleworth Local Board*, and *Cowley* v. *Newmarket Local Board* supports the same view. The liability of a public body in case of nonfeasance is laid down in *Sanitary Commissioners of Gibraltar* v. *Orfila* to the effect that no claim for reparation will lie except at the instance of a person who can show that the statute under which the public body act has imposed a duty towards himself which they have negligently failed to perform.

In the present case the duty is not imposed towards any individual. The judgment, therefore, is right.

CHITTY, L.J.—I also think that the appeal fails. The complaint is the non-performance of a statutory duty. Two sections were relied upon—sections 15 and 19 of the Public Health Act, 1875. There was no evidence that this sewer was out of repair; the complaint was as to its capacity. The remedy for that is provided for in section 299. The execution of new works for the purpose of providing such sewers as will effectually drain the district, as required by section 15, may involve the necessity of purchasing lands, which the local authority have no power to do, except by going through certain formalities.

It was then said that the sewers were not kept so as not to be a nuisance, as required by section 19. But that does not help the plaintiff, because there was no reasonable cause of complaint as to the "keeping" of the sewers which were vested in the defendants.

Application dismissed.

Solicitors for the plaintiff, *Wood & Wootton*, for *T. Milburn*, Workington.

Solicitors for the defendants, *Tatham & Procter*, for *J. Warwick*, Workington.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — March 18.

PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL. (a.)

Local government—Sewers—Duty of local authority to drain district—Remedy for default—Mandamus—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 299.

The obligation imposed on a local authority by section 15 *of the Public Health Act*, 1875, *to make such sewers as may be necessary for draining their district cannot be enforced by* mandamus, *the only remedy being that provided by section* 299—*viz., by complaint to the Local Government Board.*

Robinson *v.* Mayor, &c., of Workington, ante, *p.* 453, *followed.*

Appeal from the judgment of Charles, J., at the trial of the action without a jury.

The action was for a *mandamus* to compel the defendants to perform certain statutory duties.

The original plaintiff was Philip Cadell Peebles, a paper manufacturer, who was owner and occupier of a factory called the Whiteash Paper Mill, within the district for which the defendants were the local authority. After the commencement of the action Mr. Peebles died, and his executors were substituted as plaintiffs (see 44 W. R. 513). Subsequently the executors sold the mill and business to a company, who were added as plaintiffs, with their consent, at the hearing.

The plaintiffs alleged that they desired to cause their drains to empty into the sewers of the defendants, and to carry into such sewers the liquids proceeding from their factory or manufacturing processes, but the sewers within the district were not such as were necessary for effectually draining the district for the purposes of the Public Health Act, 1875, and in particular were not such as were necessary for effectually draining the plaintiffs' premises, whereby the plaintiffs were unable to cause their drains to empty into the sewers or to carry into them the liquids proceeding from their factory or manufacturing processes. The plaintiffs further alleged that they had required the defendants, pursuant to the Public Health Act, 1875, and the Rivers Pollution Prevention Act, 1876, to cause to be made such sewers as might be necessary for effectually draining their said district, and in particular for effectually draining the plaintiffs' premises, and to give facilities for enabling the plaintiffs to carry into such sewers the liquids proceeding from their factory or manufac-

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

turing processes; but the defendants had refused to comply with such requirements.

The plaintiffs claimed a *mandamus* commanding the defendants to cause to be made such sewers as might be necessary for effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiffs to carry the liquid proceeding from their factories or manufacturing processes into the sewers under the defendants' control.

By section 15 of the Public Health Act, 1875, "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 21 gives power to owners and occupiers of premises within the district of a local authority to drain into the sewers of that authority.

By section 299 "where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers . . . the Local Government Board, if satisfied, after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by a writ of *mandamus*, or the Local Government Board may appoint some person to perform such duty."

By section 7 of the Rivers Pollution Prevention Act, 1876, "every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers."

By section 10 the county court is constituted the proper tribunal to enforce the performance of duties created by the Act.

Charles, J., granted a *mandamus* commanding the defendants to make such sewers as might be necessary for effectually draining their district for the purposes of the Public Health Act, and in particular the plaintiffs' premises, being of opinion that the remedy by complaint to the Local Government Board, under section 299, was not an exclusive remedy precluding the issue of a *mandamus*, but he refused to grant a *mandamus* compelling the defendants to give facilities under the Rivers Pollution Prevention Act, being of opinion that the remedy by application to the county court, under section 10, was an exclusive remedy.

The defendants appealed from the first part of this judgment.

Joseph Walton, Q.C., and *Danckwerts*, for the defendants.—The obligation which the plaintiffs seek to enforce against the defendants is created by section 15 of the Public Health Act, 1875; and section 299 of the same statute gives a means of enforcing that obligation. Therefore, in accordance with well-settled law, the remedy so given is the exclusive remedy. The most recent authority on the subject, which is also a decision on this same statute, is *Robinson* v. *Mayor, &c., of Workington*, *ante*, p. 453.

Bigham, Q.C., and *C. A. Russell, Q.C.*, for the plaintiffs.—Section 299 does not provide an appropriate remedy. That section applies where the local authority admit their liability, and the question is whether they are properly performing their duty—*e.g.*, whether the existing sewers are fit for the purpose for which they exist. It applies to questions of disputed fact, not to questions of law. Here the only question is a question of law—viz., are the defendants bound to carry away the plaintiffs' effluents? We admit that the defendants' sewers are sufficient if they are not bound to take our effluents; they admit that their sewers are insufficient if they are bound to take our effluents. Therefore the only question is whether they are bound to take them, and there is no question of fact for the Local Government Board. The section therefore does not preclude this action.

They cited *Glossop* v. *Heston and Isleworth Local Board*, 28 W. R. 111, 12 Ch. D. 102, and *Eccles* v. *Guardians of Wirrall Union*, 34 W. R. 412, 17 Q. B. D. 107.

Lord ESHER, M.R.—In this case the plaintiffs, having allowed to flow from their factory a large quantity of dirty water, which has spread over a part of the defendants' district, have called upon the defendants to make their sewers larger so that they may be sufficient to carry off the overflow which is doing mischief to the district generally. No doubt the plaintiffs desire also on their own account to be relieved from the inundation which they have caused. They have brought an action asking for a *mandamus*, which they have obtained by the judgment of Charles, J. The defendants say that no action at all can be maintained against them. The answer which they suggest to the action is this—that a liability is imposed upon them by a particular statute to see their district clear from inundations, no such obligation having existed before the statute, and by the same statute a remedy is given in case the duty so imposed is not properly performed by them—viz., by complaint to the Local Government Board. The canon of construction is that, if in a statute a new obligation is created and in the same statute a remedy is provided for the non-fulfilment of that obligation, that remedy is the only remedy. In obedience to that rule this court held, in *Robinson* v. *Mayor, &c., of Workington*, that, as section 15 of the Public Health Act, 1875, imposed on the local authority an obligation which was not known to the common law, and section 299 enacted a remedy to meet the case of that obligation not being fulfilled, that remedy was the only remedy which an individual living in the district could follow. It is true that there the action was for damages, whereas this action is for a *mandamus*. But neither damages nor mandamus is the remedy provided by section 299, and it follows from the reasoning of that case that an action for *mandamus* cannot be maintained.

It is argued that in this case an action for *mandamus* is maintainable because the only question in dispute is a question of law. But this action has not been brought merely for the purpose of having a point of law settled; it goes beyond that, and the judgment which has been given is an order on the local authority to carry out large and expensive works. If on the hearing of a complaint brought before the Local Government Board a question of law arises to be determined, they must decide it. It is of course possible that they may decide wrongly, and their wrong decision may impose serious consequences on individuals or corporate bodies. But I think we must not determine the extent of the power of the Local Government Board. In my opinion it was intended to give them a very large discretion, and I do not desire to put any limit on their power. I cannot agree with the judgment of Charles, J. I think that the action does not lie and that the appeal must be allowed.

LOPES and CHITTY, L.JJ., concurred

Appeal allowed.

Solicitors for the plaintiffs, *Soames, Edwards, & Jones*, for *Boote & Edgar*, Manchester.

Solicitors for the defendants, *Pritchard, Englefield & Co.*, for *C. Costeker*, Darwen.

High Court of Justice.

Chan. Div. } Stirling, J. } April 8.

In re SAUNDERS.
SAUNDERS *v.* GORE. (*a.*)

Settlement—Appointment of stock sufficient to raise net sum—Duty.

Under a power in a settlement an appointment was made of sufficient stock to raise a net sum of £2,000.

Held, that the appointee was not entitled to receive the said sum free from deductions in respect of duty, but that he must pay duty.

Banks *v.* Braithwaite, 32 *L. J. Ch.* 35, *followed.*

Summons.

This case raised the question whether the appointee of a sufficient sum of stock to raise a net sum of cash was entitled to have the cash paid him without any deduction for stamp duty or other charges.

Under a settlement dated the 15th of January, 1855, made upon the marriage which was afterwards solemnized between Hugh Ward Saunders and Ellen Ann Saunders, then Ellen Ann Bannerman, Mrs. Saunders was tenant for life of part of certain funds thereby settled, and upon the death of her husband, which took place in 1877, became tenant for life of the whole thereof.

The settlement gave to the husband and wife a joint power of appointment to the children or issue of the marriage. Such joint power was not exercised. In default of such joint appointment it gave to the survivor of them a power to appoint the settled funds amongst the children or issue.

Pursuant to her power as such survivor Mrs. Saunders made three several appointments of £2,000, £3,000, and £4,000 respectively to her son Edward George Saunders.

By deed-poll dated the 9th of February, 1894, she appointed that so much of the settled funds as should be sufficient to raise the net sum of £2,000 should, subject to her life interest therein, thenceforth belong to the said E. G. Saunders.

By a deed-poll dated the 11th of August, 1896, she assigned to the said E. G. Saunders her life interest in the funds appointed by the preceding deed-poll, to the intent that he might thenceforth be absolutely and beneficially entitled in possession to so much of the funds as should be sufficient to raise the net sum of £2,000.

The 8th of August, 1894, and the 18th of April, 1896, similar deed-polls as to £3,000.

The 27th of December, 1894, similar deed-poll as to £4,000.

On the 27th of July, 1896, the defendants, the present trustees of the settlement sold £3,563 G. W. R. Guaranteed Stock, part of the settled funds for £7,036 18s. 6d., from which £35 3s. 7d. for brokers' commission and 1s. for stamp duty was deducted, and they received £7,001 13s. 11d.

This sale was in respect of the said appointments of £3,000 and £4,000, which the said E. G. Saunders had requested the trustees to raise and pay to him.

On the 8th of September, 1896, the defendant trustees sold £1,018 G. W. R. like stock for £2,010 11s., from which £10 1s. for commission and 1s. stamp duty was deducted, and they received £2,000 9s.

This was in respect of the £2,000 appointment.

The said E. G. Saunders took out the present summons for the determination of the question whether by virtue of the said deed-poll the defendants ought not to pay all duty in respect of the sums so appointed as also all costs of raising the same out of the remaining trust funds not comprised in the second deeds-poll, and so as to enable the plaintiff to receive the net sums of £2,000, £3,000, and £4,000 respectively, free of duty, brokerage, and all other charges.

Medd, for *E. G. Saunders.*—The appointment is of a net sum. The word "net" would be frittered away if it were not to cover the duty.

He referred to *Peareth* v. *Marriott*, 31 W. R. 68, 22 Ch. D. 182; *In re Currie*, 36 W. R. 752; *Haynes* v. *Haynes*, 1 W. R. 204, 3 De G. M. & G. 590; *Gray* v. *Gray*, 44 W. R. 406, 3 De G. M. & G. 590; *In re Shaw, Tucket* v. *Shaw*, 43 W. R. 315, [1895] 1 Ch. 343; *Wilks* v. *Groom*, 4 W. R. 697; *Ex parte Sitwell*, 37 W. R. 238, 21 Q. B. D. 466; *In re Higgins, Day* v. *Turnell*, 34 W. R. 81, 31 Ch. D. 142; Hanson on the Death Duties, 4th ed., pp. 464-465, 706-707.

Godefroi, for *Ferdinand Saunders*, in the same interest, adopted *Medd's* argument.

W. A. Peck, for the trustees, referred to *Freman* v *Whitbread*, 14 W. R. 188, L. R. 1 Eq. 266.

Petersen, contra.—The word "net" refers to the necessary expenses of raising the sum, and the question of debt does not arise till the sum is raised. All the cases cited are cases of directions to pay a clear sum. *Sanders* v. *Kiddell*, 7 Sim. 536, and *Pridie* v. *Field*, 2 W. R. 632, 19 Beav. 497, show that the word "clear" is not in itself sufficient. You must look at the will as a whole.

Medd, in reply, referred to Jarman on Wills, 5th ed., p. 151. [STIRLING, J., referred to **Banks* v. *Braithwaite*, 32 L. J. Ch. 35.]

STIRLING, J.—The substantial question which I have to decide is whether under certain appointments made in pursuance of a power the appointees are entitled to take the appointments duty free—in other words, whether the amount of duty payable by them in respect of the appointments has been given to them by the appointor as well as the sums themselves.

The appointor was a lady entitled for life who made several appointments in the same form. I will read one of them: [His lordship read as follows: "Now these presents witness that in exercise of the power to the said Ellen Ann Saunders, for this purpose given to her by the said indenture of settlement, and of every other power enabling her in this behalf, the said Ellen Ann Saunders doth hereby irrevocably appoint that so much of the stocks, funds, shares, and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of £2,000 shall, subject to the life interest of the said Ellen Ann Saunders, henceforth belong to and be vested in the said Edward George Saunders, his executors, administrators, and assigns."] That is not an appointment of a net sum of £2,000, but of such an amount of stock as is sufficient to raise £2,000. It has been decided on the part of many judges with much difficulty that a direction to pay a clear legacy or annuity means a legacy or annuity free from all deductions. A series of cases have so decided, and by these I should be bound. But those are cases under wills. This is a case of an appointment made under a settlement. Even in the case of a will a distinction has been taken, and it was

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

* Not reported in the WEEKLY REPORTER on this point.

established in *Banks* v. *Braithwaite*, before Kindersley, V.C., that there is a difference between the case of a gift of a clear annuity or legacy and the case of the gift of a sum of stock sufficient to produce the legacy, or the income of which, would be sufficient to pay an annuity. In that case a testator gave the residue of his personal estate to trustees upon trust to set apart £10,000 Consols and pay the dividends to his sister for life, and after her decease to retain so much of the said sum of £10,000 as should be sufficient to realize the clear yearly income of £150; and he directed his trustees to pay the dividends and other income of the sum so directed to be retained by them to his nephew. It was held that the nephew took the annuity subject to legacy duty, and the Vice-Chancellor refers to the authorities which decided that an annuity is given clear of legacy duty if a testator gives a clear annuity of a definite amount, but he is of opinion that that is a different case. He says: "That principle does not touch the present question; for in those cases the word "clear" was annexed to the gift of the annuity. In this case there is no gift of an annuity, but what is given is the dividend of a sum of stock. It is not said that the legatee is to have the dividends clear, but the sum of stock is to be thus ascertained. It is such a sum of stock as would produce a clear income of £150 per annum. The particular sum is £5,000 Consols; and that amount having been arrived at, the dividends are then directed to be paid to the petitioner." In applying that reasoning here what is given is not a clear sum of £2,000, but stock sufficient to pay a clear sum of £2,000; and when that is ascertained by proper calculation that particular sum would belong to the appointee. It seems to me this case is governed by *Banks* v. *Braithwaite*, and that the gift is not given free of duty, and the appointee has to pay duty.

Solicitors, *Valpy, Chaplin, & Peckham; Witham, Roskell, Munster, & Weld; Hasties.*

Chan. Div. Stirling, J. March 19; April 3.

In re RIDDING.

THOMPSON *v.* RIDDING. (*a.*)

Will—Tenant for life and remainderman—Leaseholds—Repairs.

Where a testator directed that the income derived from certain leasehold houses should be paid to his widow for her life,

Held, that the words "income derived" meant net income, and not gross income, and that, consequently, the tenant for life must bear the expense of all outgoings incurred after the testator's death.

In re Courtier, 35 *W. R.* 85, 34 *Ch. D.* 136, *discussed.*

In re Baring, Jeune *v.* Baring, 41 *W. R.* 87, [1893] 1 *Ch.* 61, *dissented from.*

This summons raised (*inter alia*) the question whether the tenant for life was entitled from the death of the testator to receive the rents and profits of the leasehold property of the testator, which she held at ground-rents, without making any deduction therefrom in respect of ground-rents, rates, taxes, repairs, insurance, and other outgoings.

By his will the testator appointed his wife, S. Ridding, and S. Thompson and G. W. Fry executors and trustees to arrange his affairs, manage his estate, and carry out his wishes and desires. Then he directed that all his just debts, funeral and testamentary and other expenses, be paid and satisfied as soon as conveniently might be after his decease; and immediately after his decease he requested his executors and trustees to take in hand the various businesses carried on by him and manage the same until they could advantageously be put in the market, and to obtain the highest possible price for them.

He directed his executors and trustees to sell the various premises he held at rack rentals as early as practicable and to the highest advantage; and then certain premises (naming them) held at ground-rents he wished to be retained by his trustees and let on lease or otherwise at fair rentals, together with all other property which he might hold at nominal ground-rents which might be acquired by him at any time, and the income derived therefrom to be devoted as thereinafter described. He then generally "directed and devised" that, after the collection of and getting together of all outstanding assets, the proceeds of the sales of the various premises, &c., and of all sums to which he might be entitled, or which might become due to him at the time of his decease, and, after due payment of all his just debts, liabilities, testamentary and other expenses, legacies, and other sums incidental to the settling up of his estate, the surplus remaining in their hands should be invested in Consols, Government securities, ground-rents, or freehold cottage property, and the whole of such income from such investment should be paid over to his said wife quarterly or at other suitable periods for her benefit and that of his children, and to be enjoyed by her and them during the term of her natural life, and at her decease the whole of his estate to be equally divided among his children as therein mentioned.

A question having been raised whether the cost of current repairs and outgoings of the retained leaseholds were payable out of income or *corpus*, this summons was taken out.

P. F. Wheeler, for the trustees.

Whinney, for the children.—I submit that the liability imposed by *In re Courtier*, 35 W. R. 85, 34 Ch. D. 136, only applies to the liability to put premises in repair which have got out of order during the lifetime of the testator.

He referred to *In re Baring*, 41 W. R. 87, [1893] 1 Ch. 61; *Debney* v. *Eckett*, 43 W. R. 54.

Cozens-Hardy, for the tenant for life.—The word "manage" in the will does not apply to the leaseholds, and I ask that *In re Baring* should be followed, and I submit that that case was rightly decided. The case in the WEEKLY REPORTER (*Debney* v. *Eckett*) is not clear, and I submit that the facts there were different.

He also referred to *Brereton* v. *Day*, [1895] 1 Ir. Rep. 518, 44 W. R. Dig. 3.

Cur. adv. vult.

April 3.—STIRLING, J. [having stated the facts and read the question on the summons above set out, continued:] The question is whether the accruing income derived from these leaseholds is to be paid over to the widow without making any deductions for payments which may be made for ground-rent or for satisfying repairs, by which, of course, are meant those occurring after the death of the testator, or otherwise in performance of the covenants in the leases. It is to be observed that first the testator directs the trustees to arrange his affairs, manage his estate, and carry out his wishes and desires. So far he imposes on them the management of his estate. No doubt he repeats the word "management" in a

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law

subsequent clause as to his businesses in the interval between his death and the sale, but he does not thereby give up the direction which exists in the prior portion of the will as to the management of his estate. With reference to the retained leaseholds, he directs them to be let on lease at fair rentals, and then says that the income to be derived from them is to be devoted as thereinafter described—that is, paid to the widow. What is income? It appears to me that it is not the whole income which would be derived from these rentals without any deduction, but the income after making proper deductions in respect of these charges. That seems to me the very meaning of the language used. "Income derived" in ordinary parlance is understood to mean not the gross rents, but the rents after deducting the proper outgoings. In that view I am corroborated in the language used in giving the income of the residuary estate. He there says "the whole of such income shall be paid over to my wife." He does not say that in respect of the leaseholds. There, however, it is said that he directs the liabilities to be paid out of his estate. No doubt he does, but if I am right in holding that income directed to be paid to the widow derived from leaseholds means net income, I cannot see that that construction can be effected by a direction to discharge liabilities out of *corpus*. And, therefore, according to the language used the widow must bear the expense of the proper outgoings in respect of ground-rent, rates, taxes, insurance, and other outgoings on the property.

On behalf of the widow the case of *In re Baring* was relied on. That case was decided partly on the language of the particular will and partly with reference to the case *In re Courtier*. As far as it depended on the language of the particular will, I shall not enter into consideration of it. But as regards *In re Courtier*, I feel bound to say that having read it carefully I am unable to put the construction on the language used by the various members of the Court of Appeal, which seems to have been put on it in *In re Baring*. Certainly in point of decision *In re Courtier* did not decide the present case, because it was exclusively directed to the question whether the tenant for life was bound to discharge the liabilities in respect of repairs to property which had accrued at the death of the testator. The decision of the Court of Appeal was given with reference to that and nothing else, and it seems to me that when one looks at the judgments, that was the sole question which the judges of the Court of Appeal dealt with. It is sufficient to refer to the judgment of Cotton, L.J., after stating that the leaseholds were at the death of the testator in a condition requiring repair, he says: "The widow has kept them in the same state as they were in at the testator's death, but declines to put them in such a state of repair as to satisfy the covenants in the leases. With respect to that question, it is admitted that the words of the will are such that it cannot be contended that there is a trust for immediate conversion." Then he goes on. He is dealing entirely with the question whether the widow is bound to put the leaseholds in such a state of repair as will satisfy the covenants in the leases at that time. I do not think, therefore, that *In re Courtier* can be relied on as a decision adverse to that which I think ought to be given in the present case.

Solicitors for all parties, *Sheffield, Son, & Powell.*

Chan. Div. }
Kekewich, J. } March 19.

In re BATTAMS & HUTCHINSON (SOLICITORS). (*a.*)

Solicitor—Costs—Taxation—Joint application of mortgagee-solicitor and his bankrupt client—Submission of solicitor to pay.

A solicitor, who is mortgagee of the moneys coming to his client on the cash account and taxation of the bills of costs of his client's former solicitors, and who makes a joint application with his client for delivery of such cash account and bills of costs and for taxation, must join with his client in the usual submission to pay, and the fact that his client has been adjudicated bankrupt while such proceedings were pending will not relieve the solicitor from making such submission.

Motion.

On the 30th of October, 1896, Mr. Alexander de Schwertchkoff took out a summons against his former solicitors, Messrs. Battams & Hutchinson, for delivery within seven days of certain bills of costs, a cash account, and for taxation. At the time a receiving order had been made against Schwertchkoff but he had not been yet adjudicated a bankrupt. Schwertchkoff's present solicitor, Mr. Harker, claimed to be a mortgagee of all moneys coming to his client from Messrs. Battams & Hutchinson on the taxation. In the circumstances the court required Mr. Harker to join in the application then before the court, and this was accordingly done. On the 21st of January, 1897, the court made an order upon the above-mentioned summons for delivery of the bills of costs and cash account, and directed the rest of the summons to stand over, with liberty to apply. Certain bills of costs and a cash account were delivered in pursuance of this order, but being considered inconsistent, the applicants, Schwertchkoff and Harker, moved on the 19th of February, 1897, for an order directing the respondents to deliver within four days proper bills of costs and disbursements, and a cash account. All the bills were, by order made upon that motion, referred to taxation, the costs being reserved. In the meantime Schwertchkoff was adjudicated bankrupt. In drawing the order upon the motion, the registrar inserted the usual submission to pay by both applicants whatever should be found due to Messrs. Battams & Co. Schwertchkoff consented, but Harker objected, to make this submission. The respondents required that the order for taxation should go upon a submission to pay by both parties—*i.e.*, the original applicant and his solicitor, and they objected to allow the order to go for taxation of the bills upon the submission to pay of Schwertchkoff alone, he being at the time a bankrupt.

Harker now moved to vary the minutes of the order and to be relieved from the submission to pay.

Eustace Smith, for the applicant Harker.

Stephen Lynch, for the respondents.

KEKEWICH, J., sated the facts of the case, and continued: The question which I have to decide is whether the order can go on the submission of one, or whether it must not be on the submission of both applicants. It is the established practice that the order for taxation on the application of a client is never made without the submission of the client to pay. That of course rests upon the relation of solicitor and client. The client admits the retainer for the purpose of the business under consideration,

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

he therefore admits the relation and the liability to pay what is properly due; and if he puts the solicitor to the expense and trouble of taxation he is bound to pay what is eventually due: that is perfectly right. Mr. Eustace Smith says that in an order for taxation you are dealing with the jurisdiction of the court arising out of the relation between the parties of solicitor and client, and that, therefore, the submission to pay is that of the client only, and flows from the relation of solicitor and client and nothing else, and that the other applicant, the solicitor, who comes here as an assignee of whatever is due, if anything, is under no liability to submit, as the submission does not arise out of that relation. That, to my mind, is not the proper way of putting it. It does arise out of the relation of solicitor and client, and it is something evoked from that relation and the person who makes the application, if he is entitled to make it at all, must also submit to pay. He cannot have it both ways. If he is entitled to the order he must have it in the proper form. I think he is entitled at any time before the order is passed to say, "I never intended to submit, not being the client." He is entitled to raise that objection; this is therefore quite a proper matter to have tried before me. The applicant must take his choice, either he takes the order or he does not. If he takes it, it must be by submitting to pay. If he does not submit he cannot have the order, and his motion fails, because he has not complied with the order of the court. I understand in this case that Mr. Harker is now willing to join in the submission to pay, and the order will therefore go in that form, all costs being reserved.

Solicitors, *Edward Swain; John Battams*, for *Battams & Hutchinson*.

Chan. Div. Kekewich, J. } Jan. 16.

DAVIS v. INGRAM. (a.)

Partition action—Practice—Infant plaintiffs—Sale in lieu of partition—Sale depending upon result of inquiries—Form of judgment.

Form of judgment in an action for sale in lieu of partition where the plaintiffs are infants entitled to one undivided one-third share, and where the execution of the sale depends upon the result of the inquiries directed by the order, the infants, in the event of a sale, being declared trustees of their shares for the purchaser and their next friend being appointed to convey the infants' shares.

Action.

By his will dated the 10th of December, 1873, Thomas James Bayliss, after providing for payment of his debts, funeral and testamentary expenses, gave, devised, and bequeathed all the rest, residue, and remainder of his real and personal estate, subject to his wife's life interest therein, unto and among all and every his children who should be living at the decease of his said wife in equal shares and proportions, and the issue of such of them as should be dead (such issue nevertheless taking only the share to which their deceased parent would have been entitled in the event of such parent surviving the testator's said wife), to and for his, her, or their own use and benefit absolutely.

The testator died on the 11th of December, 1873, and his will was duly proved on the 18th of July, 1874.

The testator's widow died on the 9th of January 1895.

The testator left three children surviving him—namely, (1) Mary Jane Bayliss, who married Samuel Samson Davis, and died in 1891, having had three children. These children were infants, and were the plaintiffs in this action, suing by James Ingram, their next friend. (2) Elizabeth Anne Bayliss, who married Charles Ingram in or about the year 1870, and was one of the defendants. Charles Ingram had not been heard of for several years, and it was not known whether he was living or dead; and (3) Charles Jenkins Bayliss, who mortgaged his share under the will to the defendant James Frederick Townend, in whom the same was now vested. Charles Jenkins Bayliss was adjudicated a bankrupt in 1893, and his trustee in bankruptcy was joined as a defendant.

The testator died seized of certain freehold property in Essex.

The plaintiffs alleged that it would be for the benefit of all the persons interested in the property that the same should be sold and not partitioned, and they claimed all necessary inquiries and a sale in lieu of partition.

Percy F. Wheeler, for the plaintiffs, asked the court to direct the necessary inquiries, and also to direct that in the event of a sale the infant plaintiffs might be declared to be trustees, and the plaintiff James Ingram, their next friend, appointed to convey on their behalf, according to the form in Seton's Judgments and Orders, 5th ed., vol. 2, p. 1542-3, No. 21.

KEKEWICH, J.—Is it usual to give directions in an order before it is certain that there will be a sale—*i.e.*, while the sale is still hypothetical? I am not at present disposed to alter the practice. I will refer the matter to the registrar to be gone into by him.

Gore-Browne and *E. A. Jelf*, for the various defendants.

The order, as subsequently drawn up, directed the usual inquiries and also an inquiry whether it would be for the benefit of such of the persons interested in the said hereditaments as were infants that the same should be sold, and proceeded as follows: And if it shall be certified that all the persons interested are parties to this action and either (1) that the parties desiring a sale, other than the infants, are interested to the extent of one moiety or upwards in the said hereditaments, or (2) that it will be for the benefit of the said infants that the said hereditaments should be sold, and that the parties desiring a sale, including the said infants, are interested to the extent aforesaid—it is ordered that the said hereditaments be sold with the approbation of the judge. And it is ordered that the money to arise from such sale be paid into court to the credit of this action. But if it shall appear that any of the persons interested are not parties to this action, then it is ordered that any of the persons interested, collectively or individually, to the extent of one moiety or upwards in the said hereditaments, be at liberty, when it shall have been certified that the persons who ought to be served with notice of this judgment have been so served, to apply at chambers for a sale of the said hereditaments, the said infants not to be at liberty to apply hereunder unless and until it shall have been certified that it will be for their benefit that the said hereditaments should be sold. And this court doth declare that upon any such sale being made, such of the parties interested

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

in the said hereditament as are infants will be trustees for the purchaser or purchasers of their undivided share or shares of the said hereditaments within the meaning of the Trustee Act, 1893. And it is ordered that James Ingram, of &c., the next friend of the plaintiffs, be appointed to convey such share or shares to the purchaser or purchasers of the said hereditaments. And it is ordered that the said James Ingram, upon payment into court by any purchaser of the amount of his purchase-money, convey to such purchaser accordingly the property bought by him. And any of the parties interested in the said hereditaments other than the party having the conduct of the sale are to be at liberty to bid at such sale and become the purchaser of the said hereditaments or any part thereof without payment of any deposit in respect thereof. And it is ordered that the purchase-money of any portion so purchased by any of the parties be set off against the shares to which they may be respectively entitled.

Further consideration adjourned, with liberty to apply.

Solicitors, *J. S. Tyler; J. L. Higgs; Sims & Syms.*

Chan. Div. } March 2, 3; April 6.
Romer, J. }

RAFFETY v. SCHOFIELD. (a.)

Landlord and tenant—Lease—Building agreement—Power of landlord to determine—Option to tenant to purchase—Interest of tenant after exercise of option.

A. entered into an agreement with B. by which B. was to build upon A.'s land, and A. was, upon the works being carried out, to demise the land to B. for ninety-nine years, and the agreement contained an option to B. to purchase the freehold. It was thereby provided (inter alia) *that B. should forthwith proceed with the works, and completely finish on or before a certain day, and if B. should not perform the several agreements on his part, A. might determine the agreement and re-enter. A., being dissatisfied with B.'s progress, gave notice to B. to determine the agreement, B. having shortly before given notice to A. of B.'s intention to purchase.*

Held, (1) *that B. had made default in performing his part of the agreement;* (2) *that the option of purchase was, notwithstanding, well exercised;* (3) *that the contract so made did not in itself before completion put an end to the leasing parts of the agreement, but created fresh rights and liabilities between the parties, and the new relation of vendor and purchaser between them;* (4) *that assuming that A.'s notice to determine had put an end to B.'s rights so far as they arose directly from the building agreement, A. had not thereby put an end to the contract for sale or to B.'s rights thereunder; but* (5) *that after the exercise of the option, and pending completion, A.'s power, if any, to determine B.'s occupation, and B.'s rights and liabilities under the building agreement, became, as between A. and B., superseded and not enforceable.*

Action.

It appeared that the plaintiff, who was the freeholder of certain land and premises situate on the west side of Pembridge-villas and west side of Chepstow-place, in the parish of St. Mary Abbotts, Kensington (which premises were formerly the site of two messuages and tenements), also of a certain other piece of land situate on the west side of Chepstow-place aforesaid (which premises were formerly the site of a messuage or dwelling-house), on the 12th of August, 1895, entered into an agreement in writing with the defendant, whereby it was agreed that the defendant should carry out upon the said land certain building operations, and the plaintiff should, upon the buildings being erected and covered in, and the works carried out as mentioned in the agreement, demise the said premises to the defendant for ninety-nine years from the 29th of September, 1895, at a rent, after the first year, of £675; and in the agreement there was an option to the defendant to purchase the said premises upon the terms which are set out below.

By clause 3 of the said agreement it was provided that the defendant should forthwith proceed with such works, and should, on or before the 1st of May, 1896, erect and cover in shops with residential flats upon the said pieces of land and lay the drains and fix the gutters and rain-water pipes thereto, and connect the same with the sewers, and should completely finish the same fit for occupation, with the fence, walls, iron fence, gates, and other buildings, on or before the 1st day of June, 1896, and should, on or before that day, lay out, pave, plant, and complete for use the yard and garden where the land was not built upon, and should expend not less than the sum of £20,000 in and about such works.

There was a dispute between the parties whether the above dates were filled in on the 12th of August, when the agreement was signed, or some time later, and also whether there was a contemporaneous agreement that, if an extension of the time for the completion of the said buildings beyond those dates could be obtained by the defendant from the London County Council, those dates should be postponed by the amount of such extension.

By clause 13 of the said agreement it was provided that until the said premises should have been actually demised, the defendant should pay the said rent and perform and observe the stipulations and agreements on his part thereinbefore referred to, which were provisions of a usual character in agreements of this kind.

By clause 15 of the said agreement it was provided that in case the defendant should not at the respective times and in manner thereinbefore expressed have built and fully completed the said shops and flats thereinbefore agreed to be built on the land thereby agreed to be demised, or in case the defendant should for the space of twenty-eight days next after the rent payable in respect of the said pieces of land or any portion of such rent should have become payable make default in the payment thereof, or if the defendant should not perform or observe the several stipulations or agreements on his part therein contained then, and in any or either of the said cases, it should be lawful for the plaintiff by such writing as was therein mentioned to determine and put an end to the said agreement and thereupon, into and upon the said land and premises and all buildings thereon to re-enter, and the same to have again, repossess, and enjoy as in his former estate.

By clause 17 of the said agreement it was provided that if the defendant should be desirous of purchasing the fee simple free from incumbrances (except the said agreement of the 12th of August, 1895) of the said piece of land and premises at the price of £16,000, and should at any time before the 9th of August, 1897, give to the plaintiff notice in writing to that effect then, and in such case the person giving such notice should be deemed the purchaser of the premises at the price of £16,000 as from the date of such notice subject to such conditions as therein mentioned, of which two only are material to this report—viz., a condition that the purchaser should pay

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

all arrears of rent up to the day appointed for the completion of the purchase including the quarter's rent due on that day; and a condition that if the purchaser should take any objection or make any requisition which the vendor should be unable or unwilling to remove or comply with the vendor might by such notice as was therein mentioned, and notwithstanding any intermediate negotiation, rescind that agreement for sale.

The defendant applied for, and, after considerable delay, obtained from the London County Council an extension of time for the completion of the buildings until the 27th of October, 1897, the letter from the council consenting to the application being dated the 28th of October, 1896.

The plaintiff would seem to have been dissatisfied from the first with the progress made by the defendant in carrying out the works, and on the 27th of January, 1897, caused a notice to be served upon the defendant purporting to determine the said agreement under the above power in clause 15 thereof, and stating the plaintiff's intention to forthwith re-enter upon the premises. The notice alleged default in carrying out the said agreement as the reason, and the plaintiff's evidence particularly alleged that the defendant had taken no step to build upon the land, and had never paid any rent as provided by the said agreement.

Meanwhile—viz., on the 30th of December, 1896—the defendant had served upon the plaintiff notice of his intention to exercise the option of purchase given by clause 17 of the said agreement.

The defendant's evidence was to the effect that the defendant had expended upwards of £1,000 in building upon the said land and premises, and the time for the completion of the buildings did not expire until the 27th of October, 1897, under the circumstances above mentioned, and that a quarter's rent (being the first rent payable under the agreement) was due on the 25th of December, 1896, which he had not paid, as under clause 17 of the said agreement, having exercised his option to purchase, he was deemed to be the purchaser of the premises, and under the same clause all arrears of rent were to be paid with the purchase-money on the completion of the purchase.

This was an action for an injunction to restrain the defendant from trespassing upon or interfering with the possession by the plaintiff of the said land and premises, and proceeded upon the footing of the plaintiff's allegation that he had taken possession pursuant to his notice, and had since remained in possession. This allegation was denied by the defendant, who alleged that his men had been continually at work upon the land since the date of the agreement.

Farwell, Q.C., and *A. à B. Terrell*, for the plaintiff.

Levett, Q.C., and *G. Lawrence*, for the defendant.

ROMER, J.—This action gives rise to points of some difficulty. From the evidence before me it appears that the property is worth considerably more than the purchase-money payable by the defendant, and if the plaintiff's contention be correct, the defendant will lose not only the benefit of his bargain, but also all the money that he has already paid to the plaintiff and that he has otherwise expended in reference to the property. On the other hand it is suggested on the plaintiff's behalf that if the defendant does not complete the purchase the property will be deteriorated in value by the buildings contemplated by the agreement not being completed within the time limited. But having regard to the value of the property, it does not appear to me very probable that the defendant will fail to complete.

The first question is, whether the defendant has made such default as would entitle the plaintiff, if the option had not been exercised, to determine the agreement under clause 15? It was contended on the plaintiff's behalf that the defendant had committed default in not completing the buildings by the time limited by clause 3. But it was proved to my satisfaction that there was a collateral contemporaneous agreement that the dates mentioned in clause 3 should be postponed if an extension of time could be obtained from the London County Council for the completion of the buildings by the amount of such extension. A large extension was so obtained, and the times for covering in and finally completing the buildings under the original and collateral agreements have in consequence not yet expired. So no default has arisen in this respect. But the other default relied on by the plaintiff occasions more difficulty. It appears that beyond pulling down some erections on the site, and stacking the bricks ready to be used for the new building, and paying one or two men to keep possession of and look after the premises, the defendant has not substantially done anything to carry out the works mentioned in the agreement. It seems to me that under these circumstances, and looking at the agreement as a whole, I cannot say that the defendant did "forthwith proceed with the works" within the fair meaning of those words as used in clause 3. And in coming to this conclusion I bear in mind that the agreement does not provide for or require that the works should be continuously proceeded with. But I think it did require some building to be forthwith proceeded with. Something more, at any rate, than what the defendant has done. I therefore come to the conclusion that in this respect there was default on the defendant's part, and that consequently he did not "perform and observe the several stipulations and agreements on his part" within the meaning of these words as used in clause 15.

This conclusion renders it necessary for me to consider the effect of the exercise by the defendant of the option of purchase given to him by clause 17. Now it clearly was not a condition precedent to the exercise of the option that the defendant should not have made default under the building agreement, so that the option was well exercised and a building contract was thereby come to, between plaintiff and defendant for sale and purchase of the property. But I agree with the plaintiff's arguments so far that that contract did not in itself before completion put an end to what I may call the leasing parts of the building agreement. I come to that conclusion from a general consideration of the building agreement and in particular of the provisions of clause 17, that the tenant was to buy "free from incumbrances (except these presents)." And of course the contract of purchase might not be completed, and that from no fault of the purchaser, for it might (by way of example) be put an end to by the vendor under the provision of clause 17, that if the purchaser made any requisition that the vendor was unable or unwilling to remove or comply with, the latter might rescind the sale, and it could not be within the contemplation of the building agreement that in such a case the purchaser should not only lose his purchase bargain, but also find himself deprived of all his rights under the other parts of the agreement. But on the other hand, though the contract of purchase did not in itself destroy the leasing parts of the agreement, it created fresh rights and liabilities between the parties, and a new relation between them—viz., that of vendor and purchaser. It was, in fact, a new and distinct contract from that created by the building agreement, though it arose by reason of and flowed from the

building agreement; and even assuming that, notwithstanding the purchase contract, the rest of the building agreement stood, including the power to determine under clause 15, I see no sufficient reason for holding that the determination of the building agreement under the power would in itself destroy or affect the contract for sale, which (as I have pointed out) was a new and distinct contract from that created by the building agreement. The wording of the provision in clause 15 which enabled the landlord to determine "this present agreement" is not appropriate if attempted to be applied to the contract of purchase.

The last-named contract was not "this present agreement," or even part of it, though flowing from it. And even assuming that the plaintiff has by his notice to determine put an end to the defendant's rights so far as they arise directly from the building agreement, I think the plaintiff has not thereby put an end to the contract of sale or to the defendant's rights thereunder.

Now, on the evidence it is clear that the defendant has throughout remained and is still in possession of the property, and I find that on completion under the second condition in clause 17 he will have to pay to the plaintiff all arrears of rent up to that date, and under these circumstances I think I ought not even on the above assumption to order him to retire from possession before the date fixed for completion arrives. I think it was contemplated by the agreement that after exercising his option of purchase the defendant should remain in possession until completion, and should then pay with his purchase-money rent for the *interim* possession, and with that possession I think I ought not to interfere. I may add that no question arises here as to rent accruing due before the option was exercised, for no such rent remains owing.

But there is another consideration which also induces me to hold that the plaintiff ought to fail in this action. After the relation of vendor and purchaser was established between the parties, the purchaser was in equity the owner of the property. And the position of the vendor is clearly stated by Lord Cairns in *Shaw* v. *Foster*, 20 W. R. 907, L. R. 5 H. L. 321, p. 338: "The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a court of equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee; he was a trustee having a personal and substantial interest in the property, a right to protect that interest and an active right to assert that interest if anything should be done in derogation of it. The relation therefore of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." Now, in the case before me I cannot see that any paramount right of the vendor to protect his own right as vendor requires or entitles him to determine the defendant's occupation or his interests under the building agreement, even assuming that the defendant is occupying the property not as purchaser, but as a *quasi*-tenant under the building agreement. This is not a case where the vendor has rights in respect of the defendant's occupation which are apart and separate from the rights of the purchaser or require separate protection. As I have pointed out, no rent remains owing to the vendor in respect of the occupation of the property prior to the exercise of the option of purchase, and the subsequent rent is expressly provided for by the contract of sale. The question of the defendant's occupation, therefore —that is to say, whether it is better or not that that occupation should be determined, is one which only concerns the property sold and its value, and that property is in equity the defendant's, and he is entitled to say that he desires the existing position of the property and its occupation not to be disturbed pending completion. Suppose that the occupier had not been the purchaser, and had been an ordinary tenant existing at the date of the contract. The purchaser would have been entitled to say to the vendor that he did not desire the tenancy to be determined, for as between vendor and purchaser of a property which at the date of contract is in occupation of a tenant, the purchaser is, generally speaking, entitled to have the property preserved pending completion in its existing state, and the vendor would not only not be entitled as against the purchaser's desire to determine the tenancy, but if he did determine it he would be liable to the purchaser for any loss thereby accruing. This has always, I think, been the general view of the profession, and is certainly implied in the case of *Harford* v. *Purrier*, 1 Madd. 532. In fact as between vendor and purchaser generally the powers of the vendor to act as owner of the property and (*inter alia*) to change tenants or holdings, are suspended pending completion of the purchase. And I think I ought to hold in the case before me that after the exercise by the defendant of the option to purchase and pending completion, the power of the plaintiff, if any, to determine the defendant's occupation, and the defendant's rights and liabilities under the building agreement, became as between the plaintiff and defendant suspended, and not enforceable—at any rate, not enforceable under the circumstances of the case established before me.

The action, therefore, fails, and must be dismissed with costs.

Judgment for the defendant.

Solicitors for the plaintiff, *Fladgate & Co.*

Solicitors for the defendant, *Parker & Thomas.*

Chan. Div. Byrne, J. — March 9, 10, 11, 12, 13, 15, 25.

WILDING v. SANDERSON. (*a.*)

Consent judgment—Mortgagee's accounts—Unilateral mistake—Mistake innocently induced—Ambiguous phraseology—Mistake of fact or law—Subsequent adoption.

A judgment by consent which has been duly passed and entered after its terms have been settled in the presence of the parties, will—upon action brought for that purpose—be set aside if it has been consented to by one party, or his legal advisers, in the belief that the terms employed bore a meaning which in reality they do not bear, where such erroneous belief was contributed to, although innocently, by the conduct of the other party or his agents.

The court will set aside a consent judgment made in pursuance of and intended to embody a supposed previous agreement between the parties, when such supposed agreement was in reality no agreement at all, the parties never having been ad idem *on an essential particular.*

So long as such a consent judgment stands it must be obeyed, and consequently the conduct of one party in insisting upon its having the meaning he thought it had when he consented to it, and in taking the necessary legal steps to maintain his supposed rights under it, is not such an election to stand by the judgment as will prevent him afterwards claiming to have it set aside.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Trial of action.

This was an action to set aside a consent order made by Romer, J., on the 23rd of November, 1894, in a redemption and foreclosure action of *Ainsworth* v. *Wilding*, in which the present defendants Sanderson, Howson, & Waugh, as representing the original plaintiff, Ainsworth, were the plaintiffs, and the present plaintiff and the other defendants were the defendants.

The facts were as follows: For some years previously to the mortgage hereinafter mentioned Richard Wilding, since deceased, and John Wilding, the present plaintiff, acted as solicitors for one John Smith, and made large advances to him from time to time, and received payments on account. On the 7th of October, 1877, Smith gave an equitable mortgage by way of charge upon freehold and leasehold properties to the Wildings to secure the sum of £12,500, which was the sum believed to be then due to them, with interest at 5 per cent. In January, 1878, Smith brought the action of *Smith* v. *Wilding* for redemption against the Wildings, and by the judgment therein in March, 1878, the mortgage was declared to stand as security for the amount of money actually due on the balance of accounts, to the Wildings, and accounts were directed to be brought in. An account was accordingly made out between the parties in the nature of an ordinary current account, in which interest at 5 per cent. per annum was charged on both sides on all receipts and payments, and a balance of £11,805 3s. 1d. shown as due to the Wildings up to the 7th of October, 1877. This account was accepted, and an agreement admitting that this balance was due to the Wildings was signed by them and Smith at the foot of the account on the 4th of August, 1879, and thereupon further proceedings in the action were stayed by consent. Previously, in February, 1879, Smith had mortgaged the same property as that comprised in the mortgage of October, 1877, but subject to it, to Thomas Ainsworth, who acted as his solicitor up to July, 1879. In October, 1879, the Wildings went into possession of the mortgaged property. Richard Wilding died in 1884 leaving John Wilding, the plaintiff, in sole possession, and solely entitled to the mortgage.

The mortgagees while in possession from time to time sold portions of the mortgaged property. In 1884 Smith, the mortgagor, became bankrupt, and died in 1892.

In August, 1890, Ainsworth brought the abovementioned action of *Ainsworth* v. *Wilding*, in the court of Stirling, J., against John Wilding and Smith and a third mortgagee, the present defendant, Sir W. C. Brooks. Upon the death of Ainsworth in December, 1890, the action was continued by his representatives, Sanderson, Howson, & Waugh, the present first three defendants. Subsequently the trustee in bankruptcy of Smith, the present defendant Edelsten, was also made defendant. In this action the plaintiff alleged that the sales of portions of the mortgaged property by the Wildings had been made at an undervalue, and claimed a declaration that J. Wilding was liable to make good the loss thus occasioned, and for damages, and to have an account taken as against a mortgagee in possession of what was due to Wilding under his mortgage. Before the trial came on negotiations and correspondence took place between the solicitors of the parties, minutes of a consent order were proposed, but were not agreed to owing to a difference between the parties as to whether the account signed on the 4th of August, 1879, could be reopened or not, and it was suggested that the court might pursue a third course—namely, to hold the account *primâ facie* binding upon the then plaintiffs, but subject to their right to surcharge and falsify. At the trial, which took place before Romer, J., on the 23rd of November, 1894, the plaintiffs' counsel stated that the only point between the parties was whether the said settled account was binding upon the subsequent mortgagees, and after discussion and evidence, and a suggestion by the learned judge that the settled account should be taken as *primâ facie* correct, subject to the plaintiffs' right to surcharge and falsify, a suggestion made by counsel for the then plaintiffs that the account should be "upon the footing and by way of continuation of" the previous account appeared to be assented to.

The judgment was drawn up before the registrar in the presence of the parties, and was passed and entered. It by consent declared that the mortgage of the 7th of October, 1877, should stand as a security for the amount which on taking the accounts thereinafter directed should be found to be due to the plaintiff, and accounts were directed of what was due to the plaintiff upon his mortgage, and of the rents and profits received by Wilding, or which without his wilful default might have been so received, "and it was by consent ordered that the said accounts should be taken on the footing and by way of continuation of the account delivered in the action of *Smith* v. *Wilding* up to the 7th of October, 1877," and that on taking such accounts the plaintiff should be at liberty to surcharge and falsify any items except those agreed to prior to the 23rd of May, 1879 (an agreed date).

On the 16th of January, 1895, a summons was taken out in chambers to proceed upon the consent judgment by the plaintiffs in *Ainsworth* v. *Wilding*, and accordingly an account was brought into chambers by Wilding in the ordinary form as from the appointed date—that is to say, not such an account in form as the previous one agreed upon between Smith and Wilding, charging and allowing interest at 5 per cent., but the ordinary account of a mortgagee in possession who has sold part of the property. The account was verified by affidavit dated the 9th of March, 1895.

This form of account was objected to by the plaintiffs on the ground that the judgment directed an account current of the same kind as the previous account. The determination of this question was adjourned to the chief clerk, and by him to Stirling, J., who decided that the account was in its proper form as directed by the judgment, but upon appeal the Court of Appeal reversed this decision, and held that the account must be taken in the same manner as the previous one.

Wilding thereupon made an application in the action of *Ainsworth* v. *Wilding* to Romer, J., to set aside the judgment on the ground of mistake, reported 44 W. R. 540, [1896] 1 Ch. 673, but it was refused, as asking the court to do what could not be done on motion. Wilding then brought this present action, stating that if the construction placed upon the consent order by the Court of Appeal was correct, the order had not been made by consent, and did not carry out the intention of himself or his counsel or solicitors in consenting to it, and that the plaintiff never gave his counsel or solicitors any authority or instructions to consent to such an order, and he claimed rectification of the said order of the 23rd of November, 1894, or that it might be set aside, and the action of *Ainsworth* v. *Wilding* reheard. At the trial Mr. Hopkinson, Q.C., and Mr. Rawlins, Q.C., who had been the counsel engaged for Wilding in the action of *Ainsworth* v. *Wilding*, were examined on oath (in their places within the bar) as to what were their instructions and intentions, and gave evidence in support of the above allegations.

Astbury, Q.C., and *J. G. Butcher*, for the plaintiff.—A consent order may be impeached upon the same grounds as an ordinary agreement: *Huddersfield Banking Co.* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273; *Hickman* v. *Berens*, [1895] 2 Ch. 638, 44 W. R. Dig. 41. The plaintiff's advisers never intended to consent to such an order as the Court of Appeal has now pronounced this to be. Under such circumstances the order will be set aside: *Paget* v. *Marshall*, 33 W. R. 608, 28 Ch. D. 255; *Harris* v. *Pepperell*, 16 W. R. 68, L. R. 5 Eq. 1. The order was intended to carry out a previous agreement, or supposed agreement, which did not leave the form of the account an open question. If this was not the agreement then there was none, as the parties were never *ad idem*. The misleading words were suggested to us. We were misled by the conduct of the defendants in the previous negotiations.

Eve, Q.C., and *O. L. Clare*, for the defendants.—A consent order passed and entered cannot be set aside, except upon such grounds as would enable an agreement to be set aside: *Attorney-General* v. *Tomline*, 26 W. R. 188, 7 Ch. D. 388. An agreement can only be set aside on account of a mistake of fact, and there was no such mistake on the part of the advisers of the plaintiff: *Stewart* v. *Kennedy*, 15 App. Cas. 108, 38 W. R. Dig. 179; *Midland Great Western Railway of Ireland* v. *Kinder*, 6 W. R. 510, 6 H. L. Cas. 798. The construction of a document is not a question of fact: Fry on Specific Performance, 3rd ed., p. 356, par. 765; *Powell* v. *Smith*, 20 W. R. 602, L. R. 14 Eq. 85; *Marshall* v. *Collett*, 1 Y. & C. Eq. Ex. 232; *Denys* v. *Shuckburgh*, 4 Y. & C. Eq. Ex. 42; *Hart* v. *Hart*, 30 W. R. 8, 18 Ch. D. 670, 693. *Holt* v. *Jesse*, 24 W. R. 879, 3 Ch. D. 177, and *Hickman* v. *Berens* were cases where the order had not been drawn up, and they turned upon the authority of counsel. They do not apply where the order has been completed: *Hickman* v. *Berens*, Lindley, L.J., p. 646; *Harvey* v. *Croydon Rural Union Sanitary Authority*, 32 W. R. 389, 26 Ch. D. 249. The plaintiff has estopped himself from repudiating the order. The order was voidable, not void; and after he discovered its ambiguity he elected to stand by it. He cannot both approbate and reprobate it. He took his chance of its turning out in his favour: *Sharpley* v. *Louth and East Coast Railway Co.*, 2 Ch. D. 663, 685, 24 W. R. Dig. 62; *Clough* v. *London and North-Western Railway Co.*, 20 W. R. 189, 191, L. R. 7 Ex. 26, 34; *Gray* v. *Fowler*, L. R. 8 Ex. 249, 281, 22 W. R. Dig. 254; *Arbib & Class's Contract*, 39 W. R. 305, [1891] 1 Ch. 601; *Campbell* v. *Fleming*, 1 Ad. & El. 40; Fry on Specific Performance, 3rd ed., p. 341; *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345.

Astbury, in reply.—The plaintiff did not elect because he had no other course open to him.

March 25.—BYRNE, J. [after stating the facts]: It is consistent with every word that was said during the case, and is the fact, that in discussing and negotiating as to the nature of the order to be made, the plaintiff and his advisers remained in the belief—a belief induced by the previous correspondence, by the minutes as proposed by the then plaintiffs' advisers, and by the opening remarks of leading counsel for the then plaintiffs—that there was no question as to the form of the account to be taken, as from the date at which the *primâ facie* amount of the principal sum due under the mortgage was to be deemed settled. Their minds were directed to the question of whether or not the account was to be reopened from the commencement of the transactions between Smith and the Wildings, or whether or not a sum was to be taken as due at the particular date, either finally and absolutely, or subject to a right to surcharge and falsify. I have heard the evidence of the counsel engaged in the case on behalf of Wilding and the evidence of the solicitor's managing clerk and his own evidence, and I am satisfied that they neither agreed nor intended to agree that the account to be taken as from the stipulated date should be taken on the footing of its being a current account with interest charged and allowed at 5 per cent. on both sides, as the account had been made out and agreed between Smith and the Wildings in 1879. I am satisfied that subsequently, during the revision and settlement of the minutes, and up to and after the time when the order was passed and entered—indeed, until after the accounts were brought into chambers—they continued in the same condition of mind.

As regards the meaning and intention of the counsel acting for the then plaintiffs, although I have not heard any evidence from them, I have seen their briefs and have heard the evidence of the managing clerk instructing them, and, although there is one passage in the observations which might perhaps point to the notion that those instructing counsel were willing to take a judgment which would leave it an open question in what form accounts would have to be rendered under it, still I cannot think that they intended to take a judgment bearing any other meaning than that which the Court of Appeal has decided it actually does bear. The judgment is not in common form, and, in respect of the account directed about which the difference has really arisen, it is far from being clearly expressed; and although I know what it means, having the decision of the Court of Appeal to guide me, still I am of opinion that the words used are ambiguous, and so ambiguous as to true nature of the account to be taken that even trained legal minds might well mistake its real sense. Moreover, I think that this ambiguity is not fully apparent upon the face of the document itself, but requires knowledge of other circumstances connected with the subject before it fully appears. A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to the proceedings embodied in an order of the court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot, if he conceives he is entitled to relief from its operation, simply wait until it is sought to be enforced against him and then raise, by way of defence, the matters in respect of which he desires to be relieved. He must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly instituted for the purpose. In my opinion there was no agreement between the parties prior to the judgment being passed and entered, their minds never having been *ad idem* in respect of the subject-matter with which they were dealing. It also appears to me that the divergence of their minds was in respect of an essential or fundamental point. If there was no agreement there was no consent upon which the judgment could be founded, and, just as a consent order may be set aside upon any of the grounds upon which an agreement can be set aside, so it appears to me to follow that such an order may be set aside if it can be clearly proved that there was no agreement, and consequently no true consent to the order made. There was, it is true, an agreement that the judgment should be drawn up in the words actually used, but that agreement was, in fact, only part of and founded upon a supposed prior agree-

ment come to by the parties. When it is once ascertained that there was no actual agreement arrived at before the judgment was completed, and that the consent upon which it purports to be founded never existed, the actual judgment pronounced does not, I think, in itself constitute or represent an agreement, but stands as a judgment of the court made in pursuance of a supposed agreement or consent which both parties believed to exist, but which did not in fact exist. I conceive that this is the true principle upon which the present case ought to be decided, and that the judgment ought to be set aside upon the ground that there never was any agreement or consent between the parties. In so deciding I believe that I am not infringing any of the established rules in reference to contracts and as to parties being presumed to have intended what they have expressed in words, and I think that I have the authority of the Court of Appeal, in principle, for my decision, in the case of *Hickman* v. *Berens*. I may also refer to the cases of *Attorney-General* v. *Tomline* and *Huddersfield Banking Co.* v. *Lister*, both cases of setting aside orders on the ground of mutual mistake. The only difference (if any) between the present case and *Hickman* v. *Berens*, in principle, is to be found in the references in the judgments to the fact that in that case the agreement had never been formulated in an actual order of the court. These references do not, in my judgment, mean that that fact would have prevented the same relief from being given had the agreement been duly formulated. It would have prevented the relief being given without an action, and the court would, no doubt, have required the most cogent evidence in a case where so formal and deliberate an act as assenting to judgment, with all the opportunities of settling minutes and applying to the court before completion of the order, had been taken by the party complaining; but, in principle, if the court finds no agreement up to the time of perfecting the order, I think the order itself cannot stand, for the reasons given in the case referred to.

It has been argued before me that, the judgment having been perfected, the case ought to be dealt with as equivalent to the case of an agreement made, which it is sought to set aside on the ground of mistake. Further, it is argued that the mistake (if any) is on the part of one only of the contracting parties, and is not in respect of the subject-matter, but in respect of the meaning and legal effect of the agreement. Dealing with the case from this point of view, I consider that the mistake, although it is not common to both parties, is a mistake in respect of the subject-matter of the contract, and in an essential or fundamental particular, and that, although Wilding was under a mistake as to the meaning and legal effect of the contract, that is not the mistake in respect of which he asks relief, such mistake being that he thought he was bargaining in respect of one thing, while the other parties thought that they were bargaining about another. I also consider that the mistake, whatever it was, was innocently contributed to by the present defendants in their correspondence, in their form of proposed minutes, and in the statement of the case made in court by leading counsel. Whatever is the true view of the case—whether it is to be looked upon as a case of no agreement, or as a case of an agreement entered into under a mistake—I hold that the plaintiff is entitled to the same relief.

Another argument on the part of the defendants was that the plaintiff has lost his right (if any) to rescission or cancellation by electing to stand on the judgment. In support of this contention various cases were referred to, of which I need only refer to *Stewart* v. *Kennedy* as the most authoritative and favourable. In that case the contract was clear and unambiguous, and the party complaining had deliberately elected to take his chance of succeeding on the terms of the contract as they stood. But here what else could Wilding have done up to the time of the decision of the Court of Appeal other than he in fact did? The order stood and must be obeyed. I am of opinion that he has done nothing so unequivocal in its character as to estop him from asserting that an agreement had been come to.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Robins, Billing, & Co.*

Solicitors for the defendants, *Bower, Cotton, & Bower*, for *Ainsworth, Sanderson, & Howson*, Blackburn.

House of Lords.

From C. A. (England). March 16.

HOOD BARRS v. CROSSMAN & PRICHARD. (*a.*)

Solicitor—Costs—Payment of costs to solicitor—Judgment reversed on appeal—Repayment of costs by solicitors—Solicitors' agents.

A solicitor who has succeeded, after notice of appeal, in obtaining payment of his costs from the unsuccessful opposite party under an order which is afterwards reversed on appeal, cannot be personally ordered to repay such costs to the successful appellant. In cases where an appeal is intended and execution is not stayed, application should be made to the court requiring the solicitor of the successful party to give a personal undertaking to repay should the order for payment of costs be reversed.

Decision of the Court of Appeal (44 *W. R.* 487, [1896] 1 *Q. B.* 610) *affirmed.*

Fitzmaurice *v.* Jordan, 32 *L. R. Ir.* 112, 41 *W. R. Dig.* 189, *overruled.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.), reported as *Hood Barrs* v. *Heriot* (*No.* 2), 44 W. R. 487, [1896] 1 Q. B. 610.

Judgment had been obtained for £44 1s., debt and costs, against the defendant in the action, a married woman who, under her marriage settlement, was entitled to the income of trust funds for her separate use without power of anticipation.

At the date of the judgment there were arrears of income accrued due, and the judge at chambers made an order appointing a receiver of the income of the defendant accrued due, and payable at or before the date of the judgment, sufficient to satisfy the debt and costs.

The defendant appealed, and the Court of Appeal discharged the order made at chambers, with costs: see *Loftus* v. *Heriot*, [1895] 2 Q. B. 212, 43 W. R. Dig. 112.

The defendant's costs of the appeal were taxed, and the London agents of the country solicitors demanded payment. Mr. Hood Barrs offered to pay upon their giving an undertaking to repay the amount if he were successful in the House of Lords. This was refused, and, under a threat of issuing execution against him, Mr. Hood Barrs paid.

The House of Lords afterwards reversed the decision of the Court of Appeal in *Loftus* v. *Heriot*, with costs, and restored the order made at chambers, holding

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

that the arrears of income which had accrued due, though not actually paid to the married woman, could be made available to satisfy the judgment (Mr. Hood Barrs had been substituted for Mrs. Loftus previously in the proceedings): *Hood Barrs* v. *Heriot* (*No.* 1), 44 W. R. 481, [1896] A. C. 174.

Mr. Hood Barrs applied for an order for the repayment of the costs paid to the London agents as above stated. This was refused by the Court of Appeal.

The Appellant in person.

Jelf, *Q.C.*, and *Macaskie*, for the respondents, were not called upon.

Lord HERSCHELL. — In this case, in an action brought by the present appellant—or, rather, continued, I think, by the present appellant—against Mrs. Heriot, the Court of Appeal ordered the appellant to pay certain costs to Mrs. Heriot. On the occasion when that order was made application was made to the Court of Appeal to stay execution pending an appeal to this House. The application was refused. The appellant did not ask the court, if execution was not to be stayed, to require a personal undertaking from the solicitors to repay the costs if they were paid to them. When the case of *Hood Barrs* v. *Heriot* (*No.* 1) came before this House, the order of the court below was reversed, and Mrs. Heriot was ordered to repay to the appellant the costs which he had paid to her solicitors for her. The Court of Appeal was then asked to make an order upon the solicitors, who had actually received the money from the appellant, and who had been the solicitors in the proceedings (being the London agents of Mrs. Heriot's country solicitor), to repay the money. The Court of Appeal declined to make that order: hence the present appeal.

I am of opinion that the appeal must be dismissed. No precedent has been cited in which the courts in England have ever made such an order. Indeed, it appears that search was made by the registrars in the Chancery Division, and there was no trace of any such order ever having been made. In the case of *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 34 W. R. 749, 33 Ch. D. 85, an application was made for an order that the solicitors should repay the money, the judgment having been reversed. The solicitors were not before the court; the client only was represented; but it was upon that occasion that the court consulted the registrars as to the practice, and they stated that there was no precedent for such an order as that the solicitor should repay the costs. Cotton, L.J., who said it was impossible to make an order upon the solicitors as they were not before the court, added: "But I do not encourage any application against the solicitors to make them repay the costs, for I think such an application would fail. The order does not direct the money to be paid to the solicitors in their own right, but only on behalf of James Bird, just as if he had given them a power of attorney and the money had been paid out to them as his attorneys." Lindley, L.J., expressed no opinion upon the question as to whether an order could be made against the solicitors, they not being before the court. Lopes, L.J., said: "I agree in thinking that the money was ordered to be paid to the solicitors on behalf of James Bird, and James Bird is therefore alone liable to repay it."

So the matter stands as regards this country; and it is to be observed that nothing is more common than for the court when refusing to stay execution, and allowing costs to be received, to require the solicitor who is to receive them to give a personal undertaking to repay them if on the appeal the order for their payment should be reversed. The fact that such undertakings are constantly required and constantly given is, to my mind, conclusive against the notion that the court has power, when no such undertaking has been required and given, to order the solicitor to repay the costs. If the court has such inherent power without any undertaking, it is nonsensical and ridiculous in the court to require an undertaking to be given. It is requiring the solicitor to undertake to do that which it is said the court can well do without any undertaking on his part. That, to my mind, is almost conclusive against the existence of the jurisdiction contended for, which does not certainly rest on authority, and, to my mind, cannot rest on any sound principle.

It is true that in the case of *Fitzmaurice* v. *Jordan* in the Court of Appeal in Ireland, where there had been a difference of opinion in the court of Queen's Bench, and notice of appeal had been given to the solicitors, the Court of Appeal made an order when the appeal had taken place, and the judgment had been reversed, that the solicitor should repay the money. With all respect, I cannot see my way to accept that decision, if it is to be held to cover, as it apparently would cover, such a case as the present. The Lord Justice who delivered the judgment said: "I think there is a precise analogy in the ordinary case where the court orders costs to be paid to a solicitor pending an appeal, but requires his personal undertaking that he will be answerable for the amount"; and he also says: "It seems to me to be equally reasonable that the same risk should be taken where the solicitor levies the money after notice of appeal." That might or might not be a sound law to enact and to make general, but I am unable to come to the conclusion that there is any such rule of law as that a solicitor is personally liable to repay the costs.

I desire only to add this. In the present case Mr. Hood Barrs applied for a stay of execution pending the appeal to this House; but he did not apply to the court, if they were not prepared to stay execution, that they should require an undertaking from the solicitors to repay the costs. I cannot myself doubt that, if that application had been made, the application would have been granted. I say I cannot doubt it, because it appears to me so very clear that it ought to have been granted, if the application had been made, in a case of this description, where the whole controversy arose by reason of the difficulty of obtaining from a married woman payment of an undoubted debt, she interposing these difficulties and sheltering herself by reason of the circumstance that she was a married woman. Where the party to a litigation is a married woman who is setting up and interposing these obstacles, it seems to me to be preeminently a case in which, if the costs are to be repaid, a personal undertaking should be required from the solicitor. No such application was made in the present case; if it had been, very likely this litigation would never have arisen. It is impossible to hold otherwise than that the decision of the court below was correct, and that this appeal must be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion, and, agreeing in every word that has fallen from my noble and learned friend, I do not think it necessary to add anything.

Lord MORRIS.—I am entirely of the same opinion.

Lord SHAND.—I am also of the same opinion. The question appears to me to be one in which an order for the repayment of costs, if such an order had been asked for, should certainly have been granted; but no such order was asked for. When a court does

grant an order against a law agent for the repayment of costs, in the event of a reversal of a decision then given, the obligation of repayment arises from the order of the court or from the agent's undertaking given in the terms of that order. When there is no such order or relative obligation, and the party litigant receives the money for the costs, although this occurs through the hands of the law agent, the law agent incurs no personal responsibility for repayment. He has acted as agent only, and his responsibility as such is to his client. Having acted as agent only, I cannot find any legal ground upon which personal liability for the repayment of these costs can be enforced against him by the other party to the litigation; and so, with much deference to the learned judges in the Irish case which has been cited, I am unable to follow it as a precedent.

Appeal dismissed with costs.

Solicitors, *Hood Barrs; Crossman & Prichard.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) } Feb. 11, 12; April 12.

SOUTH AFRICAN TERRITORIES (LIMITED) *v.* WALLINGTON. (*a.*)

Company — Debentures — Payment by instalments — Specific performance of agreement—Damages.

The defendant applied for and was allotted sixteen debentures in the plaintiff company upon the terms that the amount thereof should be payable by instalments, and that the principal moneys secured should be repaid at a future named date. The defendant made default in the payment of the instalments.

Held, that specific performance of the agreement to pay the instalments would not be granted, and that the company was only entitled to such damages as had been suffered by reason of the defendant's default, and that as there was no evidence of any damage, the company was entitled to nominal damages only.

Appeal of the defendant from the judgment of Wright, J., at the trial of the action without a jury.

The plaintiff company issued a prospectus inviting applications for debentures of £50 each of the company, the money being payable by instalments, and the principal secured by the debentures being repayable on the 31st of December, 1900.

On the 24th of September, 1895, the defendant applied for sixteen debentures according to the form following: "To the directors of South African Territories (Limited). Gentlemen—Having, paid to your bankers the sum of £ , being a deposit of £5 per debenture on debentures of the above-named company, on the terms of your debenture prospectus dated the 21st of September, 1895, I request you to allot to me that number of debentures, and I agree to accept the same or any less amount that may be allotted to me on the terms of the prospectus dated the 21st of September, and I agree to pay the further instalments due thereon in accordance with the terms of the said prospectus."

The terms of the prospectus dealing with the payment of the instalments are set out in the judgment of Chitty, L.J.

At the time of application the defendant paid a deposit of £80, being £5 for each of the sixteen debentures applied for. The plaintiff company allotted to the defendant sixteen debentures, but the defendant paid no further instalments in respect thereof.

The plaintiff company in this action claimed specific performance of the agreement of the 24th of September, 1895, or payment of the balance of the price of the debentures and damages.

Wright, J., gave judgment for the plaintiff company for £520, the amount of the instalments due at the date of the issue of the writ.

The defendant appealed.

Gore-Browne (*R. M. Bray* with him), for the defendant.—The contract between the defendant and the plaintiff company was a contract by which the defendant undertook to advance certain sums by instalments to the plaintiff company on the terms of repayment at a future date. Specific performance of such a contract will not be granted: *Western Wagon and Property Co.* v. *West*, 40 W. R. 182, [1892] 1 Ch. 271; *Feize* v. *Thompson*, 1 Taunt. 121; *Sichel* v. *Mosenthal*, 10 W. R. 283, 30 Beav. 371; *Rogers* v. *Challis*, 7 W. R. 710, 27 Beav. 175; *Laird* v. *Pim*, 7 M. & W. 474. The only question therefore is, what damages the plaintiff company is entitled to in respect of the defendant's failure to pay the agreed instalments? On a breach of contract to lend money the damages will not be the sum agreed to be lent, for if that were the case the borrower would be in a better position than if there had been no breach, since, after obtaining the damages, he would be under no obligation to repay the amount. The borrower is only entitled to such damages as he has actually suffered through not getting the loan. In this case there was no evidence of any damage, and therefore the plaintiff company is entitled to nominal damages only.

Bigham, Q.C., and *Herbert Smith*, for the plaintiff company.—This is not a case of a contract to lend money. It is a contract to buy a negotiable security, the plaintiff company having the right to buy it back at a certain date. The property in the debenture bond passed to the defendant on allotment, and the plaintiff company is entitled to sue for the price.

Gore-Brown, in reply.—If this is not a loan, then the creation of debentures is not a borrowing, and, therefore a company without any borrowing powers could, by the creation of debentures, in effect borrow to any extent.

Cur. adv. vult.

April 12.—LOPES, L.J., read the following judgment: The plaintiffs' claim is for (1) Specific performance of an agreement dated the 24th of September, 1895, for payment of instalments due upon certain debentures of the plaintiff company applied for by the defendant; or (2) payment of the balance of the price of the debentures; and (3) damages. The learned judge has decided the case in favour of the plaintiffs on the ground that the plaintiffs' claim is a debt, and judgment is entered for £520. Is it a contract to pay a specific sum or only a contract to make a loan of money? The defendant applied for debentures according to following form. [The lord justice read the form.] The plaintiff company, in accordance with such request, on the 5th of October, 1896, duly allotted the defendant sixteen debentures of the company on the said terms, and the defendant was duly informed of such allotment. The defendant has paid the sum of £80 under the terms of the said contract, but has not paid any

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

further sum either for allotment or by way of instalment.

If the contract is a contract to make a loan, that that specific performance will not lie is too clear for argument. We must look at the agreement as a whole. Surely in its very nature it is a contract to lend money for a certain fixed period to the company, the payment to be made in the way specified.

On a contract to lend money you cannot sue for the money; you can only sue for damages for the breach of the contract. The borrower may go into the market the next day after breach, and get the money without incurring any loss, or he may not be able to get it without suffering a loss, in which case the measure of damages is the loss he suffers. Chitty, J., puts it very clearly in *The Western Wagon and Property Co.* v. *West*, [1892] 1 Ch., at p. 277: "It was contended for the plaintiffs that, on a contract to make a loan, the measure of damages for breach was the sum agreed to be lent, and that the damages were thus liquidated and ascertained. . . . On a contract to make a loan of money, the measure of damages is the loss sustained by the breach, and the damages may be merely nominal. For instance, if A. agrees to lend B. £100 at interest for a week, and makes default, and B., within a few minutes after the time at which the £100 ought to have been lent, obtains from his bankers a loan of £100 at the same rate of interest and for the same period of time, the damages would be merely nominal. Damages recovered are not recovered by way of loan; the plaintiff puts them in his pocket and keeps them. It is really difficult to understand how this argument as to the measure of damages could have been seriously advanced."

I cannot understand how the learned judge in the court below decided that the plaintiff was entitled to judgment for £520, the full amount payable upon the debentures up to the date of issuing the writ in the action—that is, in reality, specific performance.

In my judgment the contract is a contract for a loan, and on the breach damages only are recoverable. It appears that 5s. was paid into court, and there was no evidence given of any damage to the plaintiffs. Under these circumstances 5s. is sufficient. The judgment must be reversed.

CHITTY, L.J., read the following judgment: The contract between the parties was that the defendant would lend and the plaintiff company borrow, money on security. It was constituted in this way. The plaintiff company being desirous of obtaining a loan of £75,000 issued a prospectus inviting subscriptions. The prospectus stated the terms of the proposed loan, and the security offered. The loan was to be in sums of £50 secured by first mortgage debentures for that amount, the debentures constituting a floating charge on the whole of the properties and assets of the company, the loan was also to be secured by a trust deed. The money was to be paid by instalments—viz., 10 per cent. on application, 15 per cent. on allotment, and the balance by equal instalments, payable two, four, and six months after allotment. The interest on the loan was to be at the rate of 6 per cent. payable quarterly, and the principal was to be repaid on the 31st of December, 1900, with a bonus of £7 10s. per every £50 debenture. The allottees were to have a right or option to exchange their debentures for shares within two years after the 31st of December, 1896. The prospectus stated that the whole proceeds of the issue would be used for working capital and the general expenses of the company including the cost of the issue, and that failure to pay any instalment when due would render previous payments liable to forfeiture. A form of application for the debenture accompanied the prospectus. The defendant signed one of these forms for sixteen debentures and paid the deposit of £80, being 5 per cent. on each debenture. On this application the plaintiffs allotted sixteen debentures to the defendant, and gave him notice of the allotment. Under this contract the defendant was not entitled to have the debentures delivered to him until he had paid the final instalment. The defendant having made default in payment of three of the subsequent instalments this action was brought. The plaintiffs claimed—first, specific performance of the contract; secondly, the balance of the prices (as they called it) of the debentures; and thirdly, damages.

It is clear that specific performance cannot be granted of such a contract, and it was so held by the learned judge. It is settled that no specific performance of a contract to lend and borrow money can be granted at the suit either of the proposed lender or the proposed borrower. It is immaterial whether the loan is to be on security or whether the loan is to be for a fixed period; and it can make no difference whether the loan is to be made in one sum or by instalments. As regards the claim for the alleged price of the debentures, the contract is not and cannot be read as a contract for sale, the company were not selling their own debentures, but were offering them as the security for the money they were borrowing. The debentures would contain a covenant to repay and a charge by way of security. A loan on the borrower's bond or covenant is not a purchase of the bond or covenant.

By the application form which he signed the defendant agreed to pay the further instalments in accordance with the terms of the prospectus. It was urged that an action would lie on this promise, and that, accordingly, the plaintiffs were entitled to recover the unpaid instalments as a debt. But the promise cannot, in my opinion, be isolated from the other terms of the contract; and the promise was neither more nor less than a promise to lend the instalments. For these reasons the first and second grounds of claim cannot be supported.

But the plaintiffs are entitled to recover damages for breach of the agreement to make the loan. The damages in such a case may be large or small or merely nominal according to the circumstances. The measure of the damages is the loss sustained by the borrower by the breach, the rule in *Hadley* v. *Baxendale*, 9 Exch. 341, being applied when the circumstances justify its application. If the intended borrower, being a man of good credit, can readily obtain the loan from another person on the same terms, the damages would be nominal. If he cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon more onerous terms, the damages would be greater and might be very substantial. The burden of proving the amount of the loss sustained rests on the plaintiff. In this case no such evidence was adduced. The sum recovered by way of damages for breach of a contract to make a loan does not constitute a loan. It is merely the damages for not making the loan. A plaintiff is entitled under such a judgment to put the sum into his own pocket and keep it; the defendant could never recover it as money lent or otherwise. The judgment is for £570, the full amount of the instalments due. If it stands, the defendant will be in a much worse position than he would be under a decree for specific performance. Under such a decree he would be ordered to pay the instalments as they fell due, but as a loan he would be entitled to the security contracted for, and he would be entitled eventually to have the loan repaid. Under the judgment he will not be entitled to get back a penny of

his money. As there was no evidence of any special loss sustained by the plaintiffs, the damages must be reduced to a nominal sum.

Lord ESHER, M.R., concurred.

Appeal allowed.

Solicitors for the plaintiff company, *Pyke & Voules.*

Solicitors for the defendant, *Ranger, Burton, & Frost.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 23, 25; March 12.

BROOMFIELD *v.* WILLIAMS. (*a.*)

Vendor and purchaser—Building estate—Light—Implied grant—Derogation from grant—Obstruction—Damages—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

W. conveyed in fee, as beneficial owner, to B. a plot of land with a building recently erected thereon with windows overlooking an adjoining plot of land belonging to W. The adjoining plot was marked on the plan as "building land," but no right to build on such plot was expressly reserved. W. having built on the adjoining plot so as materially to interfere with the access of light to B.'s windows, B. commenced an action for an injunction and damages.

Held (*reversing* Kekewich, J.), *that W. was not entitled to build so as materially to interfere with the access of light to B.'s windows. B. admitting that W. could have built so as not to interfere with his lights, an injunction was not granted, but an inquiry was directed as to the damage sustained by B. through W.'s interference with his light.*

Swansborough *v.* Coventry, 2 *Moo. & Sc.* 362, 9 *Bing.* 305, *approved.*

Birmingham, Dudley, and District Banking Co. *v.* Ross, 36 *W. R.* 914, 38 *Ch. D.* 295; *and* Myers *v.* Catterson, 38 *W. R.* 488, 43 *Ch. D.* 470, *considered.*

Appeal of the plaintiff from a decision of Kekewich, J.

The facts as stated by A. L. Smith, L.J., in his written judgment were as follows: The defendants on the 25th of March, 1896, as beneficial owners, conveyed to the plaintiff in fee a plot of land with a house recently erected thereon, known as Rothesay, Mostyn-avenue, Llandudno, which had windows upon its western side overlooking an adjoining plot of land then belonging to the defendants. In the conveyance was the following exception: "Except nevertheless and reserving to the vendors (defendants), their heirs and assigns, and other the owners and occupiers for the time being of the land shown on the said plan contiguous or near to the piece of land hereby conveyed marked building land, a right of way." There was no reservation in express terms of any right of the defendants to build upon the vacant land. Upon the plan which was annexed to the deed was shewn a vacant piece of land which the plaintiff's western windows overlooked, and upon it were written the words "building land." Shortly after this conveyance to the plaintiff the defendants commenced to build, and had since completed two houses upon their vacant land, and the learned judge found that the erection of these houses seriously and materially interfered with the access of light to the plaintiff's kitchen window, which was one of the western windows in his house. Thereupon the plaintiff brought the present action for an injunction and damages.

It was established at the trial that the plaintiff at the date of his conveyance knew that the defendants intended to build upon their vacant land a pair of houses to the west of his house similar to those already built in the row in which the plaintiff's house was situate.

The learned judge dismissed the action with costs, being of opinion that, although there had been serious and material interference with the light to the plaintiff's window, he nevertheless had no cause of action against the defendants.

The plaintiff appealed.

Warrington, Q.C., and *Badcock*, for the appellant.—It is clear from the evidence that there has been a substantial interference with the plaintiff's light. The insertion of the words "building land" on the plan does not prove that the plaintiff was to be deprived of his *primâ facie* right to the light over the vacant land. The defendants would have had no defence to an action at law for damages for the obstruction of the plaintiff's light.

They referred to *Swansborough* v. *Coventry*, 2 Moo. & Sc. 362, 9 Bing. 305; *Myers* v. *Catterson*, 38 W. R. 488, 43 Ch. D. 470; and *The Birmingham, Dudley, and District Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295.

Bramwell Davis, Q.C., and *Rowden*, for the respondents.—The use of the words "building land" on the plan negatives the idea that the defendants were precluded from building on their own land as they pleased. The words also showed a "contrary intention" within the meaning of section 6, sub-section 4, of the Conveyancing Act, 1881.

In addition to the cases above cited, they referred to *Rigby* v. *Bennett*, 31 W. R. 222, 21 Ch. D. 559; *Beddington* v. *Atlee*, 35 W. R. 799, 35 Ch. D. 317; *Wheeldon* v. *Burrows*, 27 W. R. 165, 12 Ch. D. 31.

Warrington replied.

Cur. adv. vult.

March 12.—LINDLEY, L.J., stated the facts shortly, and after referring to the conveyance and to the plan, and to the Conveyancing Act, 1881, s. 6 (sub-sections 2 and 4), continued: The reference to the plan and description in it of the adjoining land as "building land" does not show any intention to exclude the operation of section 6 of the Conveyancing Act, 1881, for it was quite possible to build on that adjoining land without darkening the windows of the house conveyed. Consequently the conveyance of the house must be read as if the words in section 6, sub-section 2, of that Act were contained in the conveyance—*i.e.*, as if the conveyance contained the words "together with all lights appertaining to or occupied or enjoyed with or reputed as part of" the house, and as if such lights were conveyed with it. I do not myself lay much stress on these words; they probably add little, if anything, to the conveyance of the house as it was at the date of the conveyance. But from one point of view they may be important, as will appear presently. Having regard to the conveyance and to the foregoing circumstances, I was surprised to find that there could be any doubt as to the right of the plaintiff to enjoy the lights conveyed to him, unobstructed by his grantor. It was quite new to me to have to consider in such a case what was reasonable or not. But so much was made of *The Birmingham, Dudley, and District Banking Co.* v. *Ross* and *Myers* v. *Catterson* that I desired to look again at those cases in order not to make any mistake. Those cases throw no doubt at all upon the principle that a grantor cannot derogate

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

from his own grant. But they show the importance of ascertaining accurately what has been granted in any particular case to which the principle has to be applied. In those cases the grantor had not sold or conveyed a house built by himself with windows for the admission of light. The house had been built by the grantee on vacant land which he had agreed to buy, and the conveyance came afterwards, when the vendor had no equitable interest in the property conveyed. The question then arose what lights the purchaser was entitled to. In the *Birmingham case* the circumstances showed that the purchaser had bargained forand had obtained special protection against obstruction, and was entitled to no more, In *Myers* v. *Catterson* it was held that the purchaser was entitled to all the light which his vendors could give him, but that they, being a railway company, could not fetter themselves by granting rights to light which would prevent them from exercising their statutory powers and performing their statutory duties.

It was contended that these cases had shaken the law previously established by *Swansborough* v. *Coventry* and older authorities. But I do not so understand them. On the contrary, Cotton, L.J., in the *Birmingham case*, 38 Ch. D., at p. 310, and in *Myers* v. *Catterson*, 43 Ch. D., at p. 477, distinctly recognizes the principle on which the older cases were decided. They were also recognized as law in *Wheeldon* v. *Burrows*, and *Allen* v. *Taylor*, 16 Ch. D. 355, 29 W. R. Dig. 120. Some passages were read from the judgment of Bowen, L.J., in the *Birmingham case*, which, if taken by themselves and apart from the facts of the case before him, would favour the defendant's view, but he certainly never intended to throw any doubt on the above authorities. If this were a case of an implied grant, and not, as I think it is, a case of express grant, the defendant would still be in the wrong. The grantor cannot throw on the grantee the onus of showing the limit to be set on rights incidental to the enjoyment of the property granted. If such rights are to be limited in favour of the grantor, it is for the grantor, and not for the grantee, to show what those limits are. Even if section 6, sub-section 2, of the Conveyancing Act does not apply by reason of the words "building land" on the plan, I should still hold, on the authority of *Swansborough* v. *Coventry* and the older decisions, that the grantee had a *primâ facie* unrestricted right to light as against the grantor, and that the burden of setting limits to such right lay on the grantor. As the plaintiff does not complain of the defendant's building except so far as it injures him by being nearer than 4ft. 9in. to the boundary-wall the defendant will have the benefit of this limitation of the plaintiff's claims. In my view it is a concession; but in the other view the plaintiff's own evidence may be regarded as the extent to which the defendant has succeeded in limiting the right of the plaintiff to the light of his west windows.

In any event, the defendant has exceeded his rights, and the following will be the proper wording of the judgment:

Allow the appeal and discharge the order. Declare that the defendant was not entitled so to build on his land adjoining the plaintiff's house as to create any material obstruction to the light which came to the kitchen and other windows on the west side of the plaintiff's house at the time of the grant thereof by the defendant to the plaintiff. And the plaintiff not claiming any damages by reason of any obstruction to such windows which would have been caused by the defendant's house if it had been set back 4ft. 9in. from the wall bounding the plaintiff's land on the west side thereof, inquire what damages the plaintiff has sustained by reason of the obstruction of the light of the said windows occasioned by the defendant's house not being so set back, and order the defendant to pay such damages when ascertained. Liberty to apply. Defendant to pay the costs of the action and of the appeal.

A. L. SMITH, L.J., stated the facts as above set out, and after referring to *Tenant* v. *Goldwin*, 2 Ld. Raym., pp. 1089 and 1093; *Myers* v. *Catterson*, *Swansborough* v. *Coventry*, *Wheeldon* v. *Burrows*, and *Allen* v. *Taylor*, continued as follows: There being this *primâ facie* right of a grantee in circumstances such as exist in the present case not to have his lights interrupted by his grantor, how when the grantee brings an action against the grantor for derogating from his right can the grantor show that what he is doing does not give a cause of action to his grantee when a material interruption to his lights is established? In my opinion it can only be by the grantor showing that the *primâ facie* right of the grantee is in some way limited and restricted. The burthen of proof is upon the grantor, and if he does not show that this *primâ facie* right which the grantee has is in some way cut down, and if a material diminution of the grantee's light by what the grantor has done upon his own land is established by the grantee, the grantee is entitled to judgment. When the cases of the *Birmingham, Dudley, and District Banking Co.* v. *Ross* and of *Myers* v. *Catterson* are examined, it appears that the above statement of the law is not impugned, and that each of these cases was decided upon the ground that the grantor was able to show that this *primâ facie* right of the grantee was limited or restricted, or in other words, the grantor was able to show what was the implied obligation which he, in fact, undertook when he sold to the grantee. In the one case, *Birmingham, Dudley, and District Banking Co.* v. *Ross*, it was shown that it was perfectly well known to each party when the sale took place that the land was to be built upon by the corporation—*i.e.*, the grantors, as they liked, subject only to this, that there was to be a passage of the width of 20ft. between the buildings of the grantors and the house of the grantee, and that this was the measure of the grantee's protection. In the other case, *Myers* v. *Catterson*, the grantors (the railway company) established that the grantee knew at the date of the conveyance to him of his house that the grantors required the remainder of the land for the purposes of the construction of this railway, and it was held that the obligation which the grantors (the railway company) undertook towards the grantee was limited by this, that the company might utilize their land for that purpose, but for no other, and that this was the measure of the grantee's protection. This is what I understand Cotton, L.J., was pointing to when in *Birmingham, Dudley, and District Banking Co.* v. *Ross* he said: "But when the question is as to an implied obligation we must have regard to all the circumstances which existed at the time when the conveyance was executed which brought the parties into that relation from which the implied obligation results."

In the present case how does the defendant displace the *primâ facie* case of the plaintiff, the grantee? If he could have shown nothing whereby to cut down the *primâ facie* right of the grantee not to have his light interfered with by the grantor, I should have thought that the defendant could not materially have obstructed the plaintiff's light, but the defendant has been able, out of the plaintiff's own mouth, to establish this, that at the date of the conveyance to the plaintiff, the latter knew right well that the defendant was about to build upon his own

land, and that all the plaintiff required was when the defendant erected his proposed buildings that the passage should be left unbuilt upon by the defendant between his buildings and the plaintiff's house.

In these circumstances the defendant, by the plaintiff's own admission, has established that his right to build upon his vacant plot was only limited to this, that the defendant was not to build any house substantially higher than those already erected in the row, that he was not to build over the part which was to constitute the passage, and that this was the only obligation which he undertook to the grantee when he executed the conveyance to him. The defendant has shown that the plaintiff's *primâ facie* right is not an unrestricted right to the passage of light over the whole of the defendant's land, and that the defendant's right to build his proposed houses upon his own land was only restricted as above mentioned. This restriction the defendant has not observed, and consequently he is liable in this action, and in the circumstances of this case the declaration proposed by my brother Lindley is the proper declaration to make.

RIGBY, L.J.—The cases cited in argument before us were cases in which looking to the conveyance alone you find no grant of the easement, interference with which was complained of. The protection of the easement must, therefore, in each of these cases depend upon the doctrine of implied grant. The only case which I think it necessary to examine in reference to this point is *Birmingham, Dudley, and District Banking Co.* v. *Ross*, which is hereafter dealt with. The present case belongs in my judgment to the totally different class of grants by construction (not by implication), where the express words of the conveyance when properly construed (regard, of course, being had to the state of circumstances existing at the date of the conveyance) convert a *quasi* easement into a new legal easement: *Kay* v. *Oxley*, L. R. 10 Q. B. 360, 23 W. R. Dig. 251, and *Bayley* v. *Great Western Railway Co.*, 26 Ch. D. 434, 32 W. R. Dig. 227, may be taken as leading instances of this class; but the decisions with reference to it are numerous and the principle now well settled. In *Bayley* v. *Great Western Railway Co.* will be found a clear exposition by Bowen, L.J., of the difference between the two classes. He is speaking of a right of way, but of course his language would apply with at least as much force to a right of light. The words contained in the conveyance in *Kay* v. *Oxley* and other cases of the kind are not, indeed, to be found in the actual deed of conveyance in this case, but words at least as extensive are introduced by section 6, sub-section 2, of the Conveyancing Act, 1881. It is true that the section applies if only and so far as a "contrary intention" is not expressed in the conveyance (see sub-section 4). Here, however, the only words that can be suggested as expressing a contrary intention are the words "building land" occurring in the reservation of a right of way and on the map attached to the conveyance. Bearing in mind the principle that a grant must be construed in case of ambiguity against the grantor, and the well-established deduction from that principle that a reservation in the grantor's favour not being a reservation of an easement of necessity, must be expressed in clear and unambiguous language in order to be valid, it does not in my judgment need authority to prove that these words, which may be satisfied without interference with the rights as to light enjoyed at the time of the conveyance, are not inconsistent with the continuation of those rights. But the considered judgment of the Court of Common Pleas delivered by Tindal, C.J., in *Swansborough* v. *Coventry*, showing these words to be insufficient of themselves to rebut the presumption of an implied contract, is *a fortiori* an authority for holding them insufficient to exclude the operation of the Conveyancing Act in bringing about an express grant. I have said that the case of *The Birmingham, Dudley, and District Banking Co.* v. *Ross* needs some examination. There, as in *Myers* v. *Catterson* and in *Rigby* v. *Bennett*, the house in respect of which an easement was claimed, was erected not by the grantor, but by the grantee. The grantor, the Corporation of Birmingham, sold not a house, but the site only of a house. It was at the time—not of the conveyance but—of the contract for the purchase of the site, that the rights to be enjoyed with the house when built were determined. The decision of the Court of Appeal was that at that time it was agreed in substance that the corporation were to have the unrestricted right of building on the further site of Warwick-lane which the grantee stipulated should be twenty feet wide. Cotton, L.J., dealt with the question of an express grant by virtue of the Conveyancing Act having regard to this state of things. This decision was, and it is difficult to see how it could have been otherwise, that having regard to the pre-existing agreement no easement over the corporation land on the further side of the lane was ever enjoyed *de facto* by the owners of the house. From this it followed that section 6, sub-section 2, of the Conveyancing Act, even supposing it to be read at length into the conveyance, had no application. No part of the judgment of Bowen, L.J., except that which excludes the hypothesis of an express grant has any application to the case of an express grant.

It follows in my judgment that the numerous cases of which *Kay* v. *Oxley* is a leading instance, in which the *quasi* easement has been treated as enjoyed with what becomes on severance the dominant tenement, govern the present case. I should have had great difficulty, to say the least, in coming to the conclusion that there was anything to entitle the defendant as vendor to the plaintiff, to interfere more with the plaintiff's lights than if he had been a stranger and the lights ancient lights. However, the very fair and equitable treatment of the case by the plaintiff relieves the court from any difficulty in the matter.

There can, in my judgment, be no question that he is entitled to the only relief which he has asked for, and the appeal should be allowed.

Appeal allowed.

Solicitors, *Crowders & Vizard*, for *Watson & Booth*, Manchester; *Minshall, Parry Jones, Woosnam, & Smith*, for *Pugh & Bone*, Llandudno.

High Court of Justice.

Chan. Div. North, J. — Jan. 28.

FLETCHER v. NOKES. (a.)

Landlord and tenant—Lease—Breach of covenant—Sufficiency of notice—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14 (1).

The notice "specifying the particular breach complained of" required to be served on a lessee under section 14 (1) *of the Conveyancing Act*, 1881, *as a condition precedent to the enforcement of a right of re-entry*

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law

or forfeiture, must not specify the breach complained of by reference merely to the particular covenant which has been broken, but must give sufficient details to enable the lessee to understand with reasonable certainty what he is required to do to remedy the breach.

Action.

The plaintiff, the lessor, sought to recover possession of certain houses from the defendant, the lessee in consequence of the defendant's non-compliance with a notice served on the defendant under section 14 (1) of the Conveyancing Act, 1881, calling on the defendant to repair the houses in accordance with the covenants in the lease.

The covenant was to "keep the premises in good condition and complete tenantable repair," and at the expiration or sooner determination of the term so to yield up the same unto the lessor, his executors, &c.

There was the usual proviso for re-entry by the lessor on any breach of any of the covenants by the lessee.

The notice served was as follows: "I hereby give you notice that you have broken the covenants for repairing the inside and outside of the houses (describing them) contained in the lease of the said premises, dated the 7th day of June, 1896, and made between myself on the one part and yourself of the other part. And I require you to repair the said houses in accordance with the said covenants forthwith, and to pay forthwith to me £20 as compensation for such breach of covenant and for the expenses which have been incurred by me for surveyor's fees and solicitor's charges by reason of such breach of covenant aforesaid. And I hereby give you further notice that if you make default in remedying such breach of covenant in manner above-mentioned or in making the compensation hereby required I will enter and take possession of the said messuages, dwelling-houses, and premises, but without prejudice to any other remedies which I may have by reason of such default."

This notice followed the form given in Woodfall's Landlord and Tenant, 15th ed., Appx. C, p. 991, and see Wolstenholme and Turner's Conveyancing Act, 7 ed., p. 52.

The defendant, by his defence, said that he had not committed any breach of covenant and pleaded that the notice was not a good or sufficient notice in compliance with section 14 of the Conveyancing Act, 1881, as it did not specify any particular breach complained of.

Mulligan, for plaintiff.

Clayton, for defendant, referred to Key and Elphinstone Conveyancing Precedents, 5th ed., vol. 2, p. 258.

NORTH, J., after stating the facts, continued: Is this a sufficient notice? There is nothing in it to show in which house default has been made or whether all the houses are defective. Assume that section 14 had not been passed, and that the law stood as it was previously, and the landlord had brought an action against the tenant for breach of covenant. The first thing that the landlord would have been compelled to do would have been to give particulars of the breaches complained of. I think that section 14 was passed to put the tenant in a better position than he was before. He was to have the chance of doing before action those things which would have been a ground of action against him if section 14 had not been passed. It is impossible to suppose that the tenant was intended to be in a worse position than he would be after action brought. I think the notice under section 14 ought to be such a notice as will enable the tenant to understand with reasonable certainty what it is he is required to do. The landlord need not go through every room and point out every defect, but the notice ought to enable the tenant to do the particular things of which the landlord complains before an action for forfeiture is brought against him.

In my opinion this is not a sufficient notice; it is not sufficient that the notice should merely say, "You have broken the covenants for repairing."

Solicitors, *E. J. Moeran; Stanley, Evans, & Co.*

Chan. Div. } Stirling, J. } March 11; April 8.

In re GAME.

GAME *v.* YOUNG. (*a.*)

Will—Construction—Tenant for life and remainderman—Conversion of leaseholds—Rule in Howe *v.* Lord Dartmouth.

The rule in Howe *v.* Lord Dartmouth, 7 *Ves.* 137, *will be applied unless indications of the testator's intention that it shall not be applied can be discovered from the language of the will. Neither a direction to pay "rents and profits," nor a power of distress on "land" given to annuitants, nor both together are sufficient indications of intention on the part of a testator to exclude the operation of the rule.*

Harris *v.* Poyner, 1 *Dr.* 174, *and* Craig *v.* Wheeler, 8 *W. R.* 172, 29 *L. J. Ch.* 374, *followed.*

Crowe *v.* Crisford, 2 *W. R.* 45, 17 *Beav.* 507; Wearing *v.* Wearing, 23 *Beav.* 99, 6 *W. R. Dig.* 102; *and* Vachell *v.* Roberts, 32 *Beav.* 140, 12 *W. R. Ch. Dig.* 131, *dissented from.*

This was a summons taken out to decide a question arising on the construction of the will of W. Game—namely, whether the rule in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, applied so as to compel the conversion of certain leaseholds to which the testator was entitled.

By his will the testator directed his executors within a reasonable time after his decease to pay all his just debts and funeral and testamentary expenses, and he gave his wife for life his furniture, plate, linen, china, pictures, books, and household effects. And after a series of pecuniary legacies he devised his freehold house, 40, Cambridge-road, Hammersmith, to his nephew absolutely, and as to all the rest and residue of his real and personal estate, . . . he directed that the rents and profits arising therefrom should be paid to his wife for and during the term of her natural life for her own use and benefit, and after her decease he gave and bequeathed his said furniture, plate, linen, china, fixtures, books, and household effects to and equally between George Game and George Young.

Then the will proceeded: "And as to the residue of my estate, real and personal, I give and devise the same to my nephew, the said George Game, for his life, subject to and charged with the payment of the following annuities (then followed a series of annuities), and on the death of the said George Game, then I give and devise the same, subject as aforesaid, to and equally between his children as tenants in common. And I direct that each of such annuities shall commence from the death of my said wife, and shall be payable quarterly, and that each of such annuitants shall have the same or the like remedy by distress for the recovery thereof as landlords have for

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

the recovery of rent in arrear upon a common demise."

The testator died on the 5th of March, 1889, and his wife, the tenant for life, on the 29th of July, 1896. The residuary estate consisted of five freehold and five leasehold houses.

Graham Hastings, Q.C., and *Theobald*, for the summons.—*Macdonald* v. *Irvine*, 26 W. R. 381, 8 Ch. D. 101, shows that it rests with those who deny the application of the rule in *Howe* v. *Lord Dartmouth*, to produce indications of the testator's intention that it should not apply. We submit that no such indications are to be found here.

They also referred to *In re Tootal's Estate*, 24 W. R. 1031, 2 Ch. D. 628.

Manby, for the trustees of the will, took no part in the argument.

Buckley, Q.C., and *H. Terrell, contra.*—We rely on the direction in the will to pay rents and profits, and also the power of distress given to the annuitants as indications of the testator's intention.

They referred to *Hinves* v. *Hinves*, 3 Hare 609; *Thursby* v. *Thursby*, 23 W. R. 500, L. R. 19 Eq. 395.

Graham Hastings, Q.C., in reply.—*Hinves* v. *Hinves* was a very special case. *Pickup* v. *Atkinson*, 4 Hare 624.

Buckley, Q.C., referred to *Vachell* v. *Roberts*, 32 Beav. 140, 12 W. R. Ch. Dig. 131.

Cur. adv. vult.

April 8.—STIRLING, J.—This is a summons which raises a question on the construction of the will of Wm. Game, whether the rule in *Howe* v. *Lord Dartmouth* applies, so as to affect certain leaseholds forming part of the testator's residuary estate, and cause them to be converted. [His lordship then read the will, and after observing that the testator presumed that the disposition of the furniture and household articles at the beginning of the will gave them to the wife during her life only, and did not treat them as forming part of the residue, continued:] The question is whether the rule in *Howe* v. *Lord Dartmouth* ought to be applied as regards the leaseholds. It has been laid down by the Court of Appeal in *Macdonald* v. *Irvine*—I read from the judgment of James, L.J.—that "the rule must be applied, unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case." Accordingly it rests with those who assert that the rule ought not to be applied to point out indications of intention on the part of the testator that the rule should not be applied. What indications were referred to by those on whom the duty devolved which I have pointed out? They were two. The first was the direction that the rents and profits arising from the residue of the realty and personalty should be paid to the testator's wife during her life, followed by a devise to the testator's nephew for life, charged with certain annuities. The second indication relied on is the power of distress given to the annuitants. Now, as to the first point some of the authorities were referred to in the argument, and I have looked myself at others. Certainly the law appears to me to stand in a somewhat singular position. On the one hand it is said that the use of the word rents implies an intention on the part of the testator that the leaseholds should be preserved in specie. On the other hand, it is said that as the testator's estate included freeholds, the word rents is amply satisfied by reference to those, and cannot be relied on as an indication of intention that the leaseholds should be preserved in specie. The point has arisen repeatedly in cases, and in *Harris* v. *Poyner*, 1 Dr. 174, before Kindersley, V.C., the Vice-Chancellor expressed his opinion on the point. There the testator gave his residuary real and personal estate upon trust, to pay to his wife for life the net or clear rents and profits, dividends, and annual proceedings and income thereof, and after her death he gave his said real and personal residuary estate term and interest therein upon trust for his son absolutely. The argument in favour of the retention of the leaseholds in specie was based on the use of the word rents, and upon that the Vice-Chancellor says: [His lordship read the judgment from "Though there is mention . . . leasehold estate."] That is a clear expression of opinion on the part of the Vice-Chancellor that the use of the word rents alone was not a sufficient indication of intention against conversion, but he decided in that case that the leaseholds ought to be retained on the ground that in the limitation of the gift to the son, the testator spoke of the term and interest in the property, and the Vice-Chancellor held that the word term indicated an intention that the leaseholds should be enjoyed in specie. In *Craig* v. *Wheeler*, 8 W. R. 172, 29 L. J. Ch. 374, both freeholds and leaseholds were devised together, and, dealing with the general rule, Kindersley, V.C., says: [His lordship read the judgment from the words "In *Pickering* v. *Pickering* . . . satisfy myself that it exists," and continued:] Later he goes on to deal with the particular case and says: "It was said that although that word (leaseholds) was not used, there were the words messuages, lands, and by the Wills Act lands was sufficient to pass leaseholds in the absence of freeholds, and that the words rents and profits were tantamount to a sufficient designation of leasehold property. This is a fallacy, for the testator had freeholds, and it was unnecessary to resort to the word lands." And it was held that the use of the words rents and profits was not a sufficient indication of intention that the leaseholds should be enjoyed in specie. On the other hand, there were at least three cases before Lord Romilly in which a different view was expressed. One of these is *Crowe* v. *Crisford*, 2 W. R. 45, 17 Beav. 507. There a testator gave his freehold, copyhold, and leasehold estates, and all his stock, shares, and personal estate to trustees in trust to receive the rents, issues, and profits, and thereout to keep the houses and buildings in tenantable repair and renew his leaseholds, and then to pay the net income arising from the residuary real and personal estate to his wife for life, and it was held that the wife was entitled to enjoy the leaseholds in specie. Lord Romilly said: "This is not a case for conversion, the current of authority has established the rule that where the rents are referred to the person taking a life estate is entitled to the enjoyment of the property in specie, and besides, the provision as to paying fines for renewal and keeping in repair with respect to the leaseholds shows that they were not to be converted." So far, then, as the decision goes, that case is not in point because the Master of the Rolls did not rely on the use of the word rents, but he does say that a current of authority has established that where the rents are referred to the person taking a life estate is entitled to the enjoyment of the property in specie. The current of authority was not referred to in the argument, and the learned judge does not mention the cases to which he referred, but the learned reporter in a note refers to *Goodenough* v. *Tremamondo*, 2 Beav. 513, but that was a case in which no doubt the word rents was used, but there were no freeholds, and Lord Langdale came to the conclusion on the construction of the will that he should be striking the word rents out altogether if he did not imply an in-

tention on the part of the testator that they should be enjoyed in specie. That is not the case with which I have to deal, but I may observe that in the case of *Pickup* v. *Atkinson*, before Wigram, V.C., it was held that the use of the word rents was not sufficient to exclude the rule even where the testator had no freeholds to which the words could apply. The next case is *Wearing* v. *Wearing*, 23 Beav. 99, 6 W. R. Ch. Dig. 102. There the testator gave all his real and personal estate upon trust "out of the rents and profits of his said real and personal estate" to pay his widow sufficient for her maintenance; and on her death he devised "all his said real and personal estate" to his children. There are no reasons given for the decision; what the Master of the Rolls said was: "*Morgan* v. *Morgan* is a different case. In that case there was a bequest of the personal estate separate from the devise of the real estate in which the word rents was used. This case was referred to in *Craig* v. *Wheeler* and not approved by Kindersley, V.C., but distinguished." Lastly, in *Vachell* v. *Roberts*, the testator devised the residue of his real and personal estate on trust to permit A. B. to "receive and take the rents, issues, and profits" for life, with remainder over. The Master of the Rolls said: "The word rents being used I think I must follow the authorities cited. Where there is both real and personal estate the expression rents would refer to and include leaseholds as well as freeholds." The authorities cited were *Goodenough* v. *Tremamondo* which I have already mentioned, *Crowe* v. *Crisford* which was not decided on the use of the word rents but is based on the direction of renewing and repairing the leaseholds, and thirdly *Alcock* v. *Sloper*, 2 Myl. & K. 699, in which also there were other circumstances.

I confess these cases make it difficult to say what the true state of the law according to the authorities is, and I must use my own judgment. I am bound to say that I agree with Kindersley, V.C. I think that where a testator makes a residuary devise including both freeholds and leaseholds the use of the word rents is not a sufficient indication on the part of the testator that the leaseholds should be enjoyed in specie inasmuch as that word may be perfectly well satisfied by reference to the freeholds. Then there was said to be an indication of intention in the power of distress given to the annuitants. By this the testator indicated his intention that there should be liberty to distrain on the land, but on what land? I cannot find any indication of intention that that word should refer to the leaseholds. The freeholds afford ample scope for the employment of that word. In my judgment, therefore, neither of the circumstances relied on alone, nor both together, is sufficient indication of intention on the part of the testator that the leaseholds should be enjoyed in specie, and the rule in *Howe* v. *Lord Dartmouth* applies.

Solicitors, *Hartcup, Davis, & Cobbold*; *Marshall & Co.*

Chan. Div.
Romer, J. } April 29.

WILCOX & GIBBS *v.* JANES. (*a.*)

Patent — Action for infringement — Discontinuance — Costs of particulars of objections — Certificate — Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 29, *sub-section* 6.

The plaintiff in a patent action by written notice discontinued the action before the pleadings were closed. By reason of the provisions of sub-section 6 *of section* 29 *of the Patents, Designs and Trade-Marks Act*, 1883, *the taxing-master refused to allow the costs of the defendant's particulars of objections, because no certificate had been granted as required by that sub-section. The defendant took out a summons asking for a certificate.*

Held, that in the absence of information which would enable the court to certify that the particulars were reasonable and proper, the court would not enter upon any kind of trial of the action to obtain such information. That the case came within the provisions of sub-section 6 *of section* 29, *and that there being no certificate no costs of the particulars of objection could be allowed.*

Adjourned summons.

The action had been an action for the infringement of a patent. There had been ninety-one claims in the plaintiffs' specification, and to meet these the particulars of objections delivered by the defendant had been of a corresponding length.

The plaintiffs had by written notice discontinued the action before the pleadings were closed, and upon getting the notice of discontinuance the defendants carried in their bill of costs, including those of their particulars of objections. The costs of these amounted to about £160 out of a bill of £200.

Subsection 6 of section 29 of the Patents, Designs, and Trade-Marks Act, 1883, provides that "on taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them, unless the same is certified by the court or judge to have been proven or to have been reasonable and proper without regard to the general costs of the case."

Upon the ground that there was no certificate in accordance with the provisions of this sub-section, the taxing-master disallowed the defendant's costs of their particulars of objections, and this application was made by the defendants in the patent action to ask the court to certify that these particulars were reasonable and proper.

A. J. Walter, for the applicant.—The court has power at any time to certify that particulars of objections in a patent action are reasonable and proper. Unless there is such power the defendant might never be able to get these costs where as in a case like the present the plaintiffs by written notice discontinue before the pleadings are closed.

He referred to *Boake, Roberts, & Co.* v. *Stevenson*, 12 R. P. C. 228, and *Middleton* v. *Bradley*, 43 W. R. 694, 12 R. P. C. 390.

Neville, Q.C., and *J. C. Graham*, for the respondents.

ROMER, J.—I am very sorry that I am unable to intervene in this case in favour of the applicant; but the Act of Parliament is too strong for me. I cannot help thinking that a remedy might be afforded, either by an amendment of the Act or possibly by some additional rule as to discontinuance in patent cases being made. My difficulty is this—I cannot certify unless I have the materials before me which enable me to make a certificate—that is to say, unless I know sufficient of the case, and what is to be said on one side or the other, to enable me to certify that these particulars of objections are reasonable. Now, as a fact, I have no materials before me, and I cannot have unless I were to enter into an intermediate sort of half trial of the action, and that I cannot do. So to do would be a very bad precedent, and one which the court ought not to lay down. I agree with what Stirling, J., said, if I may say so, in the case of *Middleton* v. *Bradley*. I do not think the court is of

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

necessity bound to make a certificate, if it is a proper case, at the trial only; it may do it at any time, but it can only do it when, by reason of some application having been made to it, or some sort of procedure having been taken, the court comes to the conclusion that it knows sufficient of the case to be able to make a certificate.

In the present case I have no such materials, and there is nothing in the present case to enable me to make a certificate. In my judgment it would be a bad precedent, in a case like this, where the case has never come before the court at all before this application, to enter into a sort of half trial of the action in order to see whether or not these particulars of objections are reasonable. As I have said, that I cannot do, and, that being so, I cannot certify; and therefore the application fails.

Solicitors, *Frederick Jones; J. H. & J. Y. Johnson.*

Chan. Div. } Romer, J. } April 27.

In re SHEPPARD.
SHEPPARD *v.* MANNING. (*a.*)

Will—Construction—Estate pur autre vie—*Special occupant—Devolution of estate—Wills Act* (1 *Vict. c.* 26), *s.* 6.

In order to find that there is a special occupant of property devised pur autre vie *either the word "heir" must be expressly mentioned in the gift or it must be otherwise shown that the testator intended the heir of the devisee to take.*

The owner of the freehold devised to trustees upon trust for three persons and their issue equally during their lives and the life of the longer liver of them. One of the beneficiaries having died intestate,

Held, that there was no special occupant designated by the testator, and that the share consequently devolved on the personal representatives of the beneficiary according to the 6th section of the Wills Act.

Wall *v.* Byrne, 2 *Jo. & Lat.* 118, *and* Philpotts *v.* James, 3 *Doug.* 425, *distinguished.*

Summons.

The above-named testator, by his will dated the 28th of July, 1868, appointed executors and trustees thereof and thereunder, and gave, devised, and bequeathed all his real and personal estate and effects whatsoever and wheresoever unto his said trustees upon trust to pay certain pecuniary legacies, and subject thereto and to the payment of his just debts, funeral and testamentary expenses, upon trust as to his personal estate, and as to certain specified real estate as therein mentioned, and upon trust to pay over from time to time the rents, issues, and profits of all other his real and personal estate unto and for the benefit of his three daughters, the plaintiff Sarah Y. G. Sheppard, Elizabeth Sheppard, and Mary L. Sheppard, and their issue, if any, *per stirpes* in equal parts, shares, and proportions during the term of their natural lives respectively and the life of the longer liver of them for their separate use respectively, and from and after the decease of the survivor of them his said three daughters, then to equally divide the principal thereof amongst all and every the children then living of them his said three daughters in equal shares and proportions for their own sole use and benefit respectively *per stirpes* and not *per capita.*

(*a.*) Reported by J. F. WALKY, Esq., Barrister-at-Law.

The testator died on the 23rd of January, 1873, and the plaintiffs were the present trustees of his said will.

Mary L. Sheppard, one of the testator's said three daughters, intermarried with C. Manning and died on the 11th of July, 1880, leaving her two sisters, her husband, and three children, Mary L. Manning, the defendant Charles I. H. Manning, and John H. S. Manning her surviving. Her husband, C. Manning, died on the 6th of August, 1885.

The said Mary L. Manning (the younger) intermarried with the defendant John H. Heard, and died on the 25th of July, 1893, intestate, leaving her husband and one child, the defendant Marie Louise Heard, who was an infant. The said John H. S. Manning died on the 21st of December, 1893, intestate and a bachelor.

The judge in chambers having decided that the three children of Mrs. Manning became on her death absolutely entitled in thirds to her share of the income and rents of the testator's residue during the lives of Mrs. Manning and her sisters and the longest liver of them, the further question arose whether the shares of her two deceased children passed to their heirs at law or to their legal personal representatives respectively.

H. M. Humphry, for the trustees of the will and for the personal representatives of the deceased daughter. This is an estate *pur autre vie*, of which there is no special occupant, and it passed under section 6 of the Wills Act (re-enacting in substance the 12th section of the Statute of Frauds) to the daughter's personal representative on her dying intestate: *Re Barber*, 29 W. R. 909, 18 Ch. D. 624; *Chatfield* v. *Berchtoldt*, 20 W. R. 401, L. R. 7 Ch. App. 192; *Mountcashell* v. *More-Smyth*, [1896] A. C. 158, 44 W. R. Dig. 11.

Baden Fuller, for the heir of the deceased son.—The estate was an estate of *quasi*-fee, a descendible freehold: see Burton's Law of Real Property, 8th ed., p. 240. *Philpotts* v. *James*, 3 Doug. 425, seems to be the English case referred to in *Wall* v. *Byrne*, 2 Jo. & Lat. 118, and both those cases are in favour of the heir. The testator has given the whole *quasi*-fee to the persons designated in his will, and therefore the whole interest passed to them, and it is the same as if he had mentioned the heir as special occupant. The heir, therefore, takes as special occupant, and the Wills Act does not apply. [ROMER, J., referred to Lord Davey's judgment in *Mountcashell* v. *More-Smyth*, [1896] A. C. at p. 165.]

A. L. Ellis, for the heir of the deceased daughter.—The principle is the same whether the testator has an estate of inheritance and devises it for lives, as here, or only has an estate *pur autre vie*, and devises that estate, as was the case in *Wall* v. *Byrne*. *Wall* v. *Byrne*, therefore, governs this case, and shows that the persons to take here are the heirs and not the personal representatives of the devisee. [ROMER, J.—A special occupant must be a person designated in some shape or form.]

Humphry, in reply.—The devise in *Chatfield* v. *Berchtoldt* is not distinguishable from the devise here, and the principle on which that case was decided is conclusive of this.

ROMER, J.—This is the case where the owner of the freehold devises to trustees on trust to pay the income to A. during the life of another. If A. dies intestate during the life of *cestui que vie*, to whom does the beneficial interest go during the remainder of the life of *cestui que vie?* In my opinion it passes according to the 6th section of the Wills Act. There

is no special occupant in such a case. In order to find that there is a special occupant, the word heir must either be expressly mentioned in the gift or it must be otherwise shown that the heir is intended to take where the gift is by will, but the heir must be expressly mentioned where the gift is by deed. My opinion is, I think, supported by the cases which have been cited for the personal representatives.

Now, as to *Wall* v. *Byrne*, whether that case was rightly decided or not, which I need not now consider, it is not an authority here. What Sugden, L.C., says there is this: "Where a man has an estate *pur autre vie* limited to him and his heirs, and devises that estate by words which, without words of limitation, would pass the *quasi* inheritance—as the words here would—and the devisee dies intestate, the persons to take are the heirs and not the personal representatives of the devisee," 2 Jo. & Lat. at p. 119, and, assuming that to be correct, it is no authority here. The testator in the case before me did not have an estate *pur autre vie*. If the English decision referred to by Sugden, L.C., is *Philpotts* v. *James*, that case is not in point here either. There a lease was expressly limited to a person and his heirs, the person died and by his will devised his *freehold lease* to another person who was his heir-at-law, and the court held that the heir of that person was entitled to take. Lord Mansfield's judgment shows the ground of the decision. The words used by the testator there show the intention to pass the freehold. As Lord Mansfield says, "He gives all his *freehold lease*. It is the same as if he had added 'heirs.'" For these reasons these cases are not in point. I therefore hold that there is no special occupant here, and the property passes to the personal representatives according to the 6th section of the Wills Act.

Solicitors for all parties, *Torr, Gribble, Oddie, & Sinclair*.

Chan. Div.
Romer, J. } March 5.

BROOKS v. RELIGIOUS TRACT SOCIETY. (a.)

Copyright — Infringement—Copy of central figure—Sentiment of picture.

Where a picture contains a direct copy of a substantial portion of a copyright work, that substantial portion constitutes an infringement if it is a copy in the ordinary sense, and particularly where the sentiment expressed in the copyright picture has also been embodied.

Motion.

This was a motion by the plaintiff for an *interim* injunction restraining the defendants from printing, selling, &c., any copies of the *Child's Companion* containing a certain woodcut which was alleged to be an infringement of a well-known picture called "Can't You Talk?" of the copyright of which the plaintiff was registered proprietor. The infringement complained of was particularly in respect of the figure of a collie dog which appeared in the plaintiff's picture with the figure of a child on a stone floor, having a background of a wall with a door out of which a cat was looking. Above the dog was a table on which was a tub with a spoon in it. The defendants' woodcut reproduced many of the details of the plaintiff's picture. The collie dog in the woodcut was identical in expression, attitude, and position, and was with the wall in the background and the table an exact copy of those in the plaintiff's picture. The only differences between the picture and the woodcut were that in the woodcut the figure of the child had been removed, and in its place two cats and a tortoise had been inserted, while the background and foreground had been increased, and some new details introduced. The *Child's Companion* was a monthly periodical, and the woodcut in question appeared in the November issue of 1896 as an illustration to a tale entitled "A Strange Visitor." The expression of the dog in both woodcut and picture was one of calm and fixed attention. The defendants stated that they had purchased the block from which the woodcut was taken some five years ago from a man whom they had lost sight of. It was agreed that the motion should be treated as the trial of the action.

The defendants had on the plaintiff's complaint at once withdrawn the publication. The plaintiff waived any claim for damages.

Neville, Q.C., and *Knowles Corrie*, for the plaintiff.

Levett, Q.C., and *Scrutton*, for the defendants.—The dog is the only detail common to the picture and the woodcut. The pictorial meaning of the two is quite distinct. The idea conveyed by the picture is not that of the woodcut, and is not within the object of the Copyright Acts as stated by Lopes, L.J., in *Hanfstaengl* v. *Empire Palace, Hanfstaengl* v. *Baines*, 42 W. R. 681, [1894] 3 Ch. 109.

ROMER, J., said that he thought the woodcut was an infringement of the plaintiff's copyright. The principal part, or one of the principal parts, of the copyright picture was the figure of the dog with a particularly sagacious or benevolent appearance. That appearance, together with the form and attitude of the dog, had been copied, and the defendants' dog was a reproduction of the plaintiff's dog. Other portions of the plaintiff's picture had also been reproduced by the defendants. It was not only the dog which was taken, but also the feeling and artistic character of the plaintiff's work. They had taken the design whilst substituting cats and a tortoise for the child in the original. Wherever one found a direct copy of a substantial portion of a copyright work that substantial portion constituted an infringement if it was a copy in an ordinary sense. For instance, if a person were to take an historical picture and take out of it the principal figure and reproduce that figure without the other surroundings, that would be an infringement. The present case was a stronger case, because the defendants had not only taken the principal figure of a dog, but copied as well the sentiment of the picture.

By a society like the defendants what had been done had been done inadvertently. They offered an undertaking in the terms of the application. This he accepted. The defendants must pay the costs.

Solicitors, *Russell, Cooke, & Co.; Hawes, Wood, & Ware*.

Q. B. Div.
(Vaughan Williams and Wright, JJ.) } March 31.

ATTORNEY-GENERAL v. DODINGTON. (a.)

Inland revenue — Estate duty — Exemption — Person dying before commencement of Finance Act, 1894—Personal property settled by a will or disposition—Marriage settlement—Power of appointment—Will—

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 21, *sub-section* 1.

Section 21, *sub-section* 1, *of the Finance Act*, 1894, *provides that estate duty shall not be payable upon the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of the Act in respect of which property any duty mentioned in paragraphs* 1 *and* 2 *of the first Schedule to the Act has been paid.*

By a marriage settlement B. transferred personal property to trustees upon trust to pay the income to herself for life, and after her death to her husband for life, and after the death of the survivor upon trust for such persons as she should by deed or will appoint. B. died in 1883, *having by her will exercised the power of appointment in favour of certain beneficiaries. Probate duty was paid by her executors upon the value of the trust funds after deducting the value of the husband's life estate. The husband died after the Finance Act*, 1894, *came into force, and the estate duty payable under section* 1 *of that Act was claimed upon the value of the trust funds.*

Held, that the case came within the exemption from estate duty conferred by section 21, *sub-section* 1, *of the Act, save in respect of that part of the trust funds upon which no probate duty had been paid by B.'s executors.*

Information by the Attorney-General praying that it might be declared that upon the death of William Popham estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value of the trust funds remaining subject to an indenture of settlement of the 16th of October, 1871, and that the defendant, the surviving trustee of the settlement, might be ordered to pay the amount of such duty and interest to the Commissioners of Inland Revenue.

By the indenture of settlement of the 16th of October, 1871, made in contemplation of the marriage of William Popham with Elizabeth Frances Bailward, widow (which marriage subsequently took place), certain personal property was vested in trustees upon trust to pay the income to Mrs. Popham for life for her sole and separate use, and after her death, in case William Popham should survive her, upon trust to pay the income to William Popham for his life, and upon the death of the survivor upon trust for such person or persons as Mrs. Popham should by deed or will appoint.

Mrs. Popham died on the 10th of August, 1883. William Popham died on the 28th of August, 1894.

Mrs. Popham by her will appointed the trust fund as to part upon trust for William Popham, and as to the residue, subject to the life interest of William Popham, upon trust for her children by her first marriage.

At the date of Mrs. Popham's death the trust fund consisted of India Four per Cent. Stock worth £1,852 6s. 8d., and £1,939 12s. 9d. invested in a mortgage.

Mrs. Popham's executors included £2,855 18s. 2d. as the value of the reversionary interest in the trust funds (after deducting the value of William Popham's life interest) in the affidavit of the value of Mrs. Popham's estate for the purpose of obtaining probate of her will under 44 & 45 Vict. c. 12, and probate duty was paid on the said sum. The defendant contended that by reason of such payment the trust funds were exempted under section 21 (1) of the Finance Act, 1894, from duty on the death of William Popham.

The Finance Act, 1894:—

Section 1.—"In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called 'estate duty' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first Schedule shall not be levied in respect of property chargeable with such estate duty."

Section 21 (1).—"Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act in respect of which property any duty mentioned in paragraphs 1 and 2 of the first Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was, at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

First Schedule:—

"1. The stamp duties imposed by the Customs and Inland Revenue Act, 1881, on the affidavit to be required and received from the person applying for probate or letters of administration in England or Ireland or on the inventory to be exhibited and recorded in Scotland.

"2. The stamp duties imposed by section 38 of the Customs and Inland Revenue Act, 1881, as amended and extended by section 11 of the Customs and Inland Revenue Act, 1889, on the value of personal or movable property to be included in accounts thereby directed to be delivered."

Sir R. E. Webster, A.G., Sir R. B. Finlay, S.G., and *Vaughan Hawkins*, for the Crown.

Haldane, Q.C., and *Danckwerts*, for the defendants.

VAUGHAN WILLIAMS, J.—The question of the liability of the defendant to pay the duty claimed by the Crown depends in my judgment entirely upon the construction of section 21. [His lordship read the section.] The contention on the part of the Crown is that no duty mentioned in paragraphs 1 and 2 of Schedule 1 of the Act had been paid in respect of property settled by a will or disposition made by a person dying before the commencement of Part 1 of the Act within the meaning of that section. It is common ground that it could not be said under the circumstances of this case that the duty has been paid in respect of personal property settled by a will. But it is said on behalf of the respondents that duty has been paid in respect of personal property settled by a "disposition," and also that that duty is a duty mentioned in paragraphs 1 and 2 of Schedule 1. [His lordship read paragraphs 1 and 2 of the Schedule.] The two Acts of Parliament therein mentioned may be spoken of, the one as the Act relating to a duty in respect of testamentary instruments proper, and the other as the Act relating to a similar duty in respect of dispositions not strictly testamentary, but which the Legislature thought proper to include within the scope of the duty as being dispositions which might have a tendency to evade, and be executed for the purpose of evading, probate duty. It is contended by the defendant that the duty mentioned in paragraph 1 has in the present case been paid in respect of personal property settled by a disposition made by a person dying before the commencement of that part of the Act. Whether that be so or not depends upon what is the nature of the act of Mrs. Popham under which the disposition was made under which the beneficiaries now claim. If that disposition was not a part and parcel of a settlement by a will or disposition then the case would not come within the section;

and it is said on behalf of the Crown that the disposition in question was independent of the settlement, and that it ought to be looked at as a mere disposition by Mrs. Popham of property, the disposition of which was left in her notwithstanding the settlement, and as having really no dependence on the settlement whatsoever. It is said on behalf of the defendant that that it is not so, that the disposition must be treated as the exercise of a power of appointment which was created by the settlement, and that if this is so this is property which has been settled by the settlement and that such settlement is a disposition within the meaning of this section. Upon this part of the case I agree with the respondents. According to my view the exercise of the power of appointment ought to be referred to the instrument which created the power, and that is what I understand to have been the decision of the court in *Attorney-General* v. *Chapman*, 40 W. R. 79, [1891] 2 Q. B. 526. That case was decided under 44 & 45 Vict. c. 12, s. 38, by which stamp duties are imposed in respect of accounts delivered of personal property, including any property "passing under any past or future voluntary settlement made by any person dying on or after the 1st of June, 1881, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life is reserved to the settlor." The question there was whether the Act applied because the instrument executed under a power of appointment did not itself create the life estate, that estate having been created by the deed of settlement which conferred the power of appointment. Wills, J., said: "But in order that the duty may be payable it is necessary that the settlement should be one by which a life estate shall have been reserved to the settlor, and therefore since the deed of appointment reserved nothing to the appointor, the duty is not payable unless within the meaning of the sub-section the property in question "passed under" the deed of 1843. The expression "passed under" is not a phrase of art in the same strict sense in which "devise," "grant," "estate in fee," "remainder," and a host of others having exact and uniform technical significations would be properly so termed. It is a phrase of a comprehensive nature, and we think it may fairly be used in respect not only of dispositions which are effected by the words of the instrument creating them, but of those which are effected by the subsequent execution of a power created by the instrument in question. A deed of appointment would do nothing of itself, and only owes its vitality to the instrument creating it. It is surely under such circumstances no stretch of language to say that property, the right to direct the application of which is created by deed A., but the specific division of which is effected by deed B., passes *under* (not *by*) deed A." It is quite true though, that in the present section the word used is "by," not "under," but I am not pressed by that fact, because Wills, J., was not laying down a new proposition of law, he was merely enunciating, as I understand, a well established proposition. I find it laid down in Farwell on Powers that the execution of a power of appointment must be referred to the deed which created the power.

So, in this case, I think that the execution of this power of appointment must be treated as part and parcel of the settlement, and therefore I think that the argument that this property dealt with by Mrs. Popham by her will was not property settled by will or disposition fails. It is true it was not settled by will, but it was settled by disposition, and none the less so because the power of appointment took the shape of a will. But then it is said that the duty was not paid in respect of the settlement as such, but only by reason of the accident of the exercise of the power of appointment taking the form of a will. That may be true, but the Act does not say that the duty must have been a probate duty paid in respect of the settlement as such; it only says it must be a probate duty payable in respect of personal property settled by a will or disposition, and it seems to me that the case does not the less come within the words of the section, because at the time of the origin of the settlement and independently of the accident of the will no probate duty was payable at all. In my opinion this case comes within the very words of section 21.

Before leaving this part of the subject I wish to call attention to the provisions of this Act, because I am anxious to give a decision in this case which is consistent with the whole scope and intention of the Act. Section 1 creates the estate duty, which is a duty payable, not on estates and interests in property, but on the property itself, passing on the death of the persons mentioned in the Act. Section 2 deals with the property which shall be deemed to be included in property passing on death, and the effect of section 2 is to include not only property strictly speaking, but interests or estates in property, and that has an important bearing upon my decision on this case.

The only other sections to which I need refer are sections 5 and 7. It seems to me that the Legislature has dealt with two possible cases of hardship; first, cases in which the hardship arises in respect of the duty newly imposed by the Act taken by itself; and secondly, cases of hardship arising in respect of persons who have paid duties under the existing law. Section 5, sub-section 1 (*b*) deals with the one case, for it provides that during the existence of the settlement the estate duty shall not be payable more than once, and I think that section 5 recognizes the difference between the payment of duty on property strictly so called, and on interests carved out of one property by a settlement. Section 7, sub-section 7, also recognizes the same distinction. Then section 21 deals with cases of hardship where the interests carved out of a property have been created prior to the Act, and have taken effect either as duties or by the death of a testator before the Act. In construing section 21 we ought to give it such an interpretation as will make it effective against the hardship which it is clear that the Legislature intended should be guarded against. I do not think that would be so if one adopted the construction of section 21 put forward by the Crown, but the hardship will be prevented if we adopt the construction of the defendant.

That being so, the only matter that I have now to deal with is the question whether any duty is payable here at all. In my judgment the Crown is not entitled to duty upon the whole principal value of the trust fund, but I think that the defendant is liable to pay duty to a certain extent. When the probate duty was paid under Mrs. Popham's will, duty was paid in respect of two-thirds of this property, but no duty was paid on one-third—that is, the amount which was deducted from the capital value of the trust funds. I think that under those circumstances the respondents cannot in respect of that part of the personal property, or that interest in the personal property, rightly say that any duty has been paid, and therefore, in my opinion, the Crown is entitled to judgment in respect of that portion of the property as to which it cannot truly be said that any duty has been paid under those duties mentioned in the first Schedule to the Act.

WRIGHT, J.—I agree, and it is not necessary for me to say more than this, that it being agreed that but for section 21 the respondents would have been

liable to estate duty under section 1, the question of the rights of the parties appears to me to depend on the construction which ought to be put on one phrase in section 21—namely, "personal property settled by a will or disposition" made by Mrs. Popham. Section 22 says that "settled property" means "property comprised in a settlement," and that "settlement" means "any instrument whether relating to real or personal property which is a settlement within the meaning of section 2 of the Settled Land Act, 1882, or if it related to real property, would be a settlement within the meaning of that section." That definition is one which it is very hard to understand. Reading the material words of section 2 of the Settled Land Act, 1882, a settlement is "any will or instrument under or by virtue of which instrument" any property "stands for the time being limited to any persons by way of succession."

The question here is whether Mrs. Popham's will (whether you call it a will or disposition does not matter) can be considered as an instrument under or by virtue of which the property would be limited to any persons by way of succession. If it stood alone I should say it certainly could not. It simply appoints the property to her children subject to her husband's life interest; but I think in substance it ought to be treated in a different way. The will is not a simple devise, it is a pure testamentary appointment. It does not purport to do anything but exercise the powers of the marriage settlement. That being so, it seems to me that the settlement not having designated as the persons to take the property, the persons who do take it under the will, it is the will which in perfecting the exercise of the powers of appointment under the marriage settlement makes the marriage settlement operative, as giving an estate to the particular persons who take the estate. It therefore can be said that Mrs. Popham's will was an instrument under or by virtue of which the estate became limited to the particular persons who took it by way of succession to her own estate, not under the will, but under the marriage settlement—that effect, however, being given by virtue of the will. That is the ground upon which I base my conclusion.

Upon the other point I am unable to add anything. I cannot find anything in section 21 which entitles the Crown to say that unless the whole estate has been taxed for probate duty, even though probate duty was not payable in respect of the whole of it, the respondents are to pay afresh for everything; nor can I quite understand the respondents' contention that they are not liable *pro tanto* for that which they have not paid. Section 21 seems to exempt them only so far as they have paid.

Therefore I agree with the judgment of Vaughan Williams, J.

Judgment accordingly.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendant, *Flower, Nussey, & Fellowes.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Wright, JJ.) April 5.

In re JUBB.
Ex parte BURMAN. (a.)

Bankruptcy—Receiving order—Refusal to make order—"Sufficient cause"—Destruction of bankrupt's assets by bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.

The fact that the assets of the debtor are likely to be absorbed in the costs of the bankruptcy is not "sufficient cause" for refusing to make a receiving order within section 7, *sub-section* 3, *of the Bankruptcy Act,* 1883:—"*If the court . . . is satisfied that the debtor is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.*"

Ex parte Betts, In re Betts, ante, *p.* 98, [1897] 1 *Q. B.* 50, *distinguished.*

Appeal from his Honour Judge Waddy in the county court at Sheffield, refusing to make a receiving order.

The petition was presented on the 26th of October, 1896, and was for the sum of £66 15s., the act of bankruptcy alleged being notice of suspension of payment. The debts ascertained at that date amounted to about £120 owing among four creditors. The assets consisted of book debts to the amount of £20. At the hearing before the county court judge, on the 5th of November, the debtor's solicitor admitted the debt and the act of bankruptcy, but urged that no order ought to be made, because the debtor had offered a composition of 3s. 4d. in the pound which had been accepted by two out of the four creditors, and that £13 had been paid on account of such composition since the act of bankruptcy.

The learned judge refused to make a receiving order, on the ground that the assets would probably be swallowed up by the costs of the bankruptcy, which in his discretion he considered "sufficient cause" within section 7, sub-section 3, of the Bankruptcy Act, 1883, for refusing to make an order.

The petitioning creditor appealed.

R. W. Harper, for the appellant.—The reason given by the county court judge for his decision does not constitute "sufficient cause" for refusing to make a receiving order, because further assets may be discovered in the course of proceedings in bankruptcy: *Ex parte Dixon, In re Dixon*, 32 W. R. 837, 13 Q. B. D. 118; *Ex parte Baird, In re Hecquard*, 38 W. R. 148, 24 Q. B. D. 171; *Ex parte Leonard, In re Leonard*, 44 W. R. 438, [1896] 1 Q. B. 473.

E. W. Hansell, for the respondent.—The judge was right in refusing to make a receiving order when the assets were almost certain to be destroyed by the costs of bankruptcy: *Ex parte Otway, In re Otway*, [1895] 1 Q. B. 812, 43 W. R. Dig. 17; *Ex parte Betts, In re Betts, ante*, p. 98, [1897] 1 Q. B. 50.

[WRIGHT, J., referred to *In re Birkin*, 3 Manson, 291.]

R. W. Harper replied.

VAUGHAN WILLIAMS, J.—We think that the learned county court judge was wrong in this case. At the date of the presentation of the petition the debtor was possessed of assets, not large, it is true, but then his liabilities were not large either. The debtor wanted his creditors to accept a composition. Two of them accepted, and were paid; one refused, and presented a petition. Why, then, should there not be a receiving order? The learned judge, basing his decision on section 7, sub-section 3, of the Bankruptcy Act, 1883, held that there was "sufficient cause" for his refusing the order because the costs were likely to exceed the assets. I can only say that I know of no case which decides that the mere fact that the costs of the bankruptcy are likely to absorb the debtor's assets is "sufficient cause" for refusing

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

to make a receiving order. If such were the law many receiving orders would have to be refused.

It has been urged that the case of *Ex parte Betts, In re Betts*, so decides; but that is not so. It is true that Lord Esher does mention waste of money in costs in his judgment; but that was not the ground of his decision.

I cannot held adding that, after studying the facts and the correspondence in this case, I think that perhaps assets to the value of more than £20 may be forthcoming.

WRIGHT, J., concurred.

Appeal allowed.

Solicitor for the appellant, *Mellor Lumb*, for *Wilmshurst & Jones*, Huddersfield.

Solicitors for the respondent, *Steadman & Van Praagh*, for *Arthur Neal*, Sheffield.

Q. B. Div. (Vaughan Williams and Wright, JJ.) April 6.

In re RAATZ.
Ex parte CARLHIAN. (*a.*)

Bankruptcy — Practice — Appeals — Date of receiving order made on appeal.

When an appeal against a refusal to grant a receiving order is allowed, the receiving order shall date from the day of the hearing of the petition in the court below.

Appeal from the refusal of a receiving order by the registrar of the county court at Swansea.

The court allowed the appeal, whereupon

Herbert Reed, Q.C., who (with *Burleigh Muir*) represented the appellant, applied to the court to make the order as of the date when it ought to have been made—that is, the date of the hearing before the registrar at Swansea. He stated that the practice was not at present settled, receiving orders being sometimes dated as of the day of the hearing of the appeal, sometimes as of the day of the hearing of the petition in the court below.

Meager, for the respondent, did not oppose the application.

The COURT (VAUGHAN WILLIAMS and WRIGHT, JJ.), after consulting Mr. Registrar Hope, decided that the receiving order ought to be made as of the date of the hearing in the court below.

Solicitors for the appellant, *Collyer & Davis*.

Solicitor for the respondent, *Ivor Evans*, Swansea.

Q. B. Div. (Vaughan Williams and Wright, JJ.) Nov. 27.

In re STOCK.
Ex parte AMOS. (*a.*)

Bankruptcy—Composition with creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126—*Default —Determination of deed—Right of creditors to prove in the subsequent bankruptcy of the debtor—Statute of Limitations.*

Creditors accepted a deed of composition in 1881, *determinable by the trustees upon default. Default was made, the debtor became bankrupt in* 1889, *and the trustee of the deed determined it in* 1896. *The creditors then proved in the* 1889 *bankruptcy.*

Held, that they were entitled to prove, and were not barred by the Statute of Limitations, as the deed of composition was to be treated as an acknowledgment taking the debt out of the statute.

Appeal from a decision of his Honour Judge Austin in the county court at Bristol, admitting the proof of a creditor.

On the 11th of July, 1881, Stock filed his own petition under the Bankruptcy Act, 1869, with liabilities of about £4,000. A meeting of his creditors was held on the 8th of August, when they resolved to accept a composition of 5s. in the pound in such rateable instalments or dividends as the trustee of a deed to be prepared should think fit. Stock was to be allowed to continue trading, subject to an inspectorship, and to keep £500 a year for himself before paying any of the composition. A deed was prepared and executed embodying the resolutions, and further providing (*inter alia*) that if Stock were adjudged bankrupt before payment of the composition it should thereupon become lawful for the inspectors appointed under the deed to declare the same at an end.

The respondents to the present appeal were among the creditors who proved under and signed the deed. Stock never succeeded in earning more than £500 a year, so none of the composition was ever paid, and in 1889 he filed his own petition.

On the 27th of March, 1896, the sole surviving inspector under the deed made an indorsement upon it to the effect that he thereby declared it at an end.

The respondents thereupon proved in the 1889 bankruptcy for £925. The Official Receiver rejected the proof, but his decision was reversed by his Honour Judge Austin.

The Official Receiver appealed.

E. Cooper Willis, Q.C., for the appellant.—The respondents' claim is statute-barred prior to the bankruptcy in 1889, and also is barred because they encouraged people to trade with Stock. The deed was a mere licence to trade, and did not suspend the operation of the Statute of Limitations: *Fuller* v. *Redman*, 26 Beav. 614, 8 W. R. Ch. Dig. 38. [VAUGHAN WILLIAMS, J.—By the terms of this deed no creditor could sue till default made. Has there been default?] No. But the surviving inspector could not alone determine the deed, and it is still alive. [WRIGHT, J.—Then is not the whole question whether it has been validly determined?] [VAUGHAN WILLIAMS, J.—The resolutions in the deed bar the creditors from suing until default, therefore the statute could only run from the date of default: *Irving* v. *Veitch*, 3 M. & W. 90.] The respondents cannot prove because the deed is still alive, or, if they can prove, it can only be for the composition at the rate of 5s. in the pound.

Muir Mackenzie, for the respondents, was not called upon.

VAUGHAN WILLIAMS, J.—In this case it is clear that the county court judge was right. As long as the deed was in force none of the creditors could sue, but now their rights have revived. It is said that the indorsement by the one surviving inspector alone was inoperative; but having regard to the authorities cited in Lewin on Trusts (9th ed., p. 277 *et seq.*) I have no doubt but that he had power to declare the deed at an end. The deed having come to an end, it is now said that the rights of the creditors are statute-barred. I am happy to say that it is not so. It would be shocking if a creditor's right of action,

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

taken from him by a resolution to which, perhaps, he did not assent, were thus to be for ever lost.

I think it clear that the intention of the resolutions and of the deed was that, upon the deed becoming in any way inoperative, the debtor should thereupon be liable to pay the amount of the original debt. It is right to treat the deed as an acknowledgment which takes the debt out of the Statute of Limitations.

WRIGHT, J., concurred.

Appeal dismissed. Leave to appeal granted.

Solicitors for the appellant, *Chester & Co.*

Solicitors for the respondents, *Whites & Co.*, for *Press, Inskip, & Press*, Bristol.

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — March 19, 20; April 8.

BADISCHE ANILIN UND SODA FABRIK *v.* HENRY JOHNSON & CO. (*a.*)

Patent — Infringement — Patent applicable to United Kingdom only—Foreigner resident abroad sending infringing goods by post to England—Order from an English purchaser—Goods the property of the purchaser from the time of dispatch—Agency of post-office—Jurisdiction.

A person who manufactures abroad goods according to a patent applicable only to the United Kingdom, and who, in compliance with an order received from an English customer, sends such goods by post to such customer, does not infringe the English patent.

Decision of North, J., *reversed* (Rigby, L.J., *dissenting*).

Coombes's case, 1 *Lea. Cr. C.* 388, *discussed.*

Appeal from North, J.

The plaintiff company were the owners of a valid patent, applicable only to the United Kingdom, for the manufacture of (amongst other things) a dye called "Yellow T for wool." The defendants, Henry Johnson & Co., were drysalters in London, and the defendant Bindschedler was a chemical manufacturer carrying on business at Basle, in Switzerland. On the 7th of June, 1895, Johnson & Co. wrote to Bindschedler at Basle, "Please send us by post immediately 5 lbs. Yellow T for wool." On the 11th of June Bindschedler replied, "In reply to your post-card of 7th inst. we are sending you enclosed invoice for the 5 lbs. Yellow T for wool you ordered, asking you kindly to credit us for the amount, 16s. 6d." On the 12th Bindschedler sent a parcel containing 5 lbs. Yellow T for wool to Niebergall & Goth, forwarding agents in Basle, to be forwarded to Johnson & Co. The dye was forwarded accordingly, without further instructions from Johnson & Co., and was received by them in London. Johnson & Co. then remitted the price to Bindschedler, and paid the postage, including Niebergall & Goth's charges, to the postal authorities in England. It was proved that the dye so sent was of the kind covered by the plaintiffs' patent, and that Bindschedler, when he despatched the parcel, was aware of this. It also appeared that the course here adopted, of sending the goods to a forwarding agent in Switzerland, was the ordinary practice in Bindschedler's work, being prescribed by a standing order.

The plaintiff company commenced an action claiming an injunction to restrain the defendants from importing into England, and from manufacturing, selling, supplying, and using in England, dyes manufactured according to the plaintiffs' patent, and from infringing the plaintiffs' rights under their patent. Johnson & Co. at once submitted to an injunction, but Bindschedler contested the action, alleging that he had done no act in England, and that the patent was not in force in Switzerland, where alone he had done anything.

North, J., granted the injunction asked for against Bindschedler, who appealed.

W. H. Upjohn, for the appeal.—The goods were at Johnson's risk from the time they were dispatched by the appellant, or at any rate from the time they left Basle. Delivery, therefore, was complete at Basle. Under section 32, sub-section 1, of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), delivery to the carrier is delivery to the buyer. The appellant has never had any control of the article in England.

He cited *Nobel's Explosives Co.* v. *Jones*, 30 W. R. 294, 17 Ch. D. 721, 31 W. R. 385, 8 App. Cas. 1; *Grainger* v. *Gough*, 44 W. R. 561, [1896] A. C. 325; and *Henthorn* v. *Fraser*, 40 W. R. 433, [1892] 2 Ch. 27.

Moulton, Q.C., and *W. N. Lawson* (*J. C. Graham* with them), for the plaintiff company.—We admit that the appellant was justified in selling to Johnson at Basle. But here the liability does not depend upon contract, or upon the ownership of the goods. It does not matter in whom the property is, for the appellant, by sending the infringing goods into England, has done an act which ends here. [RIGBY, L.J., referred to *Reg.* v. *Keyn*, 2 Ex. D. 63, and *Coombes's case*, 1 Lea. Cr. C. 388.] The appellant cannot excuse himself by showing that he acted as agent for another person, or that the goods belonged to that other.

They cited *Elmslie* v. *Boursier*, 18 W. R. 665, L. R. 9 Eq. 217; *Von Heyden* v. *Neustadt*, 28 W. R. 496, 14 Ch. D. 230; *Wright* v. *Hitchcock*, L. R. 5 Ex. 37. [RIGBY, L.J., referred to Stephen's History of the Criminal Law of England, vol. ii., p. 12.]

Upjohn, in reply.—The appellant is only an exporter from Switzerland, not an importer into England. If he had sent the goods without any order, and merely on approval, that would have been an infringement, because the property in the goods would have continued to be in the appellant, and the post-office would have been his agents. *Coombes's case* is explained in *Reg.* v. *Keyn*, 2 Ex. D., at p. 103.

He also cited *Neilson* v. *Betts*, L. R. 5 H. L. 1.

Cur. adv. vult.

April 8.—The following written judgments were delivered.

LINDLEY, L.J.—In this case Smith L.J., has prepared a judgment in which I concur.

The conclusion at which I have arrived is that the court has no jurisdiction over the defendant Bindschedler, except so far as he has conferred such jurisdiction by appearing to the writ in order to have the merits of the case determined. If, instead of appearing to the writ, he had applied to discharge the order of this court giving leave to serve him out of the jurisdiction, the court would in my opinion have been bound to discharge such order.

But I proceed to consider the merits. I have come to the conclusion that the defendant Bindschedler has done nothing which amounts to making, using,

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

exercising, or vending the invention of the plaintiffs in this country. In other words, Bindschedler has not infringed the plaintiffs' patent. The patent is confined to this country, and does not extend to Basle, where all the acts done by Bindschedler were committed. It is true that by reason of what Bindschedler did in Basle, goods made by him there according to the plaintiffs' patent came into this country, and no one had a right to use them here. But what the defendant did in Basle was lawful and not unlawful; lawful by the law of Switzerland, and not unlawful by the law of England, which has no application there. This circumstance, and the immateriality of the intention accompanying the act done, destroy the analogy between such a case as this and those criminal cases with which Mr. Moulton ingeniously compared it, and of which *Coombes's case* is a type. There a man in this country, and on shore, fired at and killed a man out at sea; it was held that his offence was committed within the jurisdiction of the Admiralty. I cannot think such a case a safe guide for the decision of the one before us. Bindschedler has no agent here for the importation of his goods, nor are they in fact in his possession or under his control in this country. It is true that he may be said to be aiding and abetting abroad importers here; but that neither makes him amenable to our jurisdiction nor makes him an infringer of the plaintiffs' patent. See on this last point *Nobel's Explosives Co.* v. *Jones*.

The appeal must be allowed, and judgment must be entered for the defendant, with costs here and below.

A. L. SMITH, L.J.—The question in this case is new, and of considerable importance, and the defendant Bindschedler, who is a foreigner, has submitted himself to the jurisdiction of the courts of this country in order to test the point now for the first time raised. [His lordship stated the facts, and continued:] I do not think the device of putting a forwarding agent (in the present case Niebergall & Goth, of Basle) between Bindschedler and the post-office at Basle, advances Bindschedler's case, and I will deal with it as if, in compliance with the order of Messrs. Johnson & Co. of the 7th of June, 1895, Bindschedler had at Basle placed the 5 lb. packet of "Yellow T for wool" into the post-office at Basle addressed to Johnson & Co. in London. In these circumstances the plaintiffs have brought an action against both Messrs. Johnson & Co. and Bindschedler for an infringement of their letters patent in England. Messrs. Johnson & Co. submitted, and an injunction restraining them from further infringing the plaintiffs' patent was granted, and no question arises thereon. North, J., however, went further, and held that Bindschedler had also infringed the plaintiffs' patent in England, and granted an injunction restraining him from, during the continuance of the plaintiffs' patent, importing or bringing into and delivering in England—to state it shortly—"Yellow T for wool" covered by the plaintiffs' letters patent.

Bindschedler contends that he has not imported or brought into and delivered in England the dye, and therefore has not infringed the plaintiffs' patent, and the question arises what, if anything, has Bindschedler done in this country. That he has exported from Basle an article covered by a patent in this country is clear; but has he in breach of the words of the plaintiffs' patent "made, used, exercised, or vended" the article here? for if not, the plaintiffs have no cause of action against him. In spite of Mr. Moulton's ingenious arguments it appears to me that, although Bindschedler was an exporter of the 5 lbs. "Yellow T for wool" from Basle, he was not an importer thereof into England. When he had placed the parcel of dye, which was according to the order given by Johnson & Co., into the post-office at Basle addressed to Messrs. Johnson & Co. in London, he had nothing more to do with it. If it went wrong in the post, if it was lost or burnt during transit, that was nothing to Bindschedler; that was a matter concerning Johnson & Co. alone. All control over the parcel was given up by Bindschedler when it was placed into the hands of Johnson & Co.'s agent at Basle—viz., the post-office there; and I cannot see in these circumstances how it can be said that Bindschedler has imported the infringing article into this country. It was Johnson & Co. who did this by their agent, not Bindschedler. Mr. Moulton admits that if Johnson & Co. by themselves or their agent, had gone to Basle and had there received the parcel from Bindschedler he could not have supported the plaintiffs' case. But he says that Bindschedler was the instrument of sending the parcel into England; that sending infringing goods into this country suffices, and that it matters not from where the goods are sent, nor whether they are brought into this country or not by the foreign manufacturer or his agent; and he says that if a man does a wrongful act he cannot set up agency. I cannot agree with these arguments, and as to the last, as a matter of fact, what wrongful act has Bindschedler comitted at Basle? None whatever. Mr. Moulton admits that the intention of the foreign manufacturer is not the test, and this in my judgment differentiates this case from *Coombes's case*, which was a case of murder, and which, as Denman, J., pointed out at p. 103 of the report of *Reg.* v. *Keyn* (2 Ex. D.), was founded upon the presumption that the intention accompanied the act, and both operated together where the fatal wound was inflicted. Thus, in that case, the murder was committed upon the high seas, where the bullet took effect, though the murderer fired from within the body of the country. I agree that if Bindschedler by himself or his agent had brought the infringing article into this country, or had received it here, he would have been liable, for he would then be in this country by himself or his agent using, exercising, or vending the infringing article. The cases of *Elmslie* v. *Boursier* and *Von Heyden* v. *Neustadt* show this to be so.

Mr. Moulton's suggestion that Bindschedler's act was as if he had sent the parcel down a pneumatic tube extending from Basle to London is certainly far-fetched, and I think extravagant. If the analogy is to be pursued, I should say that Johnson & Co. in England had sucked the parcel down the tube, rather than that Bindschedler in Basle had blown it down. But the truth is that Bindschedler delivered the goods in Basle to Johnson & Co.'s agent—*i.e.*, the post, and that Johnson & Co., and not Bindschedler, brought them into this country, and thus infringed the plaintiffs' patent here. It is as if Johnson & Co. had taken their cart to Basle and there received the parcel of dye therein from Bindschedler, and then brought it to England. How can it be said that in such circumstances Bindschedler had used, exercised, or vended the plaintiffs' patent in England? My brother North based his judgment upon there being a combination on the part of two persons to hand over in this country (*i.e.*, to Johnson) an article infringing the plaintiffs' patent. Mr. Moulton did not stand up for this, and I do not think he could with success, for, assuming combination between Johnson and Bindschedler, surely all that took place, so far as Bindschedler was concerned, was at Basle and not in England, and what jurisdiction have our courts over a foreigner resident abroad as regards transactions carried on by him in his own country? To grant an injunction in circumstances such as exist in this case would in my judgment be to

exercise a jurisdiction over foreigners for acts done in their own country which our courts do not possess, and also would be unwarrantably extending the ambit of an English patent to foreign parts.

We gave leave in this case for service of the writ out of the jurisdiction upon Bindschedler, expecting that it would turn out that Bindschedler was doing something in this country so as to bring himself within ord. 11, r. 1 (*f*). But, now that all the facts are known, if Bindschedler had applied to discharge the order for service, the court would have been bound to discharge it. He has not done so, but has preferred to appear, in order that the question whether he can be regarded as infringing the plaintiffs' patent, might be raised and argued. It has been, and the result is that, in my judgment, we should not have given that leave to serve Bindschedler, for this court has no jurisdiction over him. The plaintiffs have not shown that Bindschedler has done anything to bring himself within the jurisdiction of the courts here. He has done nothing in this country to infringe the plaintiffs' patent, and therefore in my judgment this appeal must be allowed with costs here and below.

RIGBY, L.J.—In this case the owners of an English patent sue the defendant, a manufacturer of Basle, in Switzerland, for an injunction to restrain infringement of their patent, and for damages. The defendant was served with notice of the writ out of the jurisdiction by the authority of an order of the Court of Appeal. He, however, appeared, and did not move to discharge the order, electing to defend the action on its merits. No question, therefore, was raised before the court as to the propriety of the service out of the jurisdiction, and the action has to be tried as though the defendant, being found within the jurisdiction, had been served here with the writ. The peculiarity of the case is that, as the patentee's rights arise only within the territorial limits of his patent, there can be no infringement outside those limits; and in order to succeed the plaintiff must show that in point of law the defendant did something in England amounting to an infringement.

In my judgment the short but most important point which the case raises is, whether a man who posts at a foreign post office (in this case that of Basle) a parcel addressed to a trader in London, the carriage of which through England for delivery and the delivery of which in London for trade purposes amounts to an infringement of the plaintiffs' patent by the person causing such carriage and delivery, is so responsible for the carriage and delivery in England as to be liable to be treated as an infringer of the patent. It seems to me that in an action against the sender the patentee has nothing to do with the questions whether other persons may be infringers of the patent or not; whether the person posting the parcel did so as agent for someone else, or as a principal acting on his own account; whether he is or is not the owner of the parcel at or after the posting; whether he sends it in the fulfilment of an order, or only on approval or offer; whether he does or does not retain any control of the parcel after the posting; whether he pays the postage or leaves it to be paid on delivery in London; in short, the nature and consequences of the act done can alone be taken into account. Everything else is matter of indifference to the patentee, with which he need not concern himself. If the sender is a wrongdoer he cannot defend himself by saying that the wrongful act was done by him by the direction, in the interest, or with the property of another. Nor can he protect himself from liability for the consequences of his act by any instructions given by him to, or by any arrangement made by him with, a third person. The one fact which remains unaltered, among the numerous possible variations which may arise from the contract, is the act done (in this case the posting of the parcel). The sender, by the posting, makes it inevitable as a matter of business that the parcel will in due time, by the merely ministerial action of the postal authorities called into play by the sender, be carried into and through England to London, and thereby delivered. If what the sender does, amounts to an infringement of the patent he is responsible as a principal actor to the patentee. He does not aid or abet an infringement, but actually infringes. No other person (postal officers excepted) does any act which in any way forwards or assists the getting of the parcel to London or its delivery there. I cannot distinguish sending by post, as regards the legal effect of it, from a sending by a special messenger employed for the purpose. Any agreement between the parties that the messenger shall not treat himself as agent for the sender, but shall look to the consignee only for payment, would seem to me to be irrelevant and immaterial. No such agreement can alter the fact that the messenger does carry through England and deliver in London because he got a commission to do so from the sender, whatever the terms in which that commission may be worded. If the messenger is simply hired and paid by the sender it seems to me clear that the sender is in the same position legally as if he carried and delivered the parcel himself. If the principle above enunciated be sound, that no agreement with a third person can alter, as regards the patentee, the legal effect of the act done by the sender, then the delivery of the parcel with a commission to carry and deliver it in London makes the carriage throughout, and the delivery, that of the sender. Basle is a long way from England, and the English Channel separates England from the Continent, and has to be crossed by the parcel. But other countries, like England and Scotland, have for boundary in some places an imaginary line only, and when we are endeavouring to obtain a test of the legal effect of an act which causes a parcel to cross the boundary, it is perfectly legitimate to examine instances which might occur at such a boundary. I will take the case of a manufacturer who in order to fulfil an order throws parcels over the boundary to his customer, or, what is more likely to occur in practice, places the parcels on one end of an inclined plane or shoot crossing the boundary, and allows them to slide by the force of gravity down the shoot across the boundary into the adjacent country, to be taken by the customer at the other end. These cases appear to me to be, in their legal aspect, similar to a sending by post. It is quite as easy to attribute to the sender liability for the acts of the human agency which he has called into operation in the one, as for the natural forces called into play by him in the others. The only physical act done by the sender is in each case done in the country where the transaction commences, which I will call the foreign country. But the necessary conequence of that act is that the parcel passes the boundary, and travels for some longer or shorter space through the other, which I will call the patentee's country. Whether anything is in law done in the patentee's country by the person who starts the parcel has to be determined, as it seems to me, in the same way in each case. After the initial act which starts the parcel on its journey the sender has no control over the parcel. But that act in each case causes the parcel to cross the boundary and continue its journey through the patentee's country, and that continuance of the journey in the patentee's country seems to me to be as much attributable in law to the sender as the initial act of starting the parcel. But it seems to me also to involve a something done

by the sender, not in the foreign country, but in the patentee's country, attracting the jurisdiction of the courts of that country. I have taken the instance of a manufacturer throwing a parcel or letting it fall down a shoot across the boundary, because I think there is a very important authority which in such a case decides the liability of the starter of the parcel —that is *Coombes's case*, where it was decided that if a pistol be fired from the land at the distance of a hundred yards from the sea and a man is maliciously killed in the water a hundred yards from the shore, the offender shall be tried by the Admiralty jurisdiction, on the ground that the offence is committed where the act takes effect. This establishes the responsibility for the consequences in one jurisdiction of an act done in another, though the offender himself never crosses the boundary.

This case was much discussed in *Reg.* v. *Keyn*—the *Franconia case*. All the judges who dealt with that case agreed that it was rightly decided, though they differed as to the application of it to the *Franconia case*. Cockburn, C.J. (at p. 233), thus deals with the case: "We have in this instance not the case of the blow or wound in one jurisdiction and the death in another, but as in *R.* v. *Coombe* one in which the act causing the death begins in one jurisdiction and extends into another, in which it inflicts the blow or wound from which, as its cause, death ensues. When a man strikes a blow with a club, or inflicts a wound by the thrust of a sword or the stab of a knife, or blows out another's brains by putting a pistol to his head, the act takes effect immediately. If he hurls a stone or discharges a bullet from a gun or pistol at another person at a distance, the instrument he uses passes from him; the stone or bullet, having left his hand, has to make its way through a given space before it strikes the blow it is intended to inflict. But the blow is as much the act of him who casts the stone, or fires the gun, as though it had taken effect immediately. In such a case the act, in lieu of taking effect immediately, is a continuing act until the end has been effected—that is, till the missile has struck the blow—the intention of the party using it accompanying it throughout its course. The act must be taken to be the act of the party in the effects it was intended to produce, till its agency has become exhausted and its operation has ceased. When, therefore, a person, being in one jurisdiction, fires a shot at a person who is in another, as was the case in *R.* v. *Coombe*, it may well be held that the blow struck by the bullet is an act done in the jurisdiction in which the bullet takes effect." And, further, he says, "It is enough for the present purpose to say that *R.* v. *Coombe* was rightly decided, and I think the same principle would apply where the master of a vessel purposely ran down another, and by so doing caused the death of a person on board." It is true that the learned judge afterwards distinguished *Coombes's case* from that of *The Franconia*, but that was on the ground that the offender was a foreigner on a foreign ship on the high seas, who could not be liable to our English criminal law at all. Apply this, *mutatis mutandis*, to the sender of a parcel, whether it be thrown by hand, allowed to slide down an inclined plane, or sent by post. His act is a continuing act until the end has been effected—that is, until the parcel has been carried through England to London and delivered there. That part of its operation is done within the jurisdiction of the patentee's country (say, as in this case, England), and is a tort committed there, for which the wrongdoer can be sued in the English courts if he comes to England for any reason, whether independently of the acts complained of or for the purpose of justifying them, and to prevent the repetition of which, if it be threatened or justified, an injunction may be granted. I have dealt only throughout with the sender by post, since I hold the defendant liable in the same way as if he had posted with his own hands, notwithstanding the ingenious way in which he has tried to escape from responsibility. It was by reason of his directions that the forwarding agents posted the parcel. They acted on those directions without waiting for instructions from London, and the evidence shows that they were intended by the defendant to do so. On this part of the case I have nothing to add to what was said by North, J., in the court below, in which I entirely concur. In my judgment North, J.'s, decision ought to be affirmed.

Appeal allowed.

Solicitors, *Ward, Perks, & McKay: J. H. & J. Y. Johnson.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — March 27.

In re CARTER & KENDERDINE'S CONTRACT. (*a.*)

Vendor and purchaser—Voluntary settlement—Title of purchaser for value—Bankruptcy Act, 1883 (46 & 47 *Vict c.* 52), *s.* 47.

Notwithstanding section 47 *of the Bankruptcy Act*, 1883, *a* bonâ fide *purchaser for value under a voluntary settlement prior to the bankruptcy of the settlor acquires a good title as against any future trustee in bankruptcy.*

In re Brall, Ex parte Norton, 41 *W. R.* 623, [1893] 2 *Q. B.* 381, *and* In re Holden, 36 *W. R.* 189, 20 *Q. B. D.* 43, *approved.*

In re Briggs & Spicer, 39 *W. R.* 377, [1891] 2 *Ch.* 127, *overruled.*

Appeal of the vendors on a summons taken out by them under the Vendor and Purchaser Act, 1874, from a decision of North, J.

The vendors of real estate derived title under a voluntary settlement executed by a prior owner in March, 1896.

The purchaser objected that, by reason of section 47 of the Bankruptcy Act, 1883, the vendors could not make a good title.

North, J., held that, in view of the conflicting decisions of *In re Briggs & Spicer*, 39 W. R. 377, [1891] 2 Ch. 127; *In re Vansittart*, 41 W. R. 286, [1893] 2 Q. B. 377; and *In re Brall*, 41 W. R. 623, [1893] 2 Q. B. 381, the title was too doubtful to force on a purchaser, and dismissed the summons.

The vendors appealed.

Cozens-Hardy, Q.C., and *Borthwick*, for the appellants.—There is no suggestion of fraud on creditors or any act of bankruptcy. The true meaning of the word "void" in section 47 of the Bankruptcy Act is "liable to be avoided," and the title of the trustee in bankruptcy will not relate back to the date of the voluntary settlement, but only to the date of his appointment. If it were not so, this estate of 170 acres could not be disposed of for a period of ten years, and would be unsaleable. The Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21) puts an end to the class of cases represented by *Doe* v. *Martyr*, 1 B. & P. (N. R.) 332. There is nothing in the language of the section or in the general principles of the law to prevent a person dealing with his interest under a voluntary settlement.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

In addition to the cases above referred to, they referred to *Sanguinetti* v. *Stuckey's Bank*, 43 W. R. 154, [1895] 1 Ch. 176; *George* v. *Milbanke*, 9 Ves. 190; *Prodgers* v. *Langham*, Sid. 133; *Daubeny* v. *Cockburn*, 1 Mer. 626; *Payne* v. *Mortimer*, 7 W. R. 378, 4 De G. & J. 447; *Ex parte Bishop, In re Townies*, 21 W. R. 716, L. R. 8 Ch. 718; *Halifax Joint-Stock Banking Co.* v. *Gledhill*, 39 W. R. 104, [1891] 1 Ch. 31; and *Alexander* v. *Mills*, 18 W. R. 635, L. R. 6 Ch. 124.

Eustace Smith, for the respondent. — The word "void" means "void *ab initio*," and the section gives no protection to anybody. The settlement is a link in the chain of title, and, the settlement being void, the vendors have no right to sell.

No reply was called for.

LINDLEY, L.J.—The question is this. Some gentlemen who own some real property under a voluntary settlement have agreed to sell it for value to a purchaser, and the purchaser says, "You may become bankrupt either within two years or within ten years for anything I know, and if I complete I shall not have a good title, because your trustee, if you have one, will be able to upset your settlement, and will upset the conveyance to me." That is a very formidable objection if there is anything in it; and one cannot say there is nothing in it, because the question has arisen already, and Stirling, J., in the case referred to of *In re Briggs* v. *Spicer* has held that the objection was so serious that he could not force a title on the purchaser. On the other hand, Vaughan Williams, J., who has not had to consider it from that point of view, has considered that the purchasers do get a good title.

The question really turns on the true construction of section 47 of the Bankruptcy Act, 1883. That section, first of all, deals with a settlement, including any conveyance or transfer of property; and if you turn to section 168 you find a definition of "property," and the definition is naturally wide, and covers property of every description. Therefore this section 47, according to its terms, hits a conveyance or transfer of property of any sort. I will read it. "Any settlement of property"—with some exceptions which I will pass over—"shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." Looking at that section with no more than ordinary care, you first find that the section does not say that these settlements are to be void generally, but that they shall be void against the trustee in bankruptcy, which is a totally different thing. You must ask yourself, how can a settlement be void against the trustee in bankruptcy until there is one against whom it can be void. The force of that remark leads to this question, void as from what time? That is the whole controversy. The section does not say a word about it. You must look at it with reference to the language and the kind of transaction with which the section deals. Looking at the language only I should say that when any enactment says a settlement shall be void against the trustee in bankruptcy, it does not say it shall be void until there is a trustee in bankruptcy. Let us look at the consequences if the other result is arrived at. The consequences are that nothing which comes under the description of settlement here — no conveyance or transfer of property — can ever be made by anybody if that conveyance or transfer is what is called voluntary, that is to say, without consideration. Just conceive what that means. Suppose a father gives his son a horse or some money in the funds. Of course the father may become bankrupt within two years or within ten; the son cannot deal with that horse or give a good title to it for money or otherwise for two or ten years. That cannot be the meaning of it; and you cannot get that out of the section unless you construe the words "void against the trustee in the bankruptcy" as meaning void from the date of the transaction which is referred to. I cannot get that out of my mind. Good sense is shocked by such a startling construction as that.

It appears to me that is the true method of construing this section. The view I have taken has been taken not only by Vaughan Williams, J., but by the Queen's Bench Division in *In re Holden*. There the point arose very neatly. There had been a good deal of litigation between the settlor and the trustees of the settlement, and the trustees had incurred some costs of which the settlor tried to evade payment. The settlor became bankrupt, and the trustee in bankruptcy claimed the property from the trustees of the settlement. The trustees of the settlement said what was obvious, that these costs, charges, and expenses were incurred before the trustee in bankruptcy came in; and the court held that the trustees of the settlement had a lien upon the property for these costs. There is nothing in the Act to carry the title of the trustee in bankruptcy back to the date of the settlement. That this is the true construction appears to be very much fortified by the fact that you do not find in section 47 any clause similar to sub-section 2 of section 48, which is: "This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt." If my construction is right, you do not want it. It would be a strong mode of legislation to say that you can impeach a settlement from the date of its execution, even as against *bonâ fide* purchasers for value without notice. Such a legislation would be at variance with the whole spirit of the bankruptcy law ever since we have had one. I have no doubt that Vaughan Williams, J., was perfectly correct, and that in a case like this every *bonâ fide* purchaser gets a good title. I am of opinion that the purchaser in this case will get a perfectly good title.

A. L. SMITH, L.J.—I am of the same opinion. I come at once to the statute, and the sole point is, What is the true meaning of section 47 of the Bankruptcy Act of 1883? Having heard the case argued on both sides, I have not the slightest doubt what is the true construction of that section. I read it in this way: Any settlement of the property shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy. Void from when? That is the point and the matter which has to be determined. On one side it is said it is void *ab initio*—void from the date of the settlement. Where do you find that? The words are not there. There are other words which point in the contrary direction, and those are the words "void as against the trustee in bankruptcy." What do they mean? They mean void as against the trustee in bankruptcy from the date of the accruer of his title—or, in other words, void as from the act of bankruptcy, to which the title of the trustee relates

back. That, in my judgment, is the construction of that branch of the section. Then it goes on, "and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in bankruptcy"—exactly the same words again, except that the period is enlarged from two to ten years—"unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee of such settlement on the execution thereof." I must say that I disagree with my brother Stirling that the meaning of the words "unless the parties claiming under the settlement" include purchasers from the volunteer. I think the meaning of these words in this clause is, unless the parties claiming under the settlement—that is, the volunteers—when their deed is impeached during the period of ten years, can show that their settlor was solvent, and so get rid of the claim of the trustee. Reading the section in that way, as has been pointed out by Lindley, L.J., and Vaughan Williams, J., it is unnecessary to put sub-section 2 of section 48 into section 47, excepting from the operation of the section *bonâ fide* purchasers in good faith and for valuable consideration. If it is to be read as Mr. Eustace Smith asks us to read it, it is manifest that that sub-section ought to have been put in, because it never was the intention of the Legislature that *bonâ fide* purchasers for value should have their title impeached by what they have done in good faith. It would be contrary to all the provisions of the bankruptcy law; although, if the other construction is the right one, I think that sub-section 2 would have been inserted. For these reasons I prefer my brother Vaughan Williams' construction to the construction of my brother Stirling.

RIGBY, L.J.—I am of the same opinion. In construing this Act we must, of course, look, in the first place, to the exact way in which the enactment is expressed. In a certain contingency—that is, of bankruptcy—happening to a voluntary settlor a voluntary settlement shall be void as against the trustee in bankruptcy. It is impossible to construe that as meaning that it shall be void for all intents and purposes in favour of the trustee in bankruptcy. It is impossible to treat that as avoiding the settlement from the date of it, in favour of the trustee in bankruptcy, with the result, which would appear to follow, that the trustee might have an account of all rents received, that he might follow the money into the hands of any person who had got it, if it were money, or the land, if it were land. Of course in all these cases they would know of the Act of Parliament; but it is quite possible they might not know of the voluntary settlement. In all cases in which they did—and that would practically extend to all cases of real estate—they would know that this section might apply, and they would know they were running the risk. I do not think it possible that the Legislature, which has taken such pains in all other matters to protect the rights of innocent dealers, should have left a perfectly innocent voluntary settlement entirely without protection in the event of the bankruptcy within two years or ten, as the case may be, of the settlor. I think we must construe that as meaning that the voluntary settlement shall not stand in the trustee's way; that that alone shall not exclude him from laying his hands upon any property comprised in it, so that if the person in possession has no other title than that which is given by the voluntary settlement, that title will not avail him against the trustee. I think the reasonable construction is this, that anything that has been done under the settlement shall be treated as before; that if rents have been paid there can be no account of them; or if, going to the extreme, the property has been sold out and out in a *bonâ fide* way for valuable consideration, the trustee cannot go against the purchaser at all.

It appears to me that is the logical result of the decision in *Re Holden*. I think it is the fair result of the section itself. But, if once we admit that *Re Holden* was correctly decided, I do not see where we can stop. I have not the slightest doubt in my own mind that *Re Holden* was correctly decided, and it comes to this, that every equity which has been acquired before the bankruptcy or the act of bankruptcy, which is the beginning, is to be respected, and is not in any way interfered with or hit by section 47. In that particular case the specific question was whether the trustees, who had defended an action by the settlor and had become entitled to the costs of the litigation, and who, according to the ordinary rules of equity with regard to a valid settlement, were entitled to a lien on the property for those costs, if, as happened there, the settlor could not pay them, the specific question was whether the trustees were disentitled to these costs. Of course they could have had no such claim if the trustee in bankruptcy could go behind their title. What were the trustees? They were only persons who claimed under the voluntary settlement. I do not see that their position can be better than that of purchasers. They claimed, of course, not as volunteers, but as purchasers in the wide sense of the word, under the voluntary settlement; and if one set of purchasers is to be protected I fail to see how you can draw the line, and how you can say another set of purchasers out and out, or mortgagees, or any persons who on the faith of a settlement which at the time of dealing with them was a valid settlement, are not to be protected when they acted on the right assumption that it was valid and paid their money.

I do not think it is necessary to go into the earlier cases, but at any rate they show to what an alarming extent we should be altering the position of persons dealing with voluntary settlors on the strength of a section of an Act which does not truly bear the interpretation sought to be put on it.

Appeal allowed.

Solicitors, *Miller, Smith, & Bell; Gerrish & Foster.*

From Q. B. Div. (Lord Esher, M.R., and Chitty, L.J.) — April 6.

In re ARBITRATION BETWEEN FENNER AND LORD. (a.)

Practice—Discovery—Inspection of documents—Documents referred to in affidavits—R. S. C., 1883, *ord.* 31, *rr.* 15-18.

In the course of proceedings to set aside an award on the ground of misconduct of an arbitrator an affidavit was sworn by the arbitrator for the purpose of being used by the party in whose favour the award had been made. The affidavit was not filed, but a copy of it was handed to the other party. It contained a reference to certain letters. On an application for inspection of the letters,

Held, that the case was within ord. 31, *r.* 15, *and that there was power to make an order for inspection under rule* 18.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from an order of Lawrance, J., at chambers.

A dispute between the two parties, Fenner and Lord, having been referred to arbitration, an award was made by two arbitrators appointed by the parties respectively, in favour of Fenner. Lord gave notice of motion to the Queen's Bench Division to set aside the award on the ground of misconduct on the part of the arbitrator appointed by Fenner. An affidavit was made by the arbitrator whose conduct was impugned for the purpose of being used by Fenner on the hearing of the motion. Fenner's solicitors sent a copy of this affidavit to Lord. The affidavit contained a reference to certain letters which had passed between Fenner's solicitors and the arbitrator.

The affidavit not having yet been filed, Lord took out a summons under ord. 31, r. 18, for inspection of the letters referred to therein.

Lawrance, J., refused to make an order for inspection.

Lord appealed.

Boxall, for the appellant.—The appellant is clearly entitled to inspection of these letters under ord. 31, r. 15, and the learned judge ought to have made an order under rule 18.

Channell, Q.C., and *C. E. Jones*, for the respondent.—These letters do not come within rule 15, which allows inspection of documents which are referred to in pleadings or affidavits. The word "affidavits" in this rule must mean filed affidavits, and does not include mere copies of affidavits, which may or may not be used. It was a pure matter of courtesy that we sent them a copy of this affidavit, and it will be for counsel to determine whether it shall in fact be used. Rule 18, under which this application is made, is quite apart from rule 15, and does not cover this case.

Lord ESHER, M.R.—In this case an award has been made by arbitrators, and it is binding on both the parties unless something improper has been done such as to justify the court in setting it aside. It is alleged that there has been misconduct on the part of one of the arbitrators such as to make the award void. In the course of the dispute as to whether the award is binding or not, the parties have made affidavits, and an affidavit has been sworn by the inculpated arbitrator, which the party in whose favour the award was made desires to use for the purpose of showing that the arbitrator has not in fact been guilty of any misconduct. He is not bound by law or by custom to show this affidavit to his opponent until he uses it, but, as a matter of courtesy, and in my opinion quite properly, he has handed a copy of it to the other side, though it has not yet been filed. In the affidavit is a reference to certain letters. The question is whether that reference gives authority to the judge to order inspection of the letters.

I am of opinion that the case comes within the words of ord. 31, r. 15, which says that "every party to a cause or matter shall be entitled at any time by notice in writing to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice." This is a cause or matter, and an affidavit has been made for the purpose of being used at the hearing. It is said that it depends on the discretion of counsel whether it is in fact used. But I think the words of the rule are wide enough to include affidavits which are intended to be used. In my opinion rule 17 includes documents mentioned in rule 15, and rule 18 says that if the party served with notice under rule 17 objects to give inspection, as is the case here, a judge may make an order for inspection. I think such order ought to have been made in this case, and our order must be that the letters referred to in this affidavit be produced for inspection.

CHITTY, L.J.—Rules 15 to 18 of order 31 deal with inspection of documents referred to in affidavits. In this case certain letters are sufficiently referred to in an affidavit, and I think the party applying is entitled to an order. Rule 18 gives the judge discretion, but in my opinion that discretion ought to have been exercised in favour of the applicant. I think that rule 18 applies to documents which are within the words of rule 15.

Appeal allowed.

Solicitors for the appellant, *Nye & Moreton*, for *Nye & Treacher*, Brighton.

Solicitor for the respondent, *A. S. C. Doyle*, for *Jones & Son*, Colchester.

From Q. B. Div. (Lord Esher, M.R., and and Chitty, L.J.) — April 6.

RENSHAW v. QUEEN ANNE RESIDENTIAL MANSIONS AND HOTEL CO. (a.)

Arbitration—Contract—Master and servant—Arbitration clause—Wrongful dismissal—Stay of proceedings—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

By a contract in writing the defendants agreed to employ the plaintiff for five years, but it was provided that the defendants might at any time dismiss the plaintiff if he were guilty of gross misconduct. It was also provided that any dispute should be referred to arbitration. The defendants having dismissed the plaintiff for alleged gross misconduct, the plaintiff brought an action for wrongful dismissal.

Held, that the action ought to be stayed under section 4 *of the Arbitration Act*, 1889.

Davis *v.* Starr, 37 *W. R.* 481, 41 *Ch. D.* 242, *distinguished.*

Appeal from an order of Day, J., at chambers.

By a contract of employment made in writing between the plaintiff and the defendants, the defendants agreed to employ the plaintiff, and the plaintiff agreed to serve the defendants, as their managing engineer, for five years. It was provided that the defendants might at any time dismiss the plaintiff if he were guilty of gross misconduct. It was also provided that if any difference or dispute should arise between the defendants and the plaintiff touching their or his rights or liabilities under the contract, it should be referred to arbitration.

The defendants having dismissed the plaintiff for alleged misconduct, the plaintiff brought an action for wrongful dismissal.

On the application of the defendants, Day, J., acting under section 4 of the Arbitration Act, 1889, stayed the action, and ordered the dispute between the parties to be referred to arbitration in accordance with the terms of the contract.

The plaintiff appealed.

Bigham, Q.C., and *Schiller*, for the plaintiff.—The plaintiff's cause of action is not within the terms of the arbitration clause of the contract. The defendants, by dismissing the plaintiff, have put an end to the whole contract including the arbitration clause,

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

which therefore now has no operation. The plaintiff's only remedy is an action for damages. *Davis* v. *Starr*, 37 W. R. 481, 41 Ch. D. 242, shows that in such a case as this the court will not stay an action for wrongful dismissal. It was a condition precedent to the defendants' right to dismiss the plaintiff that they should obtain an award under the arbitration clause finding him guilty of misconduct.

Dickens, Q.C., and *R. Younger*, for the defendants.

Lord ESHER, M.R.—In this case there is a contract of service, by which the defendants agree that they will employ the plaintiff for five years unless he is guilty of gross misconduct, and it is the duty of the plaintiff to remain in the defendants' employment for the specified time. If either party breaks from their undertaking, it is of course a breach of contract, and no doubt a wrongful dismissal is a breach of contract. The contract goes on to provide that, if any dispute arises between the parties touching their rights or liabilities under the contract, it shall be referred to arbitration. The question is whether an action by the plaintiff for wrongful dismissal should be stayed, and an order made referring the dispute between the parties to arbitration. It seems to me there could be no doubt on the matter if it were not for the case of *Davis* v. *Starr*. I have a difficulty in understanding that case, but at any rate it is distinguishable from the present case. There Lindley, L.J., said: "It seems to me that the defendant was not ready to submit anything to the arbitrators except only the assessment of the damages, and he was not ready at the time when the action was brought to withdraw his dismissal if the arbitrators ordered him to do so." Here it appears that the defendants are willing to refer the whole matter to arbitration, so that *Davis* v. *Starr* does not govern this case. In my opinion the proposition, that when a man breaks a contract of employment by dismissing his servant he puts an end to it altogether, so that the arbitration clause no longer has any existence, is not tenable. I think it was right in this case to order a reference to arbitration, and the appeal must therefore be dismissed.

CHITTY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Broughton, Nocton, & Broughton.*

Solicitors for the defendants, *Lee & Pembertons.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — April 2.

COBURN (*Appellant*) *v.* COLLEDGE (*Respondent*). (*a.*)

Solicitor—Costs—Cause of action—Action for work done—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*Statutes of Limitation* (21 *Jac.* 1, *c.* 16), *s.* 3, *and* (4 *&* 5 *Anne, c.* 16), *s.* 19.

In the case of work done by a solicitor in the course of his profession a cause of action accrues due immediately after the completion of the work he was retained to do, and the Statute of Limitations runs from such date, and not from one month after the delivery of his signed bill of costs.

This was an appeal by the plaintiff in the action from the judgment of Charles, J.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister at-Law.

The appellant, a solicitor, brought this action to recover a sum of money due for work which he had done for the respondent in respect of an action which the latter had brought against one King.

The work the appellant was retained to do was completed in May, 1889, at which date the respondent settled his action with King, and on the 4th of June, 1889, he wrote to his solicitor, the appellant, asking for the delivery of his bill of costs.

On the 7th of the same month, however, before the bill was sent in and whilst it was being prepared, the respondent left England and went abroad. He remained away from England until 1896. A bill of costs, however, was duly delivered at his father's address, where he was likely to be found, but it did not reach his hands until 1891.

On the 12th of June, 1896, shortly after respondent's return to England, the present action was commenced by the appellant for the recovery of his costs.

The question thereupon arose whether the action was maintainable, and when the cause of action arose.

By 21 Jac. 1, c. 16, s. 3, all actions of debt shall be commenced within six years next after the cause of action arose.

By 4 & 5 Anne, c. 16, s. 19, it is provided that if any person against whom there is any cause of action of debt be, at the time any such cause of action accrued, beyond the seas, then such person who is entitled to any such suit or action shall be at liberty to bring the action against such person after his return from beyond the seas, so as the action is brought after the return within six years.

By section 37 of the Solicitors Act, 1843, it is provided that "no solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, or any business done by such solicitor until the expiration of one month after such solicitor shall have delivered unto the party to be charged therewith or sent by post to or left for him at his office or dwelling-house a bill of such fees."

Charles, J., held that the cause of action here was the doing of the work, and that the Statute of Limitations does not run from the indefinite date at which a solicitor chooses to deliver his bill of costs, but from the completion of the work in respect of which the action is brought, and he therefore gave judgment for the defendant in the action with costs. From this decision the plaintiff now appealed.

Atherley-Jones, Q.C. (*Sturges* with him), for the appellant.—The cause of action here did not accrue until one month after the bill of costs was delivered, but by that time the respondent had gone beyond the seas, and therefore the Statute of Limitations did not begin to run until the respondent returned to England, as provided by section 19 of 4 & 5 Anne, c. 16. By section 37 of the Solicitors Act, 1843, the delivery of a bill of costs is a condition precedent to the bringing of an action by a solicitor to recover his costs, and until one month after this has been delivered no cause of action can arise. He must prove a month has elapsed since the delivery, otherwise the defendant may apply to have the action struck out. As to the meaning of "cause of action," see the judgment of Lord Esher, M.R., in the case of *Read* v. *Brown*, 37 W. R. 131, 22 Q. B. D. 128. Even supposing there is a cause of action without the delivery of a bill of costs, yet the cause of action is suspended until the bill has been delivered one month: see *In re Kensington Station Act*, 23 W. R. 463, L. R. 20 Eq. 197, where it was held that the Statute of Limitations did not run against creditors of a railway company in respect of

the costs of obtaining an Act of Parliament until the company had assets to meet the claims.

Counsel also cited *In re Crossley, Munns* v. *Burn*, 35 W. R. 790, 35 Ch. D. 266, and *Murray* v. *East India Co.*, 5 B. & Ald. 204.

[CHITTY, L.J., referred to *Reeves* v. *Butcher*, 39 W. R. 626, [1891] 2 Q. B. 509, where Lindley, L.J., says that the statute runs "from the earliest time at which an action could be brought."]

Jelf, Q.C. (*F. M. Abrahams* with him), for the respondent.—The Statute of Limitations runs from the concluding date on or before which the work is completed, notwithstanding the fact that a formality is interposed which a solicitor must fulfil in order successfully to maintain an action for the recovery of his fees. The cause of action here is the doing of the work. He has a right to be paid, wholly apart from whether he does or does not deliver a bill.

Atherley-Jones, Q.C., replied.

Lord ESHER, M.R.—This appeal must fail. The question we have to consider is, When did the cause of action in this case arise? It is admitted that if the cause of action arises when the work by the solicitor is done, the appellant must fail; but if it arises one month after the delivery of the signed bill of costs, then the appellant is entitled to succeed.

Now, this is the case of work done by a solicitor in the ordinary course of his profession. The solicitor seeks to be paid for such work, and, unless there is something to prevent it, he has a right to be paid as soon as the work is done, and therefore a right to bring an action to recover what is due to him.

Now, before the Solicitors Act, 1843, a solicitor was in the same position as any other person in that respect and had a right to bring an action the moment the work was done. The question arises whether that Act has taken away this then existing right and altered the time when the cause of action arose, or has it only affected the procedure that must be adopted before bringing such an action. It is clear that this Act has not taken away the right of a solicitor to be paid for work that he has done. It assumes he has a right to his charges, but says that that right cannot be enforced by action unless and until certain preliminary steps have been taken. Section 37 of that Act provides, to put it shortly, that solicitors shall not commence an action for fees till one month after delivery of their bills. That section does not affect the solicitor's rights, and if he has money belonging to his client in his hands, which is not subject to any trust or charge, he may retain it in order to satisfy his claim. That Act therefore does not touch the cause of action, but only the remedy for enforcing it. Under the old system of pleading it was sufficient for him to allege the work done as the cause of action, and it would lie upon the defendant to set up the defence that a signed bill of costs had not been delivered one month before action. What I said in the case of *Read* v. *Brown*, 37 W. R., at p. 132, was that a cause of action "comprises every fact which must necessarily be proved"—that is to say, the plaintiff must assert all the facts which, if anybody traverses them, he must prove in order to support his right to the judgment of the court. I stand by what I said there. That definition was concurred in by the rest of the court (Fry and Lopes, L.JJ.). The judgment of Lindley, L.J., in the case of *Reeves* v. *Butcher* has been cited, but on looking at that judgment I see that it does not in the least differ from what I said in the case of *Read* v. *Brown*. If you can allege facts which cannot be traversed, the debt can be recovered. These definitions apply to this case, for the plaintiff here could have brought this action at once and have recovered for the work done, unless the defendant could defeat him by putting forward by way of answer, the plea that the plaintiff had not delivered a signed bill of costs, or had not delivered it one month before action. For these reasons I think the judgment of Charles, J., was right, and this appeal must therefore be dismissed.

LOPES, L.J.—I am of the same opinion. The matter has been very fully gone into by the Master of the Rolls, and it is not necessary for me to say much. The question is whether in this case time runs from when the work was completed or from the delivery of the signed bill of costs. If it runs from when the work was completed, the plaintiff is too late, but if from the time of the delivery of the bill, then he would be in time. By the Statute of Limitations of 21 James 1, c. 16, s. 3, it is provided that all actions of debt shall be commenced within six years next after the cause of action. Now when did the cause of action arise here? The work in respect of which the action is brought was completed on the 29th of May, 1889, and on the 12th of June the plaintiff's bill of costs was posted to the defendant, but the latter had then gone beyond the seas, and the bill did not reach him until 1891. In 1896 he returned to England, and shortly after his return this action was commenced. In my opinion the cause of action arose in 1889 when the work was completed. Before the Solicitors Act, 1843, the solicitor, there is no doubt, had a good cause of action immediately the work was done, and before the Judicature Act he would have sued for work and labour done, and if the defendant desired to raise any questions, he was compelled to plead specially. But that was no part of the plaintiff's case. The cause of action accrued at the time the work was done. The Statute of Limitations does not destroy that right, but merely affects the procedure of recovery. The Solicitors Act says that solicitors shall not commence an action for fees until one month after the delivery of a signed bill of costs. Now, it said that if this view is adopted a solicitor will have less time within which to bring an action for work done than any other class of people. That is so. But if, on the other hand, we do not adopt that construction, a solicitor might wait twenty years before delivering his bill of costs, and then within one month after doing so, commence his action. That would clearly be preposterous.

CHITTY, L.J.—I am of the same opinion, and this appeal must fail. The object of section 3 of the Statute of Limitations of James 1 was to prevent suitors from bringing stale actions for debt, but that statute does not affect the right to the money due which is the cause of action. Now, when did the cause of action arise here? On behalf of the appellant it is contended that it only arose one month after the delivery of the signed bill of costs. I do not think that is so. In my opinion the cause of action arose as soon as the work was done. I entirely accept what has been stated by the Master of the Rolls in the case of *Read* v. *Brown*, and I do not think that the judgment of Lindley, L.J., in *Reeves* v. *Butcher* in any way affects it. If this appeal were to succeed, a solicitor might delay the delivery of his bill as long as he likes. The whole basis of the Statutes of Limitation is to render such a thing impossible, and therefore the argument that a solicitor need only deliver his bill within a reasonable time falls to the ground.

Appeal dismissed.

Solicitor for the appellant, *H. T. Coburn.*

Solicitors for the respondent, *Blair & W. B. Girling.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) March 19.

DODD v. CHURTON. (a.)

Building contract — Construction of — Clause as to penalties for delay—Extras ordered by architect.

A builder entered into a contract to carry out certain specified works and to complete them by a stipulated date, and there was a provision that the whole of the works were to be completed by that date under a penalty of £2 per week for every week that any part of the works remained unfinished after that date, as liquidated damages. By the contract the building owner had the right to call upon the builder to do extra works, and this right he exercised. By one of the clauses in the agreement it was provided that any authority given by the architects for any alteration or addition in or to the works should not vitiate the contract. Owing to the ordering of extra works the whole work was not completed until some time after the stipulated date, and the building owner claimed to recover from the builder the penalties provided for as liquidated damages for the delay in completion.

Held, that the building owner was not entitled to claim the penalties for non-completion within the specified time, as he had ordered the builder to carry out extra works whereby it was impossible for the builder to complete the entire works within the time specified in the contract.

Westwood v. Secretary of State for India, 11 *W. R.* 261, *followed.*

Jones v. St. John's College, 19 *W. R.* 276, *L. R.* 6 *Q. B.* 115, *distinguished.*

This was an appeal by the defendant from the Divisional Court, where the judges (Wills and Wright, JJ.) differed on an appeal from the County Court of Whitchurch, in the county of Shropshire. The action was by a builder against a building owner to recover the balance due under a building contract. The claim was admitted, but there was a counter-claim by the defendant for £50 as liquidated damages for not completing the works by the date specified in the contract.

By an agreement in writing dated the 24th of February, 1892, the plaintiff agreed to do certain building works for the defendant for the sum of £664, on the terms and conditions and subject to all the stipulations of an annexed specification which was made part of the agreement. The general conditions provided *inter alia* as follows:

Clause 1. "The whole of the works, and any other works that may be ordered as additions to this contract, are to be executed and completed in the best and most workmanlike manner, and with the best materials of their several kinds, and everything to be done to the full spirit and intent of this contract, which is intended to comprise everything necessary to the perfect completion of the works. Every part of the works to be done to the satisfaction of the architects, and their direction to be followed in every respect, and their opinion on all questions relating to the works or contract to be final and conclusive."

Clause 4. "Any authority given by the architects for any alteration or addition in or to the works is not to vitiate the contract, but all additions, omissions, or variations made in carrying out the works for which a price may not have been previously agreed upon are to be measured and valued and certified for by the architects, and added to or deducted from the amount of the contract as the case may be, according to the detailed schedule of prices on which the contract was formed. The schedule of prices to apply to all deductions and to additions up to 15 per cent. above the amount of the contract; any additional works beyond 15 per cent. above the amount of the contract and any item to which the schedule of prices does not apply to be allowed for at such prices as the architects may consider fair and reasonable."

Clause 19. "The architects shall have the power to delay or suspend the works during unsuitable weather or for any other reasonable cause, but the works are to be recommenced after receiving due notice from the architects. The time lost by such delay to be added to the time allowed for completion." There was a similar condition as to strikes.

Clause 24. "The building to be ready for the roof-timbers by the first day of May, 1892, and the whole of the works to be completed by the first day of June, 1892, under a penalty of £2 per week for every week that any part of the works remain unfinished after that date as liquidated damages."

The defendant ordered, under clause 4 of the conditions, extra works to the amount of £22 18s. 8d. The entire works were not completed until the 5th of December, 1892, twenty-seven weeks after the time specified for their completion.

The defendant, allowing two weeks as being a reasonable time within which the extra works ordered might have been completed, counter-claimed under condition 24 for £2 per week for twenty-five weeks as liquidated damages for the delay in completion.

The county court judge held that by the defendant ordering extra works there was an absolute waiver on his part of the stipulation as to the payment of penalties for delay in completing, and accordingly gave judgment for the plaintiff both on the claim and the counter-claim. On appeal to the Divisional Court the judges differed. Wills, J., was of opinion that the county court judge was right, while Wright, J., was of opinion that he was not so.

The judgment of the county court judge therefore stood.

The defendant now appealed.

E. Honoratus Lloyd, for the appellant.—The judgment of the county court judge is wrong. The contract is not vitiated by the ordering of extra works, nor are any of the terms of the contract vitiated thereby, and notwithstanding that extra works are ordered the whole of the works must be finished by the stipulated date. At any rate, if the building owner, by ordering extra works, prevents the builder from completing within the stipulated time, the builder can only be entitled to a reasonable time in order to complete the works, and then at the end of that reasonable time the clause as to penalties runs again. This case falls within the decision in *Jones* v. *St. John's College*, 19 W. R. 276, L. R. 6 Q. B. 115, where there was an agreement that even if extras were ordered yet the entire works should be completed by a specific date. *Holme* v. *Guppy*, 3 M. & W. 387; *Westwood* v. *Secretary of State for India*, 11 W. R. 261, 7 L. T. 736; and *Russell* v. *Bandeira*, 13 C. B. N. S. 149, are distinguishable from *Jones* v. *St. John's College*. In *Thornhill* v. *Neates*, 8 C. B. N. S. 831, there was a subsequent and new agreement, but here that is not so.

Lochnis, for the respondent.—This case falls within the general rule—namely, that if the building owner, by ordering extra works, prevents the builder from completing by the stipulated date, he cannot claim penalties for non-completion by that date. This case does not come within *Jones* v. *St. John's College*. There are not the express words here that there were in that case. The provision in clause 4 that the ordering of extras is not to vitiate the

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

contract is only put in to show that any alteration in the works is not to rescind the original contract. If those words be struck out the relationship between the parties is not altered. They are really mere surplusage. This case comes within the decision in *Westwood* v. *Secretary of State for India.*

E. H. Lloyd replied.

Lord ESHER, M.R.—This is an action by a builder to recover the balance due upon a building contract. The claim is admitted, but the defendant, the building owner, counter-claims for £50 as liquidated damages for non-completion of the works within the time specified in the contract.

The question we have to decide is whether the defendant can recover these damages, and this raises the further question whether the defendant, by reason of his having ordered extra work beyond what was contained in the specification, has not disentitled himself to recover the penalty of £2 per week provided for in clause 24. It is admitted that extra work was ordered, and that the carrying out of that extra work must necessarily have caused the plaintiff to take a longer time in completing the contract than if he had only had to do the work specified in the contract. It is also admitted that under the contract the defendant has the right to order the plaintiff to do extra work, and that if the defendant did give such an order the plaintiff was bound to execute it.

In Comyns' Digest, "Condition (L. 6)," the rule was laid down, and has since then been recognized, that "the performance of a condition shall be excused by the obstruction of the obligee," and there is now the well-established principle that if a building owner orders extra work beyond that specified in the original contract, whereby the builder is prevented from completing the contract within the specified time, he is thereby disabled from claiming the penalties provided for in the contract for non-completion within the specified time. This rule was laid down because otherwise an unfair burden would be cast upon the builder, and it was recognized in the case of *Holme* v. *Guppy*. Then came this complication—namely, that the builder on entering into his contract agreed to do whatever extra works the building owner should call upon him to execute, and it was urged in such cases that the builder having contracted to carry out any extra works the building owner might order, could not therefore avail himself of the above rule. This argument was urged in *Westwood* v. *Secretary of State for India*, but it was there held that this did not render the rule inapplicable. Then came the case of *Jones* v. *St. John's College*, where it was alleged on the pleadings that certain extras had been ordered by the clerk of the works in accordance with powers contained in the contract, and that the period within which the works and such extras so ordered were to be completed was not by the terms of the contract to be extended except by order of the clerk of the works, and that such extension had not been ordered, and it was thereupon held that the builder, having expressly agreed to do the entire works and any extras ordered within the time originally limited, must abide by the consequences, even though it involved his performing an impossibility.

The question in the present case is whether, upon the construction of the contract, the plaintiff has agreed to take upon himself the burden which the builder in the *St. John's case* undertook; if he has done so he must abide by his agreement, however foolish and unreasonable it may be. There is a rule of construction with regard to contracts which this court adopts, which is that where the terms of a contract are ambiguous, and one particular construction would lead to what is unreasonable the court will be unwilling to adopt that construction. I cannot construe the contract in this case as containing such an unreasonable agreement by the plaintiff as was entered into by the builder in the *St. John's case*, for I think it is capable of a perfectly reasonable construction. It does not, therefore, come within that case, but only within *Westwood* v. *Secretary of State for India*, where it was held that the building owner, although entitled to give orders for extras, disables himself from claiming penalties if by the ordering of such extras he has rendered it impossible for the builder to complete the work by the specified date. We therefore adopt the judgment of Wills, J., and are of opinion that this appeal must be dismissed.

LOPES, L.J.—I agree that the appeal must be dismissed. It is a well-established principle of law that if a contractor is unable to complete the work agreed upon by the specified date, owing to some act of the other party to the contract, he is absolved from the obligation, which has been thus rendered impossible of performance, to complete on the specified date. That principle must be applied in the present case. It has been held by the court that where a contractor has agreed to pay penalties for delay in completing work undertaken, such penalties cannot be enforced if the delay has been brought about by the party who is seeking to recover the penalties. I do not think this case comes within *Jones* v. *St. John's College*, and therefore I think this appeal must be dismissed.

CHITTY, L.J.—I am of the same opinion. What we have to do here is to construe this contract. The law is well established that where the performance of a condition has been rendered impossible of performance by the action of the grantee he cannot compel the grantor to perform it: see remarks of Byles, J., in *Russell* v. *Bandeira*, 13 C. B. N. S. at pp. 205 and 206. This principle is applicable to all contracts. Here by the ordering of the extras it was impossible for the plaintiff to complete the entire works within the time specified. Of course, a man may enter into a contract such as was alleged in *Jones* v. *St. John's College*, and this rule would then not be enforced. He may contract to do specified work and any extras that may be ordered by the building owner and to complete the entire work by a certain date, but I can find nothing in the present case to justify us in saying that there was here any such contract. I am of opinion that this case does not come within the decision in *Jones* v. *St. John's College*, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Cunliffes & Davenport*, for *Churton*, Chester.

Solicitors for the respondent, *Rowcliffes, Rawle, & Co.*, for *A. E. Whittingham*, Nantwich.

High Court of Justice.

Chan. Div. } Stirling, J. } March 19; April 10.

In re WILMOT.
WILMOT *v.* BETTERTON. (*a.*)

Will—Construction—Devise to E. and her issue—Issue to take on attaining twenty-one—Rule in Wild's case.

By his will a testator devised and bequeathed his residuary estate, subject to certain life interests, to E. and "to any lawful issue she may have, such issue to take a vested interest in my said property upon attaining the age of twenty-one years." The testator died leaving both real and personal property. E. survived the testator, and died intestate and without ever having been married.

Held, (1) *as to the realty, that the direction that the issue should take vested interests on attaining to twenty-one was inconsistent with the use of the word issue as a word of limitation; that E. and her issue took concurrently as purchasers; that E. took a vested interest on the death of the testator liable to be divested* pro tanto *on the birth of issue, an event which never happened; that therefore the real estate went to E.'s heir-at-law.*

(2) *As to the personalty, that there was nothing to take the case out of the ordinary rule that under a gift to one and his children, the parent and children take* primâ facie *concurrently as joint tenants; that, consequently, the personalty belonged to E.'s legal personal representative.*

This was a summons to determine the nature of the interest which, under the testator's will, passed to his ward, Ellen Ellendü.

The testator by his will dated the 21st of November, 1888, gave a legacy of £100 to his housekeeper, Emily Packe, and all the rest, residue, and remainder of his real and personal property he gave, devised, and bequeathed to his friend Mrs. Elizabeth Betterton for her life. Upon the decease of Elizabeth Betterton he directed that the said Emily Packe should have the use and enjoyment of all his property for her life, subject to forfeiture in a certain event, and the will then proceeded: "And from and after the decease of the said Emily Packe, or the forfeiture of her interest under this my will, I give and bequeath the property so given and belonging to the said Emily Packe for life, to my ward, Mademoiselle Ellen Ellendü, now residing with me, and to any lawful issue she may have, such issue to take a vested interest in my said property upon attaining the age of twenty-one years."

The testator died on the 26th of April, 1889, leaving both real and personal estate. Ellen Ellendü survived the testator and died in 1893 without having been married.

Graham Hastings, Q.C., and *A. W. Rowden,* for the testator's heir-at-law and sole next of kin.—The words here used, "lawful issue," are words of purchase, and Ellen Ellendü took only a life estate.

They referred to Theobald on Wills, p. 255; Jarman, 4th ed., vol. 2, p. 398; and to *Hockley* v. *Mawbey,* 1 Ves. 143; *Doe* v. *Burnsall,* 6 T. & R. 30; *Doe* v. *Elvy,* 4 East, 313; and *Audsley* v. *Horn,* 7 W. R. 125, 1 De G. F. & J. 226.

Grosvenor Woods, Q.C., and *E. Ford, contra.*—There are no cases in which such indications as are to be found here, have been held sufficient to limit the interest of the parent. The will shows that, where the testator, who was a solicitor, intended to create life interests, he used apt words.

They referred to *Buffar* v. *Bradford,* 2 Atk. 220; *Newill* v. *Newill,* 20 W. R. 308, 7 Ch. App. 253; *In re Davies' Policy Trusts,* [1892] 1 Ch. 90, 40 W. R. Dig. 141; *In re Adams' Policy Trusts,* 31 W. R. 810, 23 Ch. D. 525; *Jeffery* v. *Honeywood,* 4 Mad. 398; *Bibby* v. *Thompson,* 32 Beav. 646, 13 W. R. Dig. 97; and disputed the authority of *Jeffery* v. *De Vitre,* 24 Beav. 296, 6 W. R. Dig. 100, if applicable.

G. A. Scott, for Mrs. Betterton, took no part in the argument.

Graham Hastings, Q.C., replied.

Cur. adv. vult.

STIRLING, J.—The question raised by the summons is whether Ellen Ellendü took any and what interest in the real and personal estate of the testator. First, as to the real estate. In *Roddy* v. *Fitzgerald,* 6 H. L. Cas. 823, at p. 872, Lord Cranworth thus states the law as to the effect of a devise to A. B. and his issue: "The word issue, when it is used in a will, is *primâ facie* a word of limitation—that is to say, a gift to A. B. and his issue gives him an estate tail; it is the same as a gift to him and the heirs of his body. But if the context makes it apparent that the word is not so used, then it may be treated as a word of purchase."

In the present case the direction that the issue should take a vested interest in the testator's property upon attaining the age of twenty-one years seems to me inconsistent with the use of the word as a term of limitation. The testator intended that the issue taking interests under the will should themselves attain vested interests at twenty-one: if issue as used in the primary gift be a word of limitation, the whole interest is given to Ellen Ellendü as tenant in tail, and nothing could ever vest in her issue. In my judgment, therefore, the issue took as purchasers.

What, then, is the effect of a devise to A.B. and his issue where the issue are purchasers? On this question guidance is to be obtained from the rule established in *Wild's case,* 6 Co. Rep. 17, which is thus stated by Lord Cranworth in *Byng* v. *Byng,* 10 W. R. 673, 10 H. L. C. 171, at p. 178: "Where there is a devise of land to a man and his children, and he has at the time of the devise no child, then *primâ facie* the word children shall be taken to be a word of limitation and the first taker shall have an estate tail, but on the other hand if the first taker has children at the time of the devise then the will shall *primâ facie* be construed as giving a joint estate to the first taker and the children as purchasers." His lordship proceeds: "I have qualified the rule as stated by Lord Coke by introducing the words "*primâ facie*" because he certainly did not mean to state the rule as one which must take effect where a contrary intention was apparent, and it is clear that in acting on the rule in both its branches the courts have always considered themselves at liberty to disregard it where an adherence to it would defeat the intention of the testator as collected from other passages of his will." The rules in *Wild's case* were, by Sir G. Jessel, M.R., held to be applicable to a devise to the testator's children and their issue and heirs in *Underhill* v. *Roden,* 24 W. R. 574, 2 Ch. D. 494.

According to the second branch of the rule, where the word children is regarded as a word of purchase, under a devise to A. and his children, A. and his children take concurrently as purchasers. So under a devise to A. and his issue, where the word issue is regarded as a word of purchase, A. and his issue take concurrently as purchasers.

Then arises the question as to when the class of

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

issue to take is to be ascertained. As is stated by Wood, V.C., in *Browne* v. *Hammond*, Joh. 212 n. (a), "the rule is that a devise or bequest to children as a class, distributable at the death of some other person, vests in all children in existence at the death of the testator; the gift, however, opening so as to let in such after-born children, if any, as may come into existence before the period of distribution."

Here the period of distribution would be *primâ facie* the death of the survivor of Elizabeth Betterton and Emily Packe, or the time of the forfeiture of her interest by the latter if she survived; it might in certain circumstances be later, as for example, if Ellen Ellendü had died before the period of distribution, leaving issue surviving her, none of whom had attained twenty-one at the death of the survivor or the time of forfeiture by Emily Packe. Into this, however, it is unnecessary to enter. It appears to me that Ellen Ellendü took a vested interest on the death of the testator, liable to be divested *pro tanto* by the birth of issue before the period of distribution, an event which did not happen.

It appears to me, therefore, that her heir-at-law is entitled to the real estate. It was urged in opposition to the view above expressed that Ellen Ellendü took only an estate for life, and in support of this contention the cases of *Hockley* v. *Mawbey*, *Doe* v. *Burnsall*, and *Doe* v. *Elvy* were cited. The first of these cases appears to fall under the rule that where words of distribution, together with words which would convey an estate in fee, are attached to the gift to the issue, the ancestor takes for life only, as to which see *Clifford* v. *Koe*, 28 W. R. 633, 5 App. Cas. 447-456. As to the two latter cases, I refer to the remarks in Jarman on Wills, 4th ed., p. 414.

Secondly, as to the personalty. It has been held that the rule in *Wild's case* has no application to personalty (*Audsley* v. *Horn*). Under a gift of personalty to A. and his children, the parent and children take *primâ facie* concurrently as joint tenants; but slight circumstances have been laid hold of by the courts as enabling them to come to the conclusion that a gift for life to A. with remainder to his children was intended (*Newill* v. *Newill*).

In the present case I am unable to see anything to take the case out of the ordinary rule, and in my opinion the personal estate will go to the legal personal representative of Ellen Ellendü.

Solicitors, *Taylor, Stileman, & Underwood; Peacock & Goddard.*

Chan. Div. } March 8, 9.
Byrne, J. }

NEW MOSS COLLIERY CO. (LIMITED) v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. (a.)

Canal—Special Act—Owners of adjacent and subjacent minerals—Right to support—Compensation—Statutory company—Undertaking not to sue—Ultra vires.

Where the Act of Parliament under which a canal was made and maintained contains provisions as to working the adjacent and subjacent minerals similar to or identical with the provisions of the Acts in the cases of Knowles *v.* Lancashire and Yorkshire Railway Co., 14 *App. Cas.* 248, *and* Chamber Colliery Co. *v.* Rochdale Canal Co., [1895] *A. C.* 564, *the owner of the adjacent minerals may work them without regard to the security of the canal, notwithstanding the fact that he is also owner of subjacent minerals.*

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

And if both parties admit that any damage which might result to the canal from the working of the subjacent minerals would be very trifling compared with the amount of the compensation payable to the mine owners in case they were left unworked, and if the canal owners give an undertaking that they will not claim any damages by reason of the working of such subjacent mines, and at their own expense will repair any damage thereby caused to the canal, the court will refuse to make a declaration that the mine owners are entitled to such compensation upon leaving the subjacent mines unworked.

Semble, *that such an undertaking is not* ultra vires *the canal company.*

Decision of the Court of Appeal *in* Chamber Colliery Co. *v.* Rochdale Canal Co., [1894] 2 *Q. B.* 632, 43 *W. R. Dig.* 119, *followed.*

Trial of action.

This was an action to determine the rights of the plaintiffs with regard to working or receiving compensation for coal lying adjacent and subjacent to a canal.

The plaintiffs were lessees of two seams of coal known as the Great Mine and the Roger Mine, part of which lay beneath the Ashton-under-Lyne Canal, and other part under land adjacent to the canal.

The defendants were owners of the canal, which was constructed under an Act of Parliament, [1792] 32 Geo. 3, c. 84, by a company of proprietors.

Sections 37 and 38 of this Act are as follows:

Section 37: "Provided always, and be it further enacted, that nothing herein contained shall extend to defeat, prejudice, or affect the right of any lord or lords, lady or ladies of any manor or manors, or of any owner or owners of any lands or grounds in, upon, or through which the said intended canal or any towing paths, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid, shall be made to the mines and minerals lying and being within and under the lands or grounds to be set out or made use of for such canal, towing paths, wharfs, quays, trenches, sluices, passages, or watercourses, or other conveniences aforesaid, or any of them; but all such mines and minerals are hereby reserved to such lord or lords, lady or ladies of such manor or manors, and to such owner or owners of such lands or grounds respectively, their heirs, executors, administrators, and assigns respectively; and it shall be lawful for the lord or lords, lady or ladies of such manor or manors, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained), to work, get, drain, take, and carry away to his, her, or their own use such mines and minerals, not thereby injuring, prejudicing, or obstructing the said intended canal, towing paths, wharfs, quays, trenches, sluices, passages, watercourses, or other conveniences aforesaid, or any of them; anything herein contained to the contrary notwithstanding."

Section 38: "Provided also, and be it further enacted, that if the owner or worker, owners or workers of any coal or other mine or mines shall in pursuing such mine or mines work near or under the said intended canal or other works as aforesaid, so as in the opinion of the said company of proprietors to endanger or damage the same, or in the opinion of the said owner or worker, owners or workers of the said mine or mines to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with the owner or worker, owners or workers for all such coal or other minerals as may be near or under the said intended canal or other works as shall be thought proper to be left for the security or preservation of the said intended canal, or works, or mine or mines

as aforesaid, and in case the said company of proprietors and such owner or worker, owners or workers of such mine or mines shall disagree in the satisfaction to be made for such coal or other minerals, then it shall be lawful for the said commissioners, at the request of the said company of proprietors, or of such owner or worker, owners or workers of such mine or mines, to cause a jury to be summoned and impanelled in the manner hereinbefore directed, who shall, and they are hereby authorized and required by such ways and means as aforesaid, to assess and determine what satisfaction such owner or worker, owners or workers of such mine or mines ought to have and receive from the said company of proprietors on being restrained from working such mine or mines; and upon payment or satisfaction made to such owner or worker, owners or workers of such mine or mines by the said company of proprietors according to the verdict or judgment of such jury, such owner or worker, owners or workers of such mine or mines shall be, and they are hereby perpetually restrained from working such mine or mines within the limits for which satisfaction shall by the said jury be adjudged, and declared to extend."

Section 17 appointed certain persons as commissioners for settling all questions arising between the company of proprietors of the canal and the proprietors of lands, mills, or waters, that should be injuriously affected by the execution of the powers of the Act.

Section 73 provided that the canal should be open to the public upon payment of certain rates, and subject to certain bye-laws.

By an Act, 39 & 40 Geo. 3, c. 24, power was conferred upon the company of proprietors to refer any questions to arbitration.

By an Act, 11 & 12 Vict. c. 86, the canal, with the towing paths and other works, was vested in the defendants, who were made liable to all the liabilities of the company of proprietors, and were (section 22) bound to keep open and in good repair the canal and its works, so as at all times to be open and navigable for the use of all persons.

In August, 1895, the plaintiffs served upon the defendants a notice informing them of their intention to work the coal both subjacent and adjacent to the canal, and requiring them to treat for the coal necessary to be left for the protection of the canal.

The defendants replied that they were advised that no coal was necessary to be left, and that they did not desire to treat for any coal.

The plaintiffs then brought this action, alleging that in working their mines they were approaching the canal, and that if they continued them within certain limits they would endanger and damage the canal, towing paths, and works. In their ordinary course of working they would take out the whole of the coal in each mine for 1,500 yards under and along both sides of the canal.

They claimed—(1) A declaration that they were entitled to work and get the whole of the coal and other minerals belonging to the plaintiffs which might lie within and under any land adjacent to the said canal, towing paths, and works, notwithstanding that the working or getting thereof might endanger or damage the said canal, towing paths, and works; or, in the alternative, (2) a declaration that the plaintiffs were entitled to be paid by the defendants pursuant to the Act of 1792, s. 38, satisfaction for all such part or parts of the last-mentioned coal and minerals as might be proper to be left for the security or preservation of the canal, towing paths, and works, or any of them; (3) a declaration that the plaintiffs were entitled to be paid by the defendants pursuant to the said first-mentioned Act, ss. 37 and 38, satisfaction for all such part or parts of the coal and other minerals belonging to the plaintiffs and lying under the canal, towing paths, and works as might be proper to be left for the security or preservation of the canal, towing paths, and works, or any of them.

No oral evidence was given by either side. In the course of the trial the defendants offered to give an undertaking to the plaintiffs not to claim damages, if any, caused by reason of the working by the plaintiffs of the subjacent coal, and to repair at their own expense any damage that might be done to the canal, towing paths, and works by such working. It was stated that if the subjacent coal was left its value would be about £80,000, while, as the coal was from 500 to 900 yards deep, the only damage that could result from its excavation would be a subsidence of a few feet in the course of five or six years, which could be dealt with and put right at the cost of a few hundred pounds.

It was also, with the approval of his lordship, admitted by both sides, after the form of the findings in the case of *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1894] 2 Q. B. 635, 43 W. R. Dig. 119: (1) That there was no reasonable ground for apprehending that the working of the mines near or under the canal would cause damage to the mines, or to the further working thereof, by percolation of water from the canal to the mines; (2) that the subsidence caused by the working of the mines would not interfere with the navigation of the canal; (3) that such subsidence would necessitate repairs from time to time during a period of eight or ten years to the towing path and banks of the canal; (4) that the costs of such repairs would be very trifling as compared with the compensation that would be payable under section 38 of the Act.

Joseph Walton, Q.C., and *O. L. Clare*, for the plaintiffs.—Section 37 does not deal with minerals under adjacent land, and neither that section nor section 38 prevents our working them without regard to the safety of the canal. This is the effect of the decisions of *Cromford Canal Co.* v. *Cutts*, 5 Rail. Cases 442; *Andrew Knowles & Sons* v. *Lancashire and Yorkshire Railway Co.*, 14 App. Cas. 248, 37 W. R. Dig. 121; and *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] App. Cas. 564, all of which were decisions upon sections similar to or identical with those we have here. It is true that the decision in *Knowles* v. *Lancashire and Yorkshire Railway Co.*, is not expressly restricted to the subjacent coal, but that this was intended is shown by *Chamber Colliery Co.* v. *Rochdale Canal Co.* This view of our rights would seem quite clear if we were the owners of adjacent coal only. But we are also owners of subjacent coal, and the question arises whether that fact makes any difference to our rights with respect to the adjacent coal. We submit that it does not; but the matter is not free from doubt in consequence of certain *dicta* of the learned lords in the latter case on appeal to the House of Lords, see [1895] App. Cas. pp. 573, 578, 583, and we have a right to ask for a declaration of the court upon the point for our protection. The cases also show that we are bound to leave subjacent coal sufficient for the preservation of the canal, and that we are entitled to compensation for it. It is doubtful whether the canal company being a statutory one, it is not *ultra vires* for them to give us the undertaking offered, and consequently whether we should be safe in accepting it. The decision of the Court of Appeal on this point in *Chamber Colliery Co.* v. *Rochdale Canal Co.*, was doubted by the learned lords in the House of Lords though it was not unnecessary for them to decide upon it. Such an undertaking was held *ultra vires*

in *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112.

They also cited: *Dudley Canal Co.* v. *Grazebrook*, 1 B. & A. 59, and *London and North-Western Railway Co.* v. *Evans*, 41 W. R. 149, [1893] 1 Ch. 16.

Cozens-Hardy, Q.C., and *Macnaghten*, for the defendants.—As section 37 does not deal with adjacent coal, and section 38 only gives a right to compensation after the Canal Co. has given notice, the plaintiffs are, as regards their adjacent coal, asking a needless declaration of their clear legal rights. In *Knowles* v. *Lancashire and Yorkshire Railway Co.* actual damage had already been done, which distinguishes it from the present case. The decision of the Court of Appeal in *Chamber Colliery Co.* v. *Rochdale Canal Co.* was that where an undertaking was offered the action would be dismissed; and this was not reversed by the House of Lords. It is therefore a binding decision upon the court. The case of *Ayr Harbour Trustees* v. *Oswald* is a different one, as there the trustees proposed to contract not to use the land for the special purpose for which alone they had been empowered to take it.

BYRNE, J.—This is a peculiar case. Both parties are desirous that the same conclusion shall be arrived at. There has already been two decisions of the House of Lords upon sections identical, or practically identical, with those in question here. The first of those cases is *Knowles & Sons* v. *Lancashire and Yorkshire Railway Co.*, where the mine owner was the owner of subjacent as well as adjacent minerals, and it was admitted there that the defendants had been taking and working the coal from the subjacent and adjacent mines, and had thereby "injured, prejudiced, and obstructed" the canal. Now, it is clear that under the section in that case, equivalent to section 37 here, the defendants had thus incurred a statutory liability. In that case the whole of the damage had been already done, and no distinction was taken between adjacent and subjacent minerals. The decision was that, having regard to their statutory liability, the mineowners were entitled to compensation under the section in that Act equivalent to section 38 here.

The decision in *Knowles* v. *Lancashire and Yorkshire Railway Co.* was considered in *Chamber Colliery Co.* v. *Rochdale Canal Co.* The decision in that case only concerned the rights of owners of adjacent, as opposed to owners of both adjacent and subjacent, coal; and it was held that as no statutory liability was imposed upon the owners of adjacent mines they were not entitled to compensation under the Act.

The point I have now to consider is whether, having regard to this last mentioned decision, a mine owner who owns both adjacent and subjacent coal is entitled to come to this court and ask for a declaration that he is entitled to compensation under the compensation clause. There are certain passages in the judgments of the learned lords in this last-mentioned case which require consideration. If the case of *Knowles* v. *Lancashire and Yorkshire Railway Co.* had stood alone I should have felt more difficulty, but reading that case with the judgments in *Chamber Colliery Co.* v. *Rochdale Canal Co.* I come to the conclusion that the decision in the earlier case was intended to apply to subjacent mines only, and decided nothing further. Lord Macnaghten, whose judgment in the earlier case was accepted by two others of the learned lords, refers to this case in his judgment in *Chamber Colliery Co.* v. *Rochdale Canal Co.* One passage in the latter judgment gave me some difficulty. He says, [1895] App. Cas. 585: "Section 40 is of wider application." [His lordship read down to "statutory liability," p. 585.] Now, so far as those sections are concerned, it is with reference to subjacent mines that the statutory liability applies; and the danger of this liability would arise to an owner of both subjacent and adjacent mines only because of his owning the subjacent mines. If a man was owner of adjacent mines only, he would be under no liability whatever; and I see no good reason for saying that because a person is owner of both subjacent and adjacent mines his rights with regard to the two kinds of mines are different from what they would have been if they had been owned by different persons. I think that the meaning of the decision of the House of Lords in *Chamber Colliery Co.* v. *Rochdale Canal Co.* was this: that in the case of subjacent mines there is a right to compensation under the compensation clause, and that in the case of adjacent mines there is no such liability.

That leaves another point for consideration. There is clearly a statutory liability in respect of subjacent mines, and it has been put to me (and both parties desire that I should take this view) that an undertaking can be given by the defendants that they will not insist upon any remedy in damages which they might otherwise have had by reason of the injury caused by the plaintiffs working the subjacent mines. And I am asked upon that to make no declaration with regard to the subjacent mines. Admissions have been made by the parties in accordance with what they say their scientific witnesses would prove, which show, among other things, that the damage that would be caused by working the subjacent mines would be very trifling compared with the compensation that would have to be paid if the minerals had to be left. The defendants say that the case then comes within the principle of *Chamber Colliery Co.* v. *Rochdale Canal Co.*, where such an offer was almost forced upon the mine owner. There are, it is true, certain *dicta* of the learned lords on appeal in that case to the effect that had that point come before them they would have wanted further consideration before dealing with it. But these were *dicta* only, and the standing decision is that of the Court of Appeal; and having regard to the fact that the undertaking is not being forced upon the plaintiffs, and to the admissions made, I think I may take the course suggested.

Judgment for the plaintiff upon the first paragraph of claim. No order made upon rest of claim, but the judgment to state the admissions and undertakings made and given by the parties, and an expression of the opinion of the court as above stated.

Solicitors for the plaintiffs, *Flower, Nussey, & Fellowes.*

Solicitors for the defendants, *Cunliffes & Davenport.*

Chan. Div. } Feb. 26.
Byrne, J. }

In re TURNER.
BARKER *v.* IVIMEY. (*a*)

Trustee—Investment—Unauthorized investment—Discretion of court as to relief of trustee—Solicitor-trustee—Indemnity—Third-party notice—Judicial Trustee Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.

No general rule can be laid down for the manner in which the court will give the relief provided under the Judicial Trustee Act, 1896, *s.* 3; *in each case arising*

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

thereunder the court will exercise its discretion having regard to the particular facts of the case.

In cases where there are two or more trustees, one of whom is solicitor, the trustee or trustees who are not solicitors will not be excused for a consequence of a breach of trust unless they have acted with the same caution as they would in their private affairs, but he or they may nevertheless be entitled to a complete indemnity from the solicitor-trustee.

Trial of action.

This was an action brought by the tenant for life and the reversioner under the will of Jane Maxwell Strong for a declaration that the surviving trustee thereof, H. Ivimey, and the representatives of a deceased trustee, James Turner, were liable to make good a breach of trust in respect of a sum of £900, part of the trust estate.

The facts of the case are as follows:

By her will the testatrix appointed the defendant Henry Ivimey and the above-named James Turner executors and trustees thereof, and directed that all her just debts and funeral and testamentary expenses might be paid and directed her trustees to stand possessed of the sum of £450 then invested in the leasehold premises, 13, King Henry's-road, Hampstead, in the county of Middlesex, and the sum of £450 invested (*inter alia*) on certain copyhold and leasehold premises at Acton Green, Middlesex, upon trust to pay the annual income thereof to her niece, the plaintiff Jane Maxwell Barker for her sole and separate use without power of anticipation. After her decease testatrix directed her said executors to pay the said sum of £900 and transfer any securities in which the same might be invested to the plaintiff Eliza Jane Barker, the only daughter of the plaintiff Jane Maxwell Barker. And the testatrix by her said will directed that in the event of the before-mentioned sums of £450 and £450 not being paid off at the time of her decease it should be lawful for her said trustees to continue the said investments, and in the event of their being paid off to re-invest the said sums in Government, freehold, or leasehold securities or securities guaranteed by Government upon the same trusts as were thereinbefore declared as aforesaid in favour of the plaintiffs.

The testatrix died on the 15th of August, 1876, and her said will was on the 7th of August, 1877, proved by the defendant Henry Ivimey and Turner.

The debts and funeral and testamentary expenses of the said testatrix had long since been paid.

The one sum of £450 was paid off in January, 1879, and the other sum in May, 1886. The first sum was reinvested upon an equitable mortgage in an undivided moiety in the Dowgas tenement and an undivided fourth share of and in Rock Hill tenement and certain china clay works, and two tenements all in Mollinis, all in the parish of St. Austell, in the county of Cornwall, and the property of Thomas Gill. The property was subject to certain leases.

The remaining £450 was subsequently advanced to Gill, and a legal mortgage of the premises before charged under the equitable mortgage was given by him to secure the whole £900. Ivimey, who was a solicitor and acted as such in the matter, was interested in some of the other undivided parts.

Ivimey informed Turner by letter that the mortgagor was a personal friend of his and that he could safely rely on the security. (The correspondence is fully set out in the judgment.)

The husband of the tenant for life died in 1881 and Turner died in 1892.

The property was estimated as worth about £620. Turner's executors delivered a third-party notice and claimed an indemnity from Ivimey.

Eve, Q.C., and *Solomon*, for the plaintiffs.—China clay works were an improper investment of trust moneys: *In re Whiteley, Whiteley* v. *Learoyd*, 36 W. R. 721, 12 App. Cas. 727. Further, the defendant Ivimey had a personal interest in the investment. Both trustees are equally liable to make good the loss. The Trustee Act, 1888, s. 4, sub-section 1, is no defence, as it is not merely a question of insufficient value: *Blyth* v. *Fladgate*, 39 W. R. 422, [1891] 1 Ch. 337.

H. Newson, for the defendant Ivimey.—The investment was not improper. In any case Turner's executors are not entitled to any contribution from Ivimey: *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 390.

Hopkinson, Q.C., and *S. Strickland*, for the defendants, the executors of Turner.—The security was proper, but insufficient, and Turner's estate is only liable to make good the sum advanced in excess. As to the tenant for life, section 8 of the Trustee Act, 1888, applies. The trustees ought also to be personally relieved under the Judicial Trustee Act, 1896, s. 3. Turner's estate is also entitled to be relieved against Ivimey: *Lockhart* v. *Reilly*, 4 W. R. 438, 25 L. J. Ch. 697.

Eve, Q.C., replied.

Section 3 of the Judicial Trustee Act, 1896, is as follows:

"3.—(1) If it appears to the court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same.

"(2) This section shall come into operation at the passing of this Act."

BYRNE, J., after stating the facts as above: Section 8 of the Trustee Act of 1888 is relied upon by the defendants as a bar to the claim so far as the plaintiff tenant for life is concerned, and it is admitted that the section applies to bar the claim so far as the tenant for life is concerned. The defendant Ivimey is clearly liable to the plaintiff in respect of the breach of trust, but the defendants, the representatives of Turner, claim the benefit—first, of section 9, sub-section 1 of the Trustee Act, 1893; and, secondly, they say that under section 3 of the Judicial Trustees Act, 1896, they ought to be relieved from personal liability in respect of the breach of trust alleged, in case the court should be of opinion that they are personally liable for such breach of trust. I am of opinion that they are not entitled to the benefit of section 9, sub-section 1 of the Act of 1893, because I do not consider that the mortgage security in question was a proper investment in all respects for a smaller sum than was actually advanced thereon. See the observations of Stirling, J., in *Blyth* v. *Fladgate*. The defendants, the executors of Turner, say that the court ought to act on section 3 of the Act of 1896 having regard to the circumstances of this particular case, and they rely upon certain letters written by the defendant Ivimey to their testator Turner in the years 1879 and 1880.

The first of such letters is dated the 15th of January, 1879, and runs as follows: "Dear Sir,—

Mrs. J. M. Strong, deceased. A mortgage of £450 will be paid off in a few days. I have found another security for the amount at £5 per cent. for a year, and as the mortgagor is a personal friend of mine I can safely recommend the security. . . . When would it be convenient for you to call and execute the re-conveyance?" And in a letter of the 20th of January, 1879, Ivimey says: "Thursday next at 2 o'clock has been appointed to pay off this mortgage. Please, therefore, attend here at that hour." On the 6th of May, 1880, he writes: "Mr. Williams has paid off the £450 mortgage, and I have agreed to lend that sum to Mr. Gill, who borrowed the other £450 on an equitable mortgage. I have arranged that he now shall execute a legal mortgage for the whole £900 at £5 per cent. interest. The security is on freehold property. Please call at your convenience to execute the release to Mr. Williams." Another letter was written on the 8th of May, and on the 10th of May, 1880, Ivimey wrote: "I should be obliged by your signing the enclosed receipt on the back of the mortgage deed and the discharge to be entered on the copyhold rolls. Four o'clock on Wednesday I will fix for completing the mortgage. . . . Please return me the documents at once by registered post." Turner was a linendraper carrying on business at Hanwell. Ivimey was a solicitor carrying on business at Staple-inn, Holborn. I have no evidence beyond this to justify me in coming to the conclusion that I ought to relieve Turner's estate under section 3 of the Act of 1896. Turner was clearly guilty of a breach of trust, and I have no reason to suppose that he acted otherwise than with perfect honesty in relation to the matter, but I am asked to hold that he not only acted honestly, but also reasonably, and that he ought fairly to be excused for the breach of trust. There is one other fact which appears—viz., that he had been party to a prior breach of trust—the lending of £450 upon equitable mortgage, a fact which is recited in the legal mortgage subsequently given. I have literally no further knowledge as to the circumstances of the case or the business capacity of Turner, nor have I any evidence to show what communications passed between Ivimey and Turner beyond the letters which I have already referred to. I think that the section relied on is meant to be acted upon freely and fairly in the exercise of judicial discretion, but I think that the court ought to be satisfied, before exercising the very large powers conferred upon it, by sufficient evidence, that the trustee acted reasonably. I do not think that I have sufficient evidence in this case that he so acted; in fact it does not appear from the letters that Mr. Turner acted in respect of this mortgage as he would probably have acted had it been a transaction of his own. I think that if he was—and he well may have been—a businesslike man, he would not, before lending this money, have been satisfied without some further inquiry as to the name of the mortgagor and as to the nature and value of the property upon which he was about to advance his money. It is consistent with the evidence that he might actually have made further inquiries and have been actually told the nature of the security. It was alleged that Turner was entitled to rely on the statements of his co-trustee as contained in the letters I have referred to, and that I ought to infer that he did so rely without further inquiry. It was pointed out that Ivimey was a solicitor and a trustee appointed by the testatrix, and therefore a person upon whom she relied and upon whom Turner might consider himself entitled to rely, and that upon these facts alone his estate ought to be exonerated from the consequences of the breach of trust. It would be impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and I think that each case must depend upon its own circumstances. In the present case I do not consider that I have sufficient evidence to entitle me to apply it.

The next question is, What relief are the plaintiffs entitled to? I cannot say that the investment is outside the terms of the trusts, but it went very near being outside. It is perfectly true that trustees may invest on reversionary trust property, and it is true in this case that the solicitor-trustee was not interested in the property mortgaged, although he had an interest in undivided shares of the property, other shares whereof were mortgaged. [His lordship referred to *In re Whiteley*, and continued:] *In re Salmon*, 38 W. R. 150, 42 Ch. D. 351, Fry, L.J., says: "There is no case to shew that where trust money is improvidently invested on an insufficient security of an authorized description the trustee cannot be made liable unless an option is given him of taking to the security. I think that the liability of the trustee in such a case is to make good the loss occasioned to the trust estate by the improper investment. The mode of enforcing this liability depends on the circumstances of the particular case. In some cases justice will best be done by realizing the security and making him pay the deficiency; but in some cases it may be right to make him pay at once the whole sum improperly invested, and let him take the benefit of the security."

Having regard to this decision, I think that the proper relief to give here will be to direct a sale of the property, and to declare the trustees liable for the loss.

With regard to the third-party notice following the principles laid down in *Lockhart* v. *Reilly*, *Thompson* v. *Finch*, 22 Beav. 316, 5 W. R. Ch. Dig. 100, and *Bahin* v. *Hughes*, I declare that the defendants, the representatives of Turner, are entitled to indemnity for any loss they may sustain, including the costs of this action as between solicitor and client.

Solicitors, *Redpath, Holdsworth, & Marshall*, for *W. Reed*, North Shields; *H. Ivimey; O. E. Dawson.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) — May 5.

LONDON AND EASTERN COUNTIES LOAN AND DISCOUNT CO. v. CREASEY. (a.)

Bill of sale—Specific description—Substituted chattels—Plant—Cab-horse—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 6, *sub-section* 2.

Cab-horses are not "plant" within the meaning of section 6, *sub-section* 2, *of the Bills of Sale Act*, 1882.

Yarmouth *v.* France, 36 *W. R.* 281, 19 *Q. B. D.* 647, *distinguished.*

Appeal from a judgment of a Divisional Court (Wright and Bruce, JJ.) on an appeal from a county court.

This was an interpleader issue.

The plaintiffs were the holders of a bill of sale given by one Roe, a cab proprietor, of certain horses and cabs therein specifically described. The defendant was the purchaser of two horses which, subse-

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

quently to the giving of the bill of sale, had been substituted by Roe for two of the horses specifically described therein. The sale of these two substituted horses took place at a repository to which they had been sent by Roe for the purpose of being sold. The plaintiffs having claimed the horses, the owner of the repository interpleaded, and this issue was directed to be tried.

The county court judge gave judgment for the defendant, and this decision was affirmed by the Divisional Court.

The plaintiffs appealed.

Lynden Bell, for the plaintiffs.—The property in the horses passed to the plaintiffs under the bill of sale. The effect of section 4 of the Bills of Sale Act, 1882, is that substituted property is not to pass under a bill of sale. But section 6, sub-section 2, makes an exception in favour of a particular kind of substituted property—viz., any plant or trade machinery where such plant or trade machinery is used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any like plant or trade machinery specifically described in the bill of sale. The question is whether these horses are "plant" within the meaning of that sub-section. In *Yarmouth* v. *France*, 36 W. R. 281, 19 Q. B. D. 647, it was held that a horse was "plant" within the meaning of the Employers' Liability Act, and the reasons given for that decision are applicable to this case. The words in collocation with which the word "plant" is used in the Employers' Liability Act are as little suggestive of horses as the words used in this sub-section of the Bills of Sale Act. Further, these horses have been brought upon and used in the premises in substitution for horses specifically described in the bill of sale. The sub-section therefore applies and operates so as to pass the property in these horses.

Clavell Salter, for the defendant.—*Yarmouth* v. *France* does not in any way govern this case. The meaning of the word "plant" in the Bills of Sale Act cannot depend on the meaning which has been put upon that word as used in the Employers' Liability Act. This Act contemplates local substitution of one thing for another. These horses cannot be said to have been locally substituted for other horses, neither can they be said to have been used in, attached to, or brought upon the premises within the meaning of the sub-section.

Lord ESHER, M.R.—The question is whether these horses, which have been substituted for horses described in the bill of sale, are such substituted plant as is mentioned in section 6, sub-section 2 of the Bills of Sale Act, 1882. The sub-section does not speak simply of the plant used in a business, but of plant of a particular kind—viz., plant or trade machinery used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for plant or trade machinery specifically described in a bill of sale. The words "other place" cannot mean any place in the world; they must have some limited meaning put upon them. In the present instance I think the place must be the place where the grantor of the bill of sale carries on his business as a cab proprietor—*i.e.*, his mews. In my opinion these horses cannot be said to be used in, attached to, or brought upon the mews. I suppose the real question is whether they are used in the mews. Cab-horses cannot be said to be used in a mews; they are used in the streets. Therefore I think that, although these horses might under some circumstances be called plant, they are not such substituted plant as is referred to in this sub-section.

The appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The question is, Were these horses plant within sub-section 2 of section 6? The sub-section deals with plant or trade machinery used in, attached to, or brought upon any land, house, or other place in substitution for any like plant or trade machinery. I do not think that these words can rightly be held to apply to horses.

CHITTY, L.J.—The case of *Yarmouth* v. *France* was, if I may say so, in my opinion, rightly decided, but it was a decision on the Employers' Liability Act. The language of the Bills of Sale Act, with which we now have to deal, is not the same as that of the Employers' Liability Act, neither is it equivalent to it. This sub-section does not speak of "plant used in the business," but it speaks of plant in some definite locality—plant "used in, attached to, or brought upon any land, shop, house, warehouse, or other place." Cab-horses are not used in stables, and, in my opinion, they cannot be said to be attached to or brought upon the stables within the meaning of this sub-section.

I think the judgment of the Divisional Court is right.

Appeal dismissed.

Solicitor for the plaintiff, *Roland H. Ward.*

Solicitor for the defendant, *Alfred Slater.*

High Court of Justice.

Chan. Div. Byrne, J. — March 31.

PLANT v. BOURNE. (*a.*)

Vendor and purchaser—Specific performance—Sale of land—Parcels—Statute of Frauds—Uncertainty—Extrinsic evidence.

The plaintiff and defendant signed a written agreement to respectively sell and purchase "twenty-four acres of land freehold and all appurtenances thereto at Totmonslow." In an action for specific performance of the contract the plaintiff proposed to call evidence to show that the land intended to be sold was a piece of that acreage which he owned at the place named.

Held, that there was no description in the agreement sufficient to satisfy the Statute of Frauds, and that such evidence could not be given.

Trial of action.

This was an action by the vendor for specific performance of the following written agreement between the plaintiff and defendant, signed by both parties, for the sale of land, and the question was whether there was a sufficient description of the land within the Statute of Frauds.

The agreement was as follows:—

"An agreement, made the 12th day of February, 1896, between Robert Plant, of Putney, in the county of Surrey, gentleman, of the one part, and Robert Henry Bourne, of Trentham, in the county of Stafford, station-master, of the other part. The said Robert Plant agrees to sell, and the said Robert Henry Bourne agrees to purchase, at the price of £5,000, twenty-four acres of land freehold and all appurtenances thereto at Totmonslow, in the parish of Dracott, in the county of Stafford, and all the mines

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister at-Law.

and minerals thereto appertaining, possession to be had on the 25th of March next, the vendor guaranteeing possession accordingly. As witness the hands of the parties the day and year first above written.

(Signed) ROBERT PLANT.
ROBERT HENRY BOURNE.
(Witness) A. G. RAMSDALE,
Solicitor, Longton."

Upon the defendant refusing to carry out the agreement, the plaintiff brought this action.

The statement of claim contained the following allegations: That the plaintiff was owner of freehold land at Totmonslow containing 24a. 1r. 26p., which was shown on the plan annexed to statement of claim; that the defendant was at the date of the agreement well acquainted with the land, and that he had on the 12th of February, 1896, by appointment gone over and carefully examined the land with the plaintiff, and that afterwards the agreement was entered into. The map referred to showed the land lying in one piece. At the trial the plaintiff proposed to give evidence in support of the above statement. The defendant objected to any such evidence, and submitted that the contract was void for uncertainty.

Eve, Q.C., and *J. Rolt*, for the plaintiff.—A general description of the property is sufficient if it can be shown by parol evidence what was intended, and thus be subsequently reduced to a certainty—*Id certum est quod certum reddi potest*—*Ogilvie* v. *Foljambe*, 3 Mer. 53; *McMurray* v. *Spicer*, 16 W. R. 332, L. R. 5 Eq. 527; *Wylson* v. *Dunn*, 35 W. R. 405, 34 Ch. D. 569; *Owen* v. *Thomas*, 3 My. & K. 353; *Bleakley* v. *Smith*, 11 Sim. 150; *Shardlow* v. *Cotterell*, 30 W. R. 143, 20 Ch. D. 90; *Waldron* v. *Jacob*, Ir. R. 5 Eq. 131, 19 W. R. Ch. Dig. 116-7; *Cowley* v. *Watts*, 1 W. R. 218. When a man sells land he must be presumed to be the owner of it, and thus the present agreement is the same as if the words had been "my twenty-four acres," which would be sufficient: *Cowley* v. *Watts*. If these words had been contained in a devise they would have been sufficient: *Doe d. Templeman* v. *Martin*, 4 B. & Ad. 771, 785.

Astbury, Q.C., and *A. J. Chitty*, for the defendant.—The contract is quite indeterminate and cannot be rendered certain. In all the cases cited there was such which pointed to some particular property. Here there is nothing: *Price* v. *Griffiths*, 1 De G. M. & G. 80; *Stuart* v. *London and North-Western Railway Co.*, 1 De G. M. & G. 721. It does not follow because a man agrees to sell land that he is the owner. He may generally be so, but is not so necessarily, and you cannot import the word "my" before the description of the land. The necessity for a definite as distinct from an indefinite description is shown by *Rossiter* v. *Miller*, 26 W. R. 865, 867, 3 App. Cas. 1124, 1140; *Jarrett* v. *Hunter*, 35 W. R. 132, 34 Ch. D. 182, 184.

BYRNE, J.—In this case the question I have to decide is whether there is a sufficient memorandum within the Statute of Frauds to enable the plaintiff to call evidence to show what the property really is which is comprised in the agreement of the 12th of February, 1896. It is clear that the memorandum contains some of the elements required by the statute; the parties are named, and the price is named. But more than this is required. There must be a description in words certain, or, if not certain, capable of being rendered certain. I have been referred to many cases where parol evidence was allowed to identify the property, but there is in all of these cases either something which enables you to connect the subject-matter of the memorandum with other acts or facts, such words of definition as "the," "my," or "these," or the like; or, on the other hand, words on the face of the document which refer to, and connect it with, some other documents or matters which enable you to determine with certainty what the property was about which the parties bargained. Now, in this memorandum I do not find any such words. Suppose the agreement had been simply that "the plaintiff agrees to sell and the defendant to purchase at the price of £5,000 twenty-four acres of land." It could not have been said that evidence could have been received to show what those twenty-four acres were, and I do not think that this description is at all assisted by the addition of the words which follow. The description still leaves out that which is the essential thing before you can admit parol evidence—namely, words of the kind I have before referred to, which are a key which enables you to determine with certainty directly the key is used what was contracted to be purchased. In the case of *Shardlow* v. *Cotterell* the memorandum there furnished this key upon the face of it; and so in the case of *Bleakley* v. *Smith*, which is perhaps the nearest decided case to the present. You have here many words of description, but nevertheless the memorandum fails to satisfy the requirements of the Statute of Frauds. I cannot, therefore, allow parol evidence to be given to show what property was intended to be dealt with.

Judgment for the defendants.

Solicitors, *Vizard & Monk Smith; Pitman & Sons*, for *F. W. Bayley*, Newcastle (Staffs).

Chan. Div. } March 8.
Byrne, J. }

In re BALD.
BALD *v.* BALD. (*a.*)

Conflict of laws—Scotch will—General power of appointment—English appointor—Assets for creditors.

The exercise by an Englishman of a general power of appointment conferred by the will of a Scotchman is governed by Scotch law, and consequently the fund appointed does not become assets for the payment of the debts of the appointor.

John Bald, of Monzie Castle, near Crieff, in Perthshire, made in 1879 a trust disposition and settlement in Scotch form which was of a testamentary nature, and was called throughout the case his "will."

He also made four codicils to this disposition and settlement at various times, the last being in the year 1884.

By this will and these codicils shares of the testator's residuary estate were vested in trustees upon trust to pay the income thereof to his children and with power to his said children to apportion the capital of their respective shares among their respective issue, and "with power to dispose by way of legacy to the extent of £2,000 sterling thereof to any other persons my said children may choose."

John Bald died in June, 1885, and his will and codicils were proved in England.

He was at the date of his will a domiciled Scotchman. He left several children, one of whom was Edward William Bald.

In 1887 E. W. Bald borrowed from his brother, the defendant R. B. Bald, a sum of £2,000, giving him at the time a written promise to provide for the loan by his will.

In January, 1889, he borrowed a sum of £500

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

from the defendant J. B. Harvey, upon a like promise.

In 1890 E. W. Bald made his will, and thereby, after referring to the above-mentioned loans and reciting the power of appointment conferred by the will of his father, he directed "that in the event of my being indebted to the said J. B. Harvey at the date of my death, and in the event of my general estate being insufficient to pay the amount of such indebtedness in full, the trustees or trustee for the time being of the will of my said father shall stand possessed of so much of the capital of my said share (not exceeding £2,000) as shall make up the amount by which my general estate shall be insufficient to pay my said indebtedness, in trust for, and I bequeath and dispose of the same to the said J. B. Harvey absolutely, in or towards the payment of my said indebtedness."

The testator gave a similar direction in favour of R. B. Bald.

E. W. Bald died in 1890, and his will was proved in England. His estate was insolvent, and the above-named debts were still owing at his death.

R. B. Bald and J. B. Harvey now claimed to have the legacy of £2,000 applied as directed by the will of E. W. Bald.

This claim was resisted by the Bank of Liverpool (Limited), who were also creditors of the estate of E. W. Bald, and who had been appointed to represent the other creditors, on the ground that his exercise of the power of appointment made the legacy assets for the payment of his debts generally. Thereupon the trustees of the will of John Bald took out this originating summons against the executrix of E. W. Bald, the appointees, and against the bank, asking for a direction as to whom the legacy was payable. There appeared to be some doubt as to whether E. W. Bald had, at the date of his will and of his death, a Scotch or English domicil; but it was admitted for the purposes of the argument that it was English. It was also admitted that, according to Scotch law, the exercise of the power of appointment by E. W. Bald did not make the legacy assets for this payment of his debts, and that this was the case whether he had a Scotch or English domicil. The appointees contended that even if the English law did apply they were entitled to the legacy as the appointment was for value; but this question did not need to be determined.

Hughes, for the trustees of John Bald.

H. Wace, for R. B. Bald and J. B. Harvey.—The appointment merely names the persons who are to take under the will of John Bald, and their rights are the same as if they were expressly mentioned as legatees in the will of John Bald. There seems to be no reported case covering this question.

Astbury, Q.C., and *C. E. E. Jenkins*, for the Bank of Liverpool.—The exercise of the power by an Englishman made the question one to be governed by English law.

Eve, Q.C., and *Dauney*, for other parties.

BYRNE, J.—Although the power of appointment was exercised by a domiciled Englishman, by a will in English form, yet, as the power was created by the will of a domiciled Scotchman, I think the law of Scotland applies, and that, consequently, the legacy goes to the appointees freed from the claims of the general creditors of E. W. Bald.

Declaration accordingly.

Solicitors, *Batesons, Warr, & Wimshurst*, Liverpool; *E. F. & H. Landon; Alsop, Stevens, Harvey, & Crooks*, Liverpool; *C. W. Dommett & Sons.*

Q. B. Div.
(Hawkins and Wright, JJ.) May 5.

ANDREWS v. DENTON. (a.)

Licensing law—Conviction—Selling liquor without a licence—Protection order—Licensing Act, 1872, *s.* 3.

The licence-holder of certain licensed premises remained on the premises and continued to sell liquor after a protection order had been granted in respect of the premises to another person.

Held, that the licence-holder was not liable to conviction for selling liquor without having a licence under section 3 *of the Licensing Act*, 1872.

Case stated by a metropolitan police magistrate.

An information was laid against the respondent charging him with selling beer, on the 6th October, 1896, without having a licence, contrary to section 3 of the Licensing Act, 1872.

The respondent was the licence-holder of certain licensed premises under a licence granted in June, 1896. In pursuance of a bargain entered into with a person named Jocelyn for the sale of his interest in the premises, he joined with Jocelyn in giving notice of an intention to apply for a protection order in favour of Jocelyn. Notice was also given of an intention to apply at the next special transfer sessions for a transfer of the licence to Jocelyn. The protection order was made on the 3rd of October, 1896. The licence was at the same time indorsed by the respondent as follows: "I hereby assign all my right, title, and interest in this certificate to Theogene Jocelyn"; but it was not handed over to Jocelyn.

In consequence of a dispute having arisen, the respondent refused to vacate the premises, and continued to carry on the business till the 9th of October. Jocelyn then entered the premises and a transfer of the licence was duly made at the special transfer sessions.

The magistrate before whom the information was heard acquitted the respondent.

Danckwerts, for the appellant.—The effect of the protection order granted to Jocelyn was to preclude the respondent from further selling under the licence. It was not intended that two persons should be entitled to sell liquor under the same licence. Persons applying for a protection order must be in such a position as would have entitled them to a transfer of the licence had the transfer sessions been sitting. For that purpose it was necessary that the change should have taken place before the protection order came into operation: see Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 4, and *Reg.* v. *Liverpool* (*Justices of*), 11 Q. B. D. 638. [WRIGHT, J.—Does not your argument go to show that the protection order is void?] The respondent, having joined in the application for the order, is not in a position to raise that objection.

Lawson Walton, Q.C., and *Bodkin*, for the respondent, were not called on.

HAWKINS, J.—The magistrate was right. The respondent was carrying on the business of a beer-house-keeper under a licence granted in June, 1896, which he contemplated transferring to Jocelyn. There had been no actual assignment, and the respondent kept the licence and continued in the house. He had been negotiating with Jocelyn to transfer the licence together with possession of the house. In the meantime the magistrate had power to grant a protection order. An order was accordingly granted. It may be that that order was bad. All I say is that the

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

respondent had the licence and continued in the house, and there is no ground for saying that his licence was cancelled.

WRIGHT, J.—I agree. I do not assent to Mr. Danckwerts' point that the change must have taken place. The statute applies to cases where there is or is going to be a change. The respondent's licence was not cancelled, therefore the offence charged was not proved. The respondent was entitled to go on selling liquor under the licence.

Solicitors for the appellant, *Wontner & Sons.*

Solicitors for the respondent, *Maitlands, Peckham, & Co.*

Q. B. Div.
(Wills and Grantham, JJ.) April 9.

LEEDS PERMANENT BENEFIT BUILDING SOCIETY v. MALLANDAINE. (*a.*)

Inland revenue—Income tax—Building society—Advances to borrowing members—Mortgage—Profits and gains—Borrowers' periodical repayments—Deductions—Liability of society to pay income tax under Schedule D on interest charged on loans—Schedule D of the Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *and Act of* 1853 (16 & 17 *Vict. c.* 34), *ss.* 2, 40.

A building society received subscriptions from its investing members, and from the fund so raised advances were made to its borrowing members, secured by mortgage, and the advances were repaid to the society by instalments.

The Inland Revenue Commissioners claimed income tax under Schedule D. from the society on that portion of these repayments which represented the interest charged by the society on the respective loans.

Held, that the society was liable to pay income tax under Schedule D. upon the sums received by way of interest, although such sums were not "yearly" interest.

London County Council *v.* Grove, ante, *p.* 279, *followed.*

Case stated by the commissioners for special purposes of the Income Tax Acts on an appeal by the society against an assessment of £60,200 made upon them by the commissioners for general purposes, under Schedule D of the Income Tax Acts, for the year ended the 5th of April, 1895, in respect of interest received from its borrowing members.

The society was established in Leeds in 1848 under the provisions of the Building Societies Act, 1836 (6 & 7 Will. 4, c. 42), and was in 1875 incorporated under the provisions of the Building Societies Act, 1874 (37 & 38 Vict. c. 42).

The objects of the society are to raise by subscriptions of the members a fund out of which to make advances to members upon security of freehold, copyhold, or leasehold estates by way of mortgage, such advances being made to members of the society only, and this alone constituted the business of the society. The constitution and course of business of the society are as follows:

The members are those persons who hold one or more shares, or one or more fifth parts of a share in the society, the shares being divided into two classes namely, investors' shares and borrowers' shares. The question as to shares held by investing members is not raised in this case. The borrowers are the members to whom money is advanced by the society upon the security of their property. A person desiring an advance gives particulars of the amount required and the security offered. If the loan is approved money is advanced so soon as a mortgage to the society is executed. In all cases the advance is made in respect of one or more shares or fifths of shares which the borrower takes in the society. Upon each share he pays 2s. 6d. a week. If the advance be a large one the repayment is spread over a great number of years. Hence, of the first instalment of 2s. 6d. per week a relatively large part would be appropriated to interest and a relatively small part to the repayment of the principal. If, however, the borrower elects to split up his loan into several smaller shares, then he would pay 2s. 6d. per week on each of these shares, and, since they would be payable in a relatively short time, the amount of 2s. 6d. appropriated to interest would be smaller and the amount appropriated to the repayment of principal larger.

In order to obtain the necessary funds for its staff, offices, and the like, the society charges a slightly higher rate of interest to borrowing members than it grants to depositors, or, generally speaking, to investing members. Whatever surplus accumulates out of the fund so brought into existence is from time to time divided among the members of the society. On the 6th of October, 1896, there were 2,468 borrowing members of the society, owing £1,367,724 to the society.

Dicey, Q.C. (with him *Sir Edward Clarke, Q.C., Lord Robert Cecil,* and *M. Macnaghten*), for the society.—Income tax is only chargeable on interest when it is an annual interest, which this is not; in other cases interest must be charged, if at all, as profits, and the society admittedly has made no profits. The borrowing members should deduct whatever amount of income tax is payable in respect of the property. That they have already done, or ought to have done, under Schedule A, and the Crown has no right to levy a tax on the same property twice.

Sir R. B. Finlay, S.G. (with him *Danckwerts* and *Peacock*), for the Crown.—The tax claimed under Schedule D has nothing whatever to do with any tax paid on the same property under Schedule A. Admittedly the interest which is now sought to be charged in the hands of the mortgagees—that is, in the hands of the society—is not in the nature of "profits or gains," but is interest accruing to them in respect of loans. The borrowing members—that is, the mortgagors—are not entitled to deduct this tax from the instalments as they become due and payable to the society, inasmuch as it does not fall within section 40 of 16 & 17 Vict. c. 34, under which the occupier of a house, for example, is entitled to deduct the property tax to be paid by the landlord. That section is as follows: "Every person who shall be liable to the payment of any rent or any yearly interest of money or any annuity or other annual payment, either as a charge on any property as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled . . . to deduct and retain thereout the amount of the rate of duty then payable. . . . Provided always that no tenant or occupier of any property chargeable under Schedule A of this Act shall be entitled to deduct or retain out of the rent thereof any greater sum than the amount of the duty which shall have been assessed and charged upon or in respect of such property, and actually paid by such tenant or occupier." The commissioners have found as a fact that part of the instalments paid by the borrowers consists of interest, which is the subject-matter of the assessment, and they con-

(a) Reported by ERSKINE REID, Esq., Barrister-at-Law.

firmed the assessment, being of opinion that, though the society did not carry on trade, the interest received by them was chargeable.

The following cases were referred to: *London County Council* v. *Grove*, *ante*, p. 279; *Pugh* v. *Heath*, 30 W. R. 553, 7 App. Cas. 235; *Attorney-General* v. *Worrall*, 43 W. R. 118, [1895] 1 Q. B. 99; *Middlesbrough Permanent Building Society*, 53 L. T. N. S. 492; *Clerical Assurance Co.* v. *Carter*, 37 W. R. 346, 22 Q. B. D. 444.

Sir Edward Clarke replied.

WILLS, J.—I think the principle which ought to determine our judgment in this case is perfectly clear, although it is not always so in revenue cases, which are not unfrequently extremely perplexing. Taxation is the creation of statute, and all we have to do in this case is to see how the broad principle of the statute applies to the facts before us. For the purpose of deciding that, it is immaterial (except on the question of alleged hardship) for the court to go into the question of whether or not property tax under Schedule A has been levied and paid on the property mortgaged to the company. One thing is certain, if it has been paid, it has been paid by the mortgagors—the borrowing members—and not by the society. For that reason it seems to me highly probable that a large portion of the mortgaged property has escaped taxation so far altogether, because by far the greater number of the borrowing members would be in a position to claim and would claim, exemption from liability to pay that particular branch of income tax by reason of the smallness of their incomes.

I feel clear on this point also that the payments made by the borrowing members are not yearly interest. I do not base my conclusion that this is not a yearly interest, on the fact that these repayments are made monthly. That does not affect the question at all; but the interest is so inextricably mixed up with principal, and the amount varies so from month to month under the system adopted by the society for these repayments that it cannot reasonably be regarded as an annual interest within the meaning of the statute. By that term is meant—speaking generally—a fixed sum per annum payable as interest on an amount outstanding, which can at all times readily be known.

Now, it is part of the appellants' contention that the interest paid to the society cannot be distinguished from what is capital in the instalments, and, therefore, that they are unable to furnish the return demanded by the commissioners. That is a view of the matter I do not agree with. On the other hand the persons who make these periodical payments, consisting as I have said of a variable amount of interest and of repaid capital, certainly cannot be expected to ascertain how much is interest and how much capital, and are therefore not qualified to make the deduction, if it were their duty to do so. Having decided that this is not an annual interest, the case comes down to the simple question of whether the payments are properly the subject of taxation under Schedule D of the Income Tax Acts. In my opinion they certainly are. It is obviously intended that money received by way of interest by a society should be taxed, and it makes no difference that the interest may last for less than one year, and may not properly be classed under the term "yearly interest." It is clear enough that the word interest is meant to include interest on money as it accrues, which is nevertheless not reserved or payable as yearly interest. The case of the *London County Council* v. *Grove* is very much in point, and there the Court of Appeal held that payments of interest were chargeable in the hands of the mortgagee. The Solicitor-General has amply satisfied me with regard to the powers given the commissioners to make this claim by the charging sections of the Act. Our judgment, therefore, must be for the Crown, leaving it to be ascertained how much of the gross sum is interest and how much principal.

GRANTHAM, J., concurred.

Appeal dismissed with costs.

Solicitors for the appellants, *Torr & Co.*, for *Middleton & Co.*, Leeds.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Cave and Lawrance, JJ.) April 6.

CONROY v. PEACOCK. (*a.*)

County court—Practice—Employers' liability—Want of due notice of injury—Statutory defence—Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), *s.* 4—*County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18a.

In an action in the county court for compensation under the Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), *the defence that the plaintiff has not given due notice of the injury as required by section* 4 *of that Act is a statutory defence within the meaning of the County Court Rules*, 1889, *ord.* 10, *r.* 18a, *and unless the defendant has duly filed a notice of his intention to rely upon such statutory defence he cannot avail himself thereof at the trial.*

This was an appeal by the defendant from the judgment of the deputy county court judge (S. G. Lushington, Esq.) at Wandsworth.

The action was brought under the Employers' Liability Act, 1880, by a bricklayer's labourer against the builder who employed him.

The facts of the case shortly were that the plaintiff on the 17th of June, 1896, was employed under the defendant's foreman as a hodman in the repair of a chapel at Camberwell, and whilst so employed he was injured by a portion of the scaffolding falling upon him owing to it not being properly secured. Immediately after the accident the foreman was informed of what had happened, and a few days afterwards the foreman told the defendant of the event.

On the 3rd of August, more than six weeks after the accident occurred, the plaintiff gave the defendant a written notice that he had sustained injury as above stated.

Section 4 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), provides that "an action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months after the occurrence of the accident causing the injury."

The plaintiff, however, commenced his action within the six months.

In the particulars of claim it was stated that the accident occurred on the 23rd of June instead of the 17th. At the trial, when it was proved that the accident had really happened on the 17th, counsel for the defendant objected that the notice of the injury had not been given within the six weeks as required by section 4, but the deputy judge ruled that the objection was a statutory defence, and that, there-

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

fore, the defendant could not avail himself of it without giving proper notice. The jury returned a verdict for the plaintiff, and judgment was entered accordingly for him.

From this judgment the defendant now appealed.

By the County Court Rules, 1889, ord. 10, r. 10, it is provided as follows: "Where the defendant intends to rely upon any of the grounds of defence mentioned in rules 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of this order, or upon any counter-claim, he shall file a notice, stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return day. . . . Provided that, in case of non-compliance with this and the above-mentioned rules, and of the plaintiff's not consenting at the trial to permit the defendant to avail himself of such defence, the judge may, on such terms as he shall think fit, adjourn the trial of the action to enable the defendant to give such notice."

Rule 18a of the same order provides that "Where in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter upon which he relies."

Stephen Lynch, for the appellant.—The judgment in the court below is wrong. The plaintiff cannot bring his action without giving notice as provided by section 4—*in fact*, the giving of such a notice is a condition precedent to the bringing of an action under the Employers' Liability Act, and it is immaterial whether the defendant does or does not give notice that he intends to rely upon the fact that the plaintiff has failed to comply with section 4.

Moyses, for the respondent, was not called upon.

CAVE, J.—I think this appeal must be dismissed. It seems to me this is a very clear case. The action is brought under the Employers' Liability Act, 1880, section 4 of which provides that an action for the recovery under that Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks from the occurrence of the accident causing the injury. In the present case such notice was not given until three days after the six weeks had expired, and the defendant at the trial raised the objection that notice was not given in accordance with that section. That is clearly a statutory defence. Now it is provided by the County Court Rules, 1889, ord. 10, rr. 10 and 18a that where a defendant intends to rely upon any statutory defence he must file a notice with a concise statement of such grounds and set out in such statement the year, chapter, and section of the statute on which he relies.

The defendant, however, did not file any such notice, and the learned county court judge held, and rightly so, that he could not at the trial avail himself of the defence that the plaintiff had not given notice of the injury as required by section 4 of the Employers' Liability Act, 1880, because he, the defendant, had not filed a notice that he intended to raise that defence.

Under the proviso to rule 10 the defendant might have applied for an adjournement so as to enable him to give notice of such defence, but, for reasons best known to himself, he did not do so. He now appeals to this court from the ruling of the learned judge. We are of opinion that his decision was perfectly right. This appeal must therefore be dismissed with costs.

LAWRANCE, J.—I entirely concur in what my learned brother has said.

Appeal dismissed.

Solicitor for the appellant, *S. Franklin.*

Solicitor for the respondent, *C. F. Appleton.*

Q. B. Div.
(Cave and Lawrance, JJ.) April 3.

PRATT v. SOUTH-EASTERN RAILWAY CO. (a.)

Railway—Cloak-room—Article deposited—Ticket—Condition on ticket—"Not responsible for"—Meaning of.

The plaintiff deposited a gun of over £10 in value in the cloak-room of the defendants, and received a ticket which contained the condition that "the company will not be responsible for articles left at the station unless the same be duly registered and a ticket given in exchange; the company will not be responsible for any package exceeding the value of £10." When the gun was given back to the plaintiff it was found to be damaged through the careless handling of the company's servants.

Held, that the words in the condition, "not responsible for any package exceeding the value of £10," meant not responsible for either the loss of such article or any damage to it, and protected the company against not only the loss of such article, but also any damage to it, and that the plaintiff therefore had no right of action against the company.

Appeal by the defendants from the judgment of the learned deputy county court judge sitting at the Southwark County Court.

The plaintiff deposited his gun in the cloak-room of the defendants, and upon such deposit he received a ticket which he had to produce and give up on receiving the gun. On the face and back of this ticket were printed certain conditions, but as a matter of fact the plaintiff's attention was not called to these conditions, and he did not know what the particular conditions were, but the learned deputy judge considered that he was bound by the case of *Van Toll* v. *The South-Eastern Railway Co.*, 10 W. R. 578, 12 C. B. N. S. 75, to hold that the plaintiff was bound by the conditions.

These conditions contained the following: "The company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2d. per article will be made and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1d. *per diem*, in addition, will be made on all articles left in the luggage room for a period longer than twenty-four hours. The company will not be responsible for any package exceeding the value of £10."

The plaintiff's gun exceeded in value £10, and when it was delivered by the company to the plaintiff it was found to be broken, and the learned judge found that it was so injured by the careless handling of the defendants' servants, and as he construed the condition upon the ticket that "the company will not be responsible for any package exceeding the value of £10" as having reference to the loss of the article only, and not to any damage it might sustain, he accordingly held that the company, although they would not have been liable for the loss of the gun, yet were liable for the damage to it; and as he estimated that damage at £5 5s., he gave judgment for the plaintiff for £5 5s. and costs.

The defendants, by leave, appealed.

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Reginald Brown (*Archibald Willis* with him) for the appellants.—The learned judge was wrong in holding that the company were protected against the loss of the gun only, but not against the damage to it. The words "responsible for" in the condition on the ticket mean that the company will not be liable or answerable for either the loss of the article itself or any injury or damage to it. The construction placed upon the condition by the learned judge was too narrow a construction, as it is unreasonable that the company should be protected by the condition against the loss of the article, but not against damage to it. In *Van Toll* v. *The South-Eastern Railway Co.* it was held that this very condition covered the loss of a part of the article deposited; and in *Pepper* v. *South-Eastern Railway Co.*, 17 L. T. N. S. 469, it was held that the company were protected against delay in delivering the article. As the greater includes the less, so protection against the loss of the article includes protection against any injury or damage to the article.

Hume-Williams, for the respondent (the plaintiff).—The learned judge was right in his interpretation of the condition. We have here a finding of fact that the gun was injured owing to the careless handling of the company's servants. That is equivalent to a finding that the injury was caused by the negligence of the defendants. Does the condition protect the company from the negligence of their own servants? It would be a most unreasonable construction of the condition to hold that it did. The company are bailees of this gun for reward, and as such would be liable for any damage to the gun caused by their negligence. If they seek to exempt themselves from this liability then the *onus* is upon them to make the condition absolutely clear to the other contracting party, which they have not done in this case. This is not a reasonable condition, and even if it were, the company cannot by such condition escape from the consequence of their own negligence, as in this case.

CAVE, J.—I am of opinion that the judgment in this case cannot be supported. The learned judge took the view that the word "responsible" meant responsible for loss, and that it did not mean or include responsibility for damage. The result of that view would be that an article of very great value might be irretrievably damaged and the damage might be equivalent really to the loss, but because it was damaged and not lost the company would be responsible for the full amount. I cannot think that that is a reasonable interpretation of this condition. There are words in the earlier part of the condition which we cannot neglect altogether, which are that "the company will not be responsible for articles left by passengers at the station." "Responsible" there must mean responsible not only for the loss of the article, but also for damage to it. It seems to me that when we have the same word later on in the expression "The company will not be responsible for any package exceeding the value of £10," that means what it says—namely, that the company will undertake no responsibility for any article which is over the value of £10. If it is not over the value of £10 the company do undertake responsibility for it, and they are responsible either for the loss of the article or for damage to it; but if it is over the value of £10 they undertake no responsibility, and if the owner leaves it with the company under such circumstances as the present, he does so at his own risk, and he must not look to the company if the thing is either lost or damaged. That seems to me the proper construction to put upon this condition, though I cannot see why the company should not have made the matter more clear by saying, "We will not be responsible for loss or injury to the article." The question is, what is the meaning of the words "will not be responsible for"? I think, looking at the way in which the words are used in the former part of the ticket, the best way to construe them is to hold that they mean that the company will not be responsible at all, and that an article over £10 in value is taken in at the owner's risk, and not at the company's risk.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitor for the appellants, *J. W. Watkin.*

Solicitors for the respondent, *Keene, Marsland, Bryden, & Besant.*

Q. B. Div.
(Hawkins and Lawrance, JJ.) March 31.

REG. v. PELLY AND ANOTHER, JUSTICES OF ESSEX. (*a.*)

Licensing Law—Closing hours—Person found drunk on licensed premises during closing hours—Penalty—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 12.

A person who is found drunk on licensed premises during closing hours when the premises are actually closed to the public, and who is neither a lodger nor inmate in the house, may be convicted under section 12 *of the Licensing Act*, 1872, *of "being found drunk on licensed premises," as such premises do not cease to be licensed premises when they are actually closed to the public during closing hours.*

Rule for a *certiorari* to quash a conviction whereby the applicant for the rule, Albert Lacey, was convicted by the justices of Ongar, in the county of Essex, of being found drunk on licensed premises.

At a court of petty sessions held on the 9th of January, 1897, at Ongar, Lacey was summoned on a charge of being found drunk on licensed premises—namely, the Bell Inn, Chipping Ongar, and he was convicted and fined 5s. with costs.

The defendant Lacey was in the Bell Inn on the evening of Sunday, the 20th of December, 1896. He did not leave the house at the closing time—namely, ten o'clock—when the other customers left, and when the house closed to the public.

The licensed premises having been closed at ten o'clock a police constable gained admission to the house at a quarter past ten o'clock, when he found the defendant Lacey drunk in the private bar and talking to the landlord. He gave as his reason for being there at the time that he had taken and paid for a bed in the house for that night, and the landlord made the same statement and said that Lacey was a lodger.

The justices disbelieved this statement, and found as facts that Lacey was found on the licensed premises during closing hours, that he was drunk when so found, and that he was neither a lodger nor inmate of the house on that night, and they convicted him of the offence of "being found drunk on licensed premises" within the meaning of section 12 of the Licensing Act, 1872, which provides that "every person found drunk . . . on any licensed premises shall be liable to a penalty not exceeding ten shillings."

The above rule for a *certiorari* was obtained, on the authority of *Lester* v. *Torrens*, 25 W. R. 691, 2

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Q. B. D. 403, to bring up and quash the conviction on the ground that "licensed premises" in section 12 means premises which are open to the public and before closing time, and that as the premises at the time the defendant was found therein were closed to the public they were not "licensed premises" within the meaning of section 12, and that therefore the defendant could not be convicted of being found drunk on licensed premises.

Erle, for the justices, showed cause against the rule.—The justices have found as a fact that the defendant was neither a lodger nor inmate of the house on the night of the 20th of December, and therefore that point cannot be taken. The ground of this rule is that the licensed premises are no longer licensed premises when the closing hour has arrived and when they are closed to the public. The question therefore in this case is whether the licensed premises remain licensed premises after closing time, and when they are closed to the public, or whether they cease to be licensed premises at and after closing time when they are closed to the public. The case of *Lester* v. *Torrens*, upon the authority of which this rule was granted, is entirely different from the present case, and is no authority for the proposition that licensed premises cease to be "licensed premises" within section 12 when they are actually closed to the public during closing hours. In that case it was the landlord himself of the licensed premises who was charged with being found drunk on his own premises, and the court there held that as it was during closing hours, and as the house was actually closed to the public, and everybody excluded except the inmates, the landlord could not be convicted under section 12 of being found drunk on licensed premises. Here the defendant was not the landlord of the house, he was not a lodger or inmate of the house, and he had no right at all to be there except to use the house as a public-house. The cases are therefore different, and *Lester* v. *Torrens* is no authority for setting aside this conviction, or for saying that the licensed premises ceased to be licensed premises during closing hours. The defendant could also have been convicted under section 25 of being on the premises during closing hours. It would lead to many difficulties if licensed premises were held not to be licensed premises during closing hours. They remain licensed premises during the whole time the licence continues.

J. Ogle, in support of the rule.—The question is whether these premises remained "licensed premises" after they were actually closed to the public. *Lester* v. *Torrens*, is an authority that the premises ceased to be "licensed premises" within the meaning of section 12 as soon as closing time had arrived and the doors had been closed and bolted and the public excluded. Licensed premises are only licensed premises when they are open to the public to use as licensed premises, but when the public can no longer use them as licensed premises—namely, during closing hours, then the premises are not licensed premises; see the judgment of Mellor, J., in *Lester* v. *Torrens* as proving this. The defendant, therefore, being found on these premises during closing hours, was not found drunk on "licensed premises" within section 12, and therefore he ought not to have been convicted.

HAWKINS, J.—I am of opinion that this rule ought to be discharged. The conviction which we are asked to quash is a conviction under section 12 of the Licensing Act, 1872, which says that a person who is found drunk on any "licensed premises" shall be liable to a penalty. The applicant for this rule was found drunk on these licensed premises under the circumstances already stated. There is no reason to suppose he did not go there for the purpose of getting drink and using the premises as licensed premises; and unless there was some lawful excuse the landlord would be liable for his being there at all. The landlord gave the excuse that he was a lodger, an excuse which the justices found to be wholly untrue. Ten o'clock being the closing hour, it has been argued in support of this rule that if a man is found drunk on the licensed premises ten minutes before ten he is liable to this penalty under section 12, but that if he remains and is found drunk on the same premises ten minutes past ten o'clock he is liable to no penalty at all; and in support of this contention the case of *Lester* v. *Torrens* was cited. With regard to that case I may say that I entirely agree with the decision arrived at. That was a charge brought against the landlord of the licensed premises himself of being found drunk on his own licensed premises during closing hours, and when the house was clear of all outside persons. His day's work was over and the house was closed to the public; he lived on the premises, and it was his own private dwelling-house; and under those circumstances the court in effect said that it could not have been the intention of the Act to render the man liable to a penalty under this section. In my opinion it would be very unreasonable to construe the Act in any other way than the court did in *Lester* v. *Torrens*, as the defendant in that case was a private person in his own house, doing that which any private person may do in his own house.

In the present case the defendant went into this house for the purpose of getting drink. He was not the landlord, and the justices have found that he was not a lodger or inmate. To my mind, therefore, he was found drunk on licensed premises within the meaning of the section, and this construction of the section is fortified by looking at section 25. According to section 25, if, when premises are required to be closed, any person is found in them without lawful or reasonable excuse, such person is liable to a penalty of 40s. Now, if the contention for the defendant here be correct, then a person who is found on licensed premises sober and during closing hours is liable under section 25 to a penalty of 40s.; but if he is found drunk on the same premises during closing hours, then he is liable to no penalty at all. I think if a man goes into a licensed house and gets drunk and remains there after closing hours and is found drunk there, he is liable to be convicted under section 12. I think, therefore, that the justices were right, and that this rule must be discharged.

LAWRANCE, J., concurred.

Rule discharged.

Solicitors for the justices, *Beaumont, Son, & Rigden*, for *C. Smith*, Ongar.

Solicitors for the defendant, *Haynes & Clifton*, London and Romford.

Q. B. Div. (Cave and Grantham, JJ.) March 13.

REG. v. THE LUNACY COMMISSIONERS. (a.)

Lunacy—Person detained as lunatic—Certificates that lunatic may safely be discharged—Discretion of

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Lunacy Commissioners to act on such certificates—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 49.

The Commissioners in Lunacy are not bound to act upon the certificates of two medical practitioners who have been authorized by them, under section 49 *of the Lunacy Act*, 1890, *to make an examination of a person detained as a lunatic, and who after examination have duly certified that the person so detained may safely be discharged, but, notwithstanding such certificates, the commissioners have, under section* 49, *a discretion to grant or refuse an order for the discharge of the lunatic.*

Rule for a *mandamus* to the Lunacy Commissioners commanding them to make an order, under section 49 of the Lunacy Act, 1890, for the discharge of a person detained in a private asylum as a person of unsound mind.

From the affidavits it appeared that the patient was in March, 1895, under an urgency order and upon the certificates of two duly qualified medical practitioners, removed as a private patient to the Holloway Sanatorium, in the county of Surrey, and that under a reception order he has since remained there and is still detained as a lunatic, though he has not been so found by inquisition.

Upon the instructions of the patient his solicitors wrote to the Commissioners in Lunacy stating that the patient wished to obtain his discharge from the sanatorium, and that they applied under section 49 of the Lunacy Act, 1890, for an order under that section for an examination of the patient by two medical practitioners approved and authorized by the commissioners, and they submitted the names of two practitioners who should make the examination, and they said that the facts which had indicated insanity had ceased to exist.

In January, 1897, the commissioners authorized the two medical practitioners whose names had been proposed to examine the patient, and these two medical practitioners examined the patient and duly certified that, in their opinion, the patient, though he still had unusual views on the subject of religion, did not require detention, and that he might safely be discharged without risk or injury to himself or the public, and they certified accordingly.

These certificates having been duly sent to the commissioners they refused to act upon them, upon the ground that, in their opinion after full consideration of the case, and in the opinion of the resident medical superintendent, the patient was still of unsound mind and ought not to be discharged, and that having regard to all the circumstances of the case they must decline to make an order under section 49 for the patient's discharge, as they had come to the conclusion that in this case they ought not to exercise the discretion vested in them of ordering the patient's discharge.

A rule for a *mandamus* was then obtained at the instance of the patient.

Section 49 of the Lunacy Act, 1890, provides: "An order for an examination by two medical practitioners authorized by the commissioners, of any person detained as a lunatic in any institution for lunatics, or as a single patient, may be obtained from the commissioners upon the application of any person, whether a relative or friend or not, who satisfies the commissioners that it is proper for them to grant such order; and on production to the commissioners of the certificates of the medical practitioners so authorized, certifying that . . . . they are of opinion that the patient may, without risk or injury to himself or the public, be discharged, the commissioners may order the patient to be discharged at the expiration of ten days from the date of the order."

Henry Sutton, for the commissioners, showed cause.—Throughout this Act the Legislature has left the question of the discharge of a person detained as of unsound mind to the discretion of the commissioners. They are not bound to act upon the certificates of the two medical practitioners whom they have authorized to examine the patient, but under the section they have a discretion either to order or to refuse to order the discharge of a patient. The words of the section are that the commissioners "may" order the discharge of the patient. This clearly confers upon them a power to act upon the certificates and order the discharge, but it does not impose upon them any obligation to do so: *Julius* v. *Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214. If the commissioners had not a discretion in the matter it would be in the power of the two medical practitioners who might examine the patient, and who might have no knowledge of lunacy matters, to compel the commissioners to order the discharge. If the patient is dissatisfied with the decision of the commissioners an application can be made on his behalf, under section 90, to a judge at chambers, who can order that the question whether the patient is of sound mind or not should be tried by a jury.

Tindal Atkinson, in support of the rule.—As the patient can be detained under the certificates of two medical practitioners, so he can be discharged upon the certificates of two medical practitioners. It is discretionary with the commissioners whether they will authorize the examination of the patient by two medical men under section 49; but if they so authorize the examination and the two medical practitioners certify that the patient may safely be discharged, then the discretion of the commissioners is at an end, and they are bound to act upon such certificates and order the discharge. In such a case the word "may" in the section must be construed as equivalent to "shall," and as imposing an obligation: *Julius* v. *Bishop of Oxford*.

CAVE, J.—I am of opinion that this rule must be discharged. It is quite clear that section 49 of the Lunacy Act, 1890, does empower the commissioners to order the patient to be discharged. But what the applicant for this rule has to satisfy us of is, that the section not only empowers the commissioners to so order, but that it requires them to so order, and he has entirely failed to satisfy us of that. The management of lunatics is committed in great measure to the commissioners, and the Legislature has appointed these commissioners, with the assistance of their medical advisers, to look after the care and safety of lunatics. That being so, it would be an extraordinary construction of the Act to hold that the Legislature should have superseded the commissioners altogether in favour of two medical practitioners with regard to whose election no rules whatever were laid down, the only requirement being that they should be persons of whom the commissioners approve. That cannot mean that the commissioners are to refuse to approve of any medical practitioners when they are not satisfied that such practitioners will take their view of the matter, consequently it requires no man of any particular ability or note, but merely the ordinary medical practitioner, against whose character and qualification as a medical practitioner nothing can be said. Upon receiving a certificate from a practitioner of this kind, though he may have no knowledge of lunacy, it is said that the Legislature intended to upset all they had done in the Act, and to take away from the commissioners the discretion which they are peculiarly fitted to exercise, and to give the power of setting the lunatic free upon the world, not to the commissioners, but to these two practitioners chosen without precautions being taken

as to what amount of knowledge they should have, or as to anything further than that they are medical practitioners of good character. I cannot conceive that could possibly have been the intention of the Legislature, and therefore it seems to me that Mr. Tindal Atkinson has entirely failed to show that there is a duty imposed upon the commissioners, as well as a power confided to them. If there is only a power confided to them it is one which they must exercise at their own discretion; and I entirely dissent from the view that, if it is a case of discretion the exercise of the discretion of the commissioners is to be brought for examination by this court before judges who know nothing about the matter in dispute, and who have no experience in dealing with lunacy matters. I am of opinion, therefore, that this rule ought to be discharged.

GRANTHAM, J.—I am of the same opinion.

Rule discharged.

Solicitors for applicant, *Robbins, Billing, & Co.*

Solicitor for the commissioners, *The Solicitor to the Treasury.*

House of Lords.

From C. A. (England). March 16.

HOOD BARRS *v.* HERIOT. (*a.*)

Married woman—Restraint on anticipation—Costs—Appeal—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 65), *s.* 2.

The court has no jurisdiction under section 2 *of the Married Women's Property Act,* 1893, *to order the payment of costs of an appeal by a married woman, being the defendant in the action, out of separate property which she is restrained from anticipating.*

Hood Barrs v. Cathcart (No. 3), 42 *W. R.* 633, [1894] 3 *Ch.* 376, *approved.*

This was an appeal by the plaintiff against two orders of Court of Appeal. The appellant had applied to the Court of Appeal for an order that respondent, a married woman, the defendant in the action, should pay the costs of an appeal by her from the High Court to the Court of Appeal, and that such costs should be payable out of her separate property, notwithstanding any restriction against anticipation pursuant to section 2 of the Married Women's Property Act, 1893; and had also appealed to the Court of Appeal against an order of Pollock, B., refusing an application by the appellant in chambers for an order that, pursuant to the final judgment of the House of Lords, the respondent should pay the costs of her appeal, and that such costs should be payable out of her separate estate, notwithstanding any restriction against anticipation according to the section in question. Both applications had been refused by the Court of Appeal.

Section 2 of the Married Women's Property Act, 1893, is as follows: "In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction to judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Appellant in person.—The court has jurisdiction under the 2nd section of the Married Women's Property Act, 1893, for this is a proceeding instituted by her, it being her appeal. To hold otherwise would be a narrow construction. An action is pending so long as any proceeding can be taken in it. This is really an appeal from the decision in *Hood Barrs* v. *Cathcart* (No. 3), 42 W. R. 633, [1894] 3 Ch. 376.

Lord HERSCHELL.—The question in the present case is whether the court has jurisdiction to order payment of the costs of an appeal, notwithstanding a restraint on anticipation, in the case of a married woman. The question depends on the construction of section 2 of the Married Women's Property Act, 1893. In the present case the action was not brought by the married woman, but against her. Judgment having been given against her, she then appealed to the Court of Appeal, and the question relates to the costs of that appeal.

It is said that, although the action was not brought by her, yet the appeal in the action was a "proceeding instituted" by her within the meaning of the section. I should myself perhaps feel no indisposition so to construe the section, if it were possible, because there seems nothing unreasonable in the view that if an appeal is brought by a married woman which never ought to have been brought, and thereby costs are occasioned, the court should have jurisdiction to deal with the matter. The section does not compel them to exercise that jurisdiction in any particular way; the matter is left entirely to their own judgment. But however reasonable one might think such legislation would be, I do not think it is possible so to construe the section which your lordships are now considering. If we were to hold that an appeal presented by a married woman is a "proceeding instituted" by her, then I do not think it would be possible to avoid holding that any proceeding taken by a married woman in the course of an action against her would be a "proceeding" within the meaning of the section. The court, in each of those steps she might take in an action brought against her, would have jurisdiction to enter upon this enquiry and to deal separately and independently with the costs of each of those "proceedings" under the section. I do not think that was ever intended, nor do I think that the words which the Legislature has employed are apt to give the court any such jurisdiction. The words "in any action or proceeding instituted" refer, I think, to an action or some other litigation initiated by the married woman. Unless the proceeding is one which initiates litigation, it seems to me that it is not a "proceeding" within the true intent and meaning of the section upon which reliance is placed. If that construction be the correct one—and it is the construction adopted by the Court of Appeal in *Hood Barrs* v. *Cathcart*—it follows that the appellant's appeal must fail. In my opinion, that construction is a sound one, and it is the only one which it is possible to put upon the section, even though one might not have been unwilling, if one could, to embrace other cases within the section.

For these reasons I move your lordships that this appeal be dismissed.

Lord MACNAGHTEN, Lord MORRIS, and Lord SHAND concurred.

Appeal dismissed.

Solicitor, Appellant in person.

(a) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

From C. A. (England.) April 7.

WELTON v. SAFFERY. (a.)

Company—Shares—Issue of shares at a discount—Winding-up—Adjustment of rights of contributories inter se—Companies Act, 1862 (25 & 26 *Vict. c.* 89)—*Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *ss.* 24, 25.

Under no circumstances, and for no purpose whatever, can a company incorporated with limited liability under the Companies Acts issue shares at a discount, or on any terms relieving the shareholders from payment in full. The issue of such shares does not therefore constitute a contract between shareholders, even for the purpose of adjusting their rights among themselves, although this is expressly authorized by the articles of association, and the creditors and costs of winding up have been provided for.

Decision of the Court of Appeal, 43 *W. R.* 117, [1895] 1 *Ch.* 255, *affirmed;* Lord Herschell *dissenting.*

Per Lord Davey.—*The obligation to contribute to the assets of the company in one way or another the nominal amount of the shares, is part of the statutory constitution of every joint-stock company limited by shares embodied in its memorandum of association, and therefore not alterable by the company or by the unanimous consent of all the shareholders.*

This was an appeal by Mr. Welton from an order of the Court of Appeal (Lord Halsbury, Lindley and A. L. Smith, L.JJ.) made on the 21st of November, 1894, reported as *In re Railway Time-Tables, &c., Co.,* 43 W. R. 117, [1895] 1 Ch. 255.

The facts are given at length in the judgments, and more particularly in that of Lord Herschell.

Swinfen Eady, Q.C. (*Eve, Q.C.,* with him), for the appellant.—The shareholders can determine their position as to what are to be preferential shares, &c., in the winding up. Why not insert a clause determining the order and preference on distribution as to any calls they should make? Preference as to shares and capital is lawful, therefore it is a matter of drafting. The articles express these terms. Sections 6, 7, 8, 14, 15, 16, 18, 23, 25, 38, 102, 109, 133, sub-sections 9 and 10 of the Companies Act, 1862. It is a mere matter of language to carry out this object. Nothing in the *Ooregum case,* 41 W. R. 90, [1892] A. C. 125, is against the view I am presenting. *In re Almada and Tirito Co.,* 36 W. R. 593, 38 Ch. D. 415, is no authority in present case. Nothing in *Trevor* v. *Whitworth,* 36 W. R. 145, 12 App. Cas. 409, is against my contention in this case. *Maxwell's case,* L. R. 20 Eq. 585; *In re Hodges' Distillery Co., Ex parte Maude,* 19 W. R. 113, L. R. 6 Ch. App. 51; *Birch* v. *Cropper,* 38 W. R. 401, 14 App. Cas. 525; *In re Weymouth, &c.,* 39 W. R. 49, [1891] 1 Ch. 66; *McKeown's case,* 25 W. R. 857, 6 Ch. D. 447; *Bangor's Claim,* 23 W. R. 785, L. R. 20 Eq. 59; were also cited or referred to.

Renshaw, Q.C., and *Whinney,* for the respondents.—A contract for issue of shares at a discount is invalid. The *Weymouth case; Hutton* v. *Scarborough Cliff Hotel Co.,* 13 W. R. 631, 4 De G. J. & Sm. 672; *In re Newtownard's Gas Co.,* 15 L. R. Ir. 51; *Burgess's case,* 15 C. D. 507; *In re Gibson,* 5 L. R. Ir. 139, 28 W. R. Dig. 40; *In re Addlestone Linoleum Co.,* 36 W. R. 227, 37 Ch. D. 191; and sections 24 and 25 Companies Act, 1867, were also cited or referred to.

Eady, Q.C., replied.

The House took time for consideration.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lord HALSBURY, C.—In this case a company limited by shares was duly registered in January, 1886. According to the memorandum of association its capital was to be £30,000, divided into 6,000 shares of £5 each. The memorandum also provided that there should be power to increase that capital and to issue fresh shares. Acting, apparently, on this power, in May and June of the same year the capital was increased to £40,000 and 2,000 additional shares of £5 each issued. One thousand four hundred of these shares were issued on terms which gave rise to the present litigation. Five hundred of these 1,400 shares were issued as fully paid up without having anything paid upon them at all, and 900 were issued as fully paid up when only 10s. per share was paid up. The company purported to do this under the terms of an article of association passed contemporaneously with the resolution itself, which provided that the directors might allot or otherwise dispose of the new shares thus created, to such persons, upon such terms and conditions, and at such times, as the directors thought fit, and either at a discount, premium, or otherwise. In March, 1892, the company was wound up, and Mr. Welton, who is the holder of a number of shares upon which nothing has been paid, and of shares upon which 10s. only has been paid, has been held liable to pay up the alleged existing liability on both classes of shares, notwithstanding they were issued to him pursuant to the authority purporting to be given by the 4th article above quoted, either as bonus shares because he subscribed for debentures, or as discount shares whereon 10s. each has been paid.

In respect of the liability to pay up the shares so far as it is necessary to satisfy creditors and the cost of winding up, I believe no doubt exists in the minds of any of this House. Since the *Ooregum Gold Mining Co's case* in this House it would be impossible to contend that that question is not covered by authority. But it is said that where the only object in making a call is to settle the rights of the shareholders *inter se,* the law laid down in the *Ooregum case* does not conclude the question.

I am unable to accede to that view. I think the Legislature, in permitting the existence of a company limited by shares and with limited liability, created a machinery out of which it is impossible by any expedient, either by company or shareholder, to act otherwise than in pursuance of the provisions of the statute. Whether for the purpose of settling the rights *inter se,* or for the purpose of satisfying creditors, it appears to me that the statute forces the company and shareholder alike to conform to the rule laid down, that a share for a fixed amount shall make the person agreeing to take that share liable for that amount. I think that is the decision in the *Ooregum case,* and though I am aware that a different view has been suggested where the question is not the payment of the debts of the company, but the settlement of the rights of the shareholders *inter se,* I am unable to see how this artificial creation, limited within its sphere of action by the statute under which it is created, can do anything contrary to the provisions of the statute. It is not a question for what purpose it is done. Dealing with it as I think it must be dealt with, as an artificial creation, it can only act as a company or as shareholder in either of those characters within the fetters created by the Act of Parliament.

It is said, and I think justly said, that people have been invited to take shares under an article of association which expressly provided that shares might be issued at a discount. It is, I think, hard for persons who have relied upon that assurance to find out that the article which authorized the issue of the shares at

a discount was *ultra vires* of the company, because it is in conflict with the memorandum of association which by the statute itself must determine the rights in that respect, but not the less on that account must one insist that the statute must be obeyed. If one were to suppose that the whole 6,000 original shareholders or persons who became shareholders by purchase in the market were to have agreed that these shares should only be regarded as having 10s. due upon them, each of them might perhaps against himself establish some contract by which the person agreeing with him in his individual capacity might have rights, but it would not be in his capacity as shareholder, it would be in his capacity as individual. The liquidator can only recognize shareholders, and their relation to the company of which they are shareholders must be regulated by the Act of Parliament.

The right to have a call made where it is necessary to adjust the rights between the different shareholders themselves, appears to me not less imperative than if only the creditors were in question. The supposed bar to such a proceeding is the agreement not to ask more than 10s. per share upon the discount shares, but the whole question goes back to the same point if the Legislature has prohibited that. There is no such agreement. The directors have no power to make such an article. The company *qua* company have no power to agree to such an article, and those who have taken shares and paid for them in pursuance of the Act of Parliament I think have a right to have the other shares paid up which the Act of Parliament has enacted shall be liable to that payment.

In truth, though in form reserved by the discussion in the *Ooregum case*, I think the *Ooregum case* does decide the question now in debate, and whether they were bonus shares upon which nothing was paid, or discount shares upon which 10s. only was paid, the holders of those shares are, in my judgment, liable to make good for any company purpose, the amount of the money which, upon the face of the share, they undertake to pay. I confess it seems to me, however hardly it may operate upon individuals, to be a just and right thing that those who have completely discharged their statutory obligations should have a right to call upon the other shareholders to do as the former have done and pay what is due upon the shares.

No question as to the preference shares is really in debate.

For these reasons I am of opinion that the order appealed from ought to be affirmed, and this appeal dismissed with costs.

Lord WATSON.—I need not refer in detail to the facts of this appeal, which are fully explained in the judgments which are yet to be delivered by my noble and learned friends. But I find it necessary to indicate briefly the considerations upon which my decision rests, because I apprehend that they are not altogether the same with the reasons which have influenced some of the noble and learned lords with whom I agree in result.

In dealing with the questions which arise for our decision, there appear to me to be two points which must be kept in view. The first of those, which is now beyond the range of controversy, is that the provisions of the Act of 1862, as they have already been interpreted by the House, make it unlawful for a company incorporated with limited liability to issue at a discount any of its shares, whether ordinary or preference. The second point, which has not, in my opinion, been definitely settled by authority, involves the construction of the enactments of section 25 of the Companies Act, 1867. The decision of the House in the *Ooregum Gold Mining Co.'s case* carries that construction thus far, that no member of a limited company who is not protected by a proper contract, duly registered in terms of section 25, can have a good defence against payment of such proportion of the nominal amount of his shares as has not been paid in cash, when payment is required by the liquidator for the purpose of meeting the claims of creditors of the company or the cost of liquidation.

The appellant is the holder of preference shares, which were issued at a discount, in pursuance of a power reserved to the company by its memorandum of association "to issue any shares in the original or in any new capital as preferential or guaranteed or deferred shares," and of power conferred upon the directors by its articles of association to issue new shares "upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of the assets of the company, and with a special or without any right of voting." I need hardly observe that a power expressed in these wide terms could give the directors no right to issue shares at a discount—a right which would be contrary to statute, even if it were expressly conferred by the memorandum of association. That proposition is not disputed by the appellant, who admits that if the call which is sought to be enforced in this case had been made upon him by the liquidator for the purpose of paying creditors or cost of liquidation, he would have been liable, notwithstanding the immunity purporting to be attached to the issue of his shares. But the call is not made upon him for either of these purposes. The creditors of the company have been paid in full, and the cost of liquidation has been provided for out of the assets of the concern and of calls made upon and responded to by the ordinary shareholders. In these circumstances the appellant maintains that the condition of immunity from calls, although ineffectual in law to the extent which he concedes, constitutes a contract valid *inter socios*, and binding upon the company and its ordinary members in all questions between them and the holders of these preference shares. Upon that ground he contends that he is not liable in any contribution in respect of his preference shares, because it is an admitted fact in the case that the sole object of the liquidator in making a call upon him is to repay to the ordinary shareholders money which they were under an obligation to pay so as to keep him *indemnis*.

I am not prepared to affirm that the enactments of section 25 of the Companies Act of 1867, which were certainly meant to give further security on payment to the creditors of the company, were also intended to take away, or even impair, any right to make future arrangements between ordinary and preference shareholders, through the medium of the company, in regard to the privileges to be borne by preference shares, which could have been lawfully made under the previous Companies Acts. No such arrangement can now be made, or, so far as I am able to judge, could ever have been lawfully made, to the effect of relieving preference shareholders of any part of their statutory liabilities to the creditors of the company. The rights and liabilities *inter se* of the members of different classes of shareholders, in relation to matters which do not concern or affect the interests of creditors, do not appear to me to stand in the same position. I can find no provision in the statute which either expressly or by implication enacts that ordinary shareholders desiring to raise

additional capital by the issue of preference shares may not through the company undertake that the sum required to pay creditors in liquidation, and the costs of liquidation, shall be charged primarily upon the unpaid capital which they are liable to contribute, and that no contributions shall be required from the preference shareholders for the purpose of reimbursing them, or for any other purpose than meeting debts and costs of liquidation. Assuming always that proper means are employed for accomplishing that object, it is, in my opinion, perfectly lawful. It is true that no arrangement can be made which trenches upon the rights conferred by statute upon creditors. But, in so far as concerns what may be described as the free assets of the company, meaning by that expression its surplus assets remaining after paying all debts and costs of liquidation, the sole interest is in the members who are the units of the incorporation. It has never, so far as I am aware, been disputed that a condition may be lawfully attached to the issue of preference shares to the effect that in the event of their being at any time funds available for the declaration of a dividend, these shares shall carry a higher, or it may be a lower, dividend than the original shares. And in like manner it is, according to my apprehension, a lawful condition that in the event of there being surplus assets when the company is wound up, such surplus shall be apportioned, according to any rule which may be agreed on, amongst the different classes of shareholders. The truth is that all these are domestic matters, in which neither creditors nor the outside public have any interest, and with which, in my opinion, it is the policy of the Legislature not to interfere. I desire to add that, in my judgment, when conditions for which due provision is made in the constitution of the company are sanctioned by its shareholders, and are inserted in the contract under which a preference shareholder accepts his shares, such conditions, if they be of the character which I have just indicated, will form an integral part of the contract, and be enforceable by the shareholder either against the company or its liquidator.

The difficulty which I have felt in this case is one which I casually encountered, without requiring to solve it, in *Ooregum Gold Mining Company's case.* In the present case my difficulty assumes this form: Do the three contracts under which the appellant's shares were issued and accepted contain a severable and valid condition that the holders of such shares shall not, in the event of the company going into liquidation, be liable to make any payment for the purpose of equalizing the contribution of ordinary and preference shareholders? In all these cases the resolution of the shareholders giving authority for the increase of capital and the issue of shares by the directors in pursuance of such authority are in practically the same terms. The authority given was to issue the shares at a discount, and, although part only of their nominal amount had been paid, they were issued by the directors as fully paid up. It does not therefore admit of doubt, and it is not disputed, that the issue of the shares on these terms, and the resolutions authorizing it were *ultra vires* of the shareholders, the directors, and the company. Viewed in its integrity, the condition that partly paid shares should be issued as fully paid-up was an absolute nullity, and so was the authority given to issue them on these terms. But the appellant argues that the condition, when resolved into its compound elements, must be held to comprise not a single stipulation but a whole nest of stipulations, one of which only—that which exempts the shareholder from liability for debts and costs of liquidation—is *ultra vires*, and therefore contrary to law. He accordingly maintains that whilst the condition must be disregarded in so far as it involves any stipulation which can be shown to be *ultra vires*, it must be treated as a valid and subsisting contract, protecting him against any and every kind of liability in respect of his shares from which the company, with the sanction of its members, could have given him exemption in express terms and by a separate and substantive condition.

I entertain considerable doubts whether, having regard to the terms of the condition and to the vice by which it is affected, it is capable of being dealt with in the manner proposed by the appellant; but I do not consider it necessary to determine that point. Apart from the rule of *ultra vires*, it appears to me that the contract is not one which can be so severed into parts. I find it impossible to speculate what form the arrangement might have assumed if the parties had at the time known and believed that the issue of shares at a discount was contrary to the statute law. The position of the appellant is no doubt a hard one, but it results from the original allottee of his shares having relied on a mistaken view of the law; and I am apprehensive that an attempt to sever the condition in the manner proposed might result in making a contract for the parties which they had not in their contemplation.

For these reasons I concur in the judgment moved by the Lord Chancellor.

Lord HERSCHELL.—The questions which arise in this case are of far-reaching importance. They concern not only the parties to this litigation, but the shareholders in many other public companies. The facts are somewhat complicated, because they relate to three different classes of shares held by the appellant. On the 5th of January, 1886, the Railway Time-Tables Publishing Co. was registered as a company, with limited liability. The original capital was £30,000, divided into 6,000 shares of £5 each. All the shares, with the exception of ten issued to the persons signing the memorandum of association, which were paid for in cash, were under a duly registered agreement allotted to the vendor to the company or his nominees, as the consideration for the transfer of the copyright, goodwill, plant, and stock-in-trade of his business. By a special resolution of the company, confirmed on the 11th of June, 1886, the capital was increased to £40,000 by the creation of 2,000 shares of £5 each. Of these, 600 were issued and paid for in cash, 500 as bonus shares, and 900 as discount shares. A second special resolution was confirmed on the same day, substituting new articles for those contained in Table A. To some of those it will be necessary presently to direct particular attention.

In July, 1886, the directors determined, for the purpose of raising funds which were required to carry on the affairs of the company, to issue debentures of £10 each to the amount of £3,000, bearing interest at six per cent., and to issue to the subscriber for each of those debentures two fully paid-up shares of £5 each. At an extraordinary meeting of the company held on the 29th of July, the action of the directors with reference to the issue of debentures was approved, and they accordingly issued debentures to the extent of £2,500, and two fully paid-up shares to each subscriber of £10. Contracts were entered into as to 490 of the 500 bonus shares, providing for their issue as fully paid-up, and such contracts were duly filed. By a special resolution duly confirmed on the 29th of November, 1886, the capital was further increased by £25,000 by the creation of 5,000 additional shares of £5 each. These shares were, in the first instance, offered to the existing shareholders

at the price of £1 per share. This proposal not having met with a satisfactory response, they were again offered at the reduced price of 10s. a share, and on those terms not only these 5,000 shares but also the 900 above alluded to as discount shares were allotted. By another special resolution of the company duly confirmed on the 10th of February, 1888, the capital of the company was further increased to £100,000, by the creation of 7,000 additional shares of £5 each entitled to a preferential dividend of seven per cent.; 1,680 of these shares were allotted to a Mr. Hoare, who was a creditor of the company in respect of debentures and otherwise; only a portion of these debentures, however, represented a present debt; it has therefore been held that no more than 1,112 of the shares can be regarded as fully paid, that 567 must be treated as wholly unpaid, and one with £2 10s. paid.

At the time when an order was made to wind up the company, the appellant was the holder of 215 of the bonus shares, as to 205 of which an agreement had been duly filed. He was the holder of 4,460 discount shares, as to 640 of which there were registered contracts. He also held 1,680 of the preference shares. Two calls have been made, amounting together to £2 15s. on the bonus, discount, and preference shares, for the purpose of satisfying the liabilities of the company and of paying the costs, charges, and expenses of and incidental to the winding up. As to these calls no question arises. Another call has, however, been sanctioned on these shares of £2 5s., the balance remaining uncalled, to enable the liquidator, by means thereof, to adjust the rights of the contributories *inter se*; in other words, to provide funds for the purpose of making repayment to the ordinary shareholders.

Before proceeding to consider what are the rights of the contributories *inter se*, it will be expedient to call attention to some of the provisions to be found in the memorandum and articles of association. By the former, power was taken to increase the capital and to issue any shares in the original or in any new capital as preferential or guaranteed or deferred shares. By the 4th article it was provided that the shares should be under the control of the directors, who might allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times, as the directors thought fit, and either at a discount, premium, or otherwise. By the 42nd article new shares were to be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors might determine, and in particular such shares might be issued with a preferential or qualified right to dividends and in the distribution of assets by the company. The 140th article is in these terms: "If the company shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

I will consider, in the first instance, the case of the shares issued at a discount—that is to say, the £5 shares which were issued as fully paid-up in consideration of the payment of 10s. per share. There can be no doubt after the decision in the case of the *Oregum Gold Mining Co.'s case* that the issue of the shares at a discount was so far invalid that it did not prevent the holder of them from being liable to contribute to the full amount of the shares for the purpose of paying the creditors of the company. Whatever the *dicta* bearing on the point, that case did not determine the question what was the effect of such an issue as regards the shareholders *inter se* in the case of a winding up of the company. The decision was mainly founded on the 8th and 38th sections of the Act of 1862 and on section 25 of the Act of 1867. A careful consideration of these provisions is essential to a correct view of the limits of the decision referred to.

The 8th section prescribes that in the case of a company formed on the principle of having the liability of its members limited to the amount unpaid on their shares, the memorandum of association shall state, *inter alia*, the amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount. This fixed amount is by section 38 to be the limit of their liability in case the company is ordered to be wound up. I think it very important to observe that the statement in the memorandum of association just mentioned, as prescribed in section 8, and to which so much weight was attached in the *Ooregum Gold Mining Co.'s case*, applies only to companies with limited liability. By the express terms of section 10 of the Companies Act, 1862, where a company is formed on the principle of having no limit placed on the liability of its members, the memorandum of association need not contain any such statement. This appears to me to show that the provision contained in section 8, sub-section 5, was enacted for the purpose of protecting the creditors of a company, the liability of the shareholders of which was limited. They were not to be liable beyond the fixed amount stated, but they were to be liable to that amount, and the design was that the memorandum should give notice to all who trusted the company of the extent of the members' liability. The enactment, in my opinion, does not and was not intended to determine the rights or liabilities of members of the company *inter se*. So far as regards the members of the company *inter se*, there were no more reasons for hampering them in any arrangements they might choose to make as to the interest they should have in the capital or assets of the company or as to the proportion in which they should share its profits or discharge its liabilities in the case of a limited than of an unlimited company. The 38th section provides that in the event of a company being wound up every member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with certain qualifications, of which the following is one: (4) "In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." It is to be observed that, apart from the qualifications, the enacting part of section 38 applies equally, whether the liability of the member is limited or unlimited. What the rights of the contributories amongst themselves are, for the adjustment of which members are to contribute the sums required, is not determined by any enactment of the Companies Act. It is not provided that, for the purpose of such an adjustment, every member shall be liable to contribute to the assets of the company such a sum as will make the payment of each member the same in respect of each share which he holds. How, then, are the rights of the contributories *inter se* to be ascertained? I

reply, from the terms of the articles of association of the company and the acts done by the company under the powers conferred by them.

In the absence of any provision to the contrary, it would no doubt be right to assume that every shareholder was intended to contribute an equal sum in respect of his share, and calls would be rightly made for the purpose of enforcing this equality. The statute, however, does not provide that the liquidator shall make calls for the purpose of equalizing the payments made by the contributories in respect of their shares, but only that he shall make them for the purpose of adjusting the rights of the contributories. What those rights are, and what payments must be made to adjust them, are left undetermined by the statute. It no more requires that, *inter se*, every shareholder shall contribute alike to the funds of the company, or share alike in the distribution of its surplus assets, than it does that shareholders who have contributed the same amount to its capital shall take the same share of the profits it earns. In the absence of any provision to the contrary, each shareholder could, no doubt, claim a share of the profits proportionate to the share in which he had contributed to the capital. But it is, of course, everyday experience that the articles of a company provide for preference shareholders who are to receive a certain payment out of the profits before the other shareholders receive anything.

I think, then, it is a fallacy to assume that the liquidator may in all cases make calls upon shareholders in order to equalize the payments in respect of all the shares. I can find no warrant for such proposition in the provisions of the statute; and for the reasons I have given it does not seem to me in the least to follow from the circumstance that every shareholder is, under the statute, liable to pay the amount unpaid on his share. What calls may be made in order to adjust the rights of the contributories *inter se* is, in my opinion, in no way determined by the decision in the *Oorequm Gold Mining Co.'s case*, that the holder of every share in a limited company is liable to pay in cash the amount of his share. It no more determines to what extent this liability may be enforced in a particular case to adjust the rights of contributories than it does to what extent it can be enforced for the purpose of paying the debts of the company and the expenses of the litigation. In the latter case the amount of calls which can be made, within the limit of liability, depends upon the amount of the debts and expenses; in the former upon the rights of the contributories *inter se*, whatever they may be. But the liability to pay the amount of the share fixed by the memorandum no more ascertains what those rights are than it does the amount of the debts and the expenses of the liquidation.

I have already drawn attention to the fact that the provision we are considering applies alike to unlimited and limited companies. How are the rights of the contributories any more determined by the fact that in the latter companies there is liability only to a certain amount than they are in the former case by the fact that the liability is without limit; or why in the one case more than in the other must calls be made, independently of the provisions of the articles for the purpose of equalizing the payments of the members?

Section 16 of the Act of 1862 provides that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles subject to the provisions of this Act. The articles thus become in effect a contract under seal by each member of the company, and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute, but, as I have said, the statute does not purport to settle the rights of the members *inter se*, it leaves these to be determined by the articles (or the articles and memorandum together), which are the social contract regulating those rights.

I think it was intended to permit perfect freedom in this respect. It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company, but the articles do not any the less, in my opinion, regulate their rights *inter se*. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives.

It is for this reason that I cannot agree with the view taken by the Court of Appeal in *In re Weymouth and Channel Islands Steam Packet Co.*, and which was pointedly put by Bowen, L.J., that, in order to maintain the proposition for which the appellant here contends it is necessary to imply a contract between the individual members apart from the provisions to be found in the articles. Nor can I agree that the contract made by those who take shares issued at a discount is an "illegal" contract, though it is no doubt ineffectual to enable the holder to escape from further calls for all purposes for which by section 38 of the Act contributions may be enforced.

It was not denied by counsel for the respondent that the articles might provide for different classes of shareholders having different rights—that, for example, members might be entitled to a preference in respect of dividend or in the distribution of the assets of the company. I can see nothing in the statute to prevent the articles of a company providing for any such differences in the rights and liabilities of the members *inter se* as may be thought expedient. Indeed, to take an example, section 24 of the Companies Act, 1867, expressly recognizes that a company may make arrangements, on the issue of shares, for a difference between the holders of such shares in the amount of the calls to be paid and in the time of payment of such calls.

There is nothing, in my judgment, in the 25th section of the same Act which militates against the view I have expressed. It provides that every share in a company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a duly filed contract. I do not question that the shares issued at a discount in the present case must be deemed to have been issued and to be held on those terms, but this does not determine the amount of contribution which the liquidator is entitled to require from a member. That must be ascertained by inquiring how much beyond what is necessary to pay the debts of the company and the expenses of winding-up is requisite in order to adjust the rights of the members *inter se*. The argument for the respondent involves the assumption that after the debts and expenses of winding-up are provided for, every member must be bound in respect of each share he holds to contribute an equal sum to the funds of the company in order to adjust their rights, an assumption for which I can see no warrant in the statute. I have, therefore, arrived at the conclusion that there is nothing to prevent

company providing by its articles that certain members or a certain class of members shall as between themselves and other members be entitled to equal share in the assets of the company, although they have made smaller payments in respect of their shares, and that they shall not be bound to contribute more than a specified amount, although this may be less than the amount which they are liable to contribute for the purpose of paying the debts of the company and the expenses of winding-up.

The next questions which arise are, have the company done so in the present case, and how ought the rights of the members amongst themselves to be adjusted? The articles of the company distinctly authorized the directors to issue the shares at a discount—that is to say, on the terms that on payment of less than their full amount they should be treated as fully paid up; and they were issued on the terms that the person taking them should not be liable to pay more than 10s. per share in respect of them. At the time this was done there was judicial authority for the view that this could lawfully be done even to the extent of exonerating the holder from further liability for the purpose of satisfying the debts of the company. There can be no doubt that both those who took the shares and the other members of the company intended and anticipated that no further call should be made upon them. In so far as the claims of creditors are concerned, it has since been held that the provisions of the statute render the attempt thus to limit the liability to something less than the amount of the shares nugatory, even though all the members of the company had expressly determined that this should be done. But is there anything to prevent its being binding so far as the members themselves are concerned? If I am right in thinking that a company might be constituted with articles providing for this result, I can see no reason why the article providing for the issue of shares on which no more than a special sum was to be paid, should not be binding in respect of shares issued on those terms upon all members of the company. Why should members who have become as much bound by the articles as if they had executed them under seal, in accordance with the provisions of which shares have been taken on the terms that no more than 10s. should be paid in respect of them, be allowed to say that, to adjust their rights and to diminish their loss, or even put money in their pockets, further payment should be required? It would be, I think, much more consonant with recognized principles to hold the members bound, and the transaction valid, in so far as the statute does not invalidate it. Any other conclusion would lead, in many cases, to grievous injustice where companies and their members have acted in good faith, but under an erroneous view of the law. In the present case, for example, it may be that the original shares, or some of them, are still held by the vendor to the company to whom they were allotted as fully paid up, so that a member who has come in when the affairs of the company were desperate would be compelled to find money to provide for a cash payment to the vendor, whose business turned out so unprofitable. Or, again, the shares may have been bought by the present members for 10s. a share, and the contribution of the holder of discount shares might more than recoup this amount. If the statute compels such results, we must not shrink from construing it correctly because this construction would lead to injustice. But if, without violating any legal principle, this can be avoided, I think it ought to be done.

I may here observe that the clause of the articles which provides for the distribution of the surplus assets, and which requires that they shall be distributed so that the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them, was "to be without prejudice to the rights of the holders of shares issued upon special conditions."

I do not think that if the holders of discount shares are right in their present contention, it follows that they would be entitled to be recouped out of the contributions of the other members the sums they have been compelled to pay for the discharge of the debts of the company. It is one thing to say that they are not bound to make a contribution merely for the benefit of the other members, that these possess no rights for the adjustment of which this is necessary, and another thing to imply an obligation on the part of the other members to make good any sums which the discount shareholders are, under the provisions of the statute, held bound to pay.

I do not feel pressed by the difficulties which it is suggested would flow from such a conclusion. It is part of the social contract that the holder of a discount share should be entitled to participate in the assets of the company equally with shareholders who have fully paid up their shares or become the holders of fully paid-up shares. No shareholder can be compelled to pay more than the nominal amount of his share. But if at the time of the winding up there be shares with a liability upon them, I cannot see why this liability should not be enforced to the full before the holders of these shares are entitled to participate equally in the distribution of surplus assets with those whose shares are, by the contract *inter socios*, to be treated as fully paid up. I cannot see what wrong will in any case be done to the shareholders other than the discount shareholders by the conclusion, which I think logically sound. On the contrary, they might in certain cases even obtain an advantage for which they did not bargain.

I have hitherto confined my consideration to the discount shares, but all that I have said is, in my opinion, equally applicable to the bonus shares allotted to the subscribers for debentures. The allotment of such shares was part of the consideration of a loan to the company, without which it would not have been made. Granting that in spite of this the holders are liable to contribute up to the amount of their shares for payment of the debts of the company, why should the other members be able to say that in order to adjust their rights as against these holders they should be compelled to make a further contribution?

I do not think that the preference shares issued as part of the consideration for the extinction of a debt of £13,402 can stand on a different footing. The directors had power under article 4 to issue shares on these terms so far as the members could give it.

I think the judgment ought to be reversed.

Lord MACNAGHTEN.—In the liquidation of the Railway Time-Tables Publishing Company, Limited, the position of affairs is this: The list of contributories has been settled, and there is no application before the court seeking to have it rectified. By means of calls made in the winding up all the debts of the company have been paid, and costs and expenses of the liquidation have been provided for. And now it is proposed to make a further call for the purpose of adjusting the rights of the contributories amongst themselves.

The original capital of the company was £30,000, divided into 6,000 shares of £5 each. On three occasions additions were made to the capital until, at last, it reached £100,000. All the shares were of the same nominal amount, and all were ordinary shares

except those of the last issue, which were intended to carry a preferential dividend. With the exception of ten shares taken by the subscribers to the memorandum of association, the whole of the original capital was issued as fully paid-up under a duly registered contract in consideration of property made over to the company; 600 shares of the second issue were paid up in cash. The remainder of the capital was dealt with in a less regular manner. To induce persons to take debentures two ordinary shares, nominally paid up in full, were offered by way of bonus with every £10 debenture. Other shares were issued at a discount of ninety per cent., so that a £5 ordinary share, nominally paid up in full, was to be had for 10s. Then, in July, 1890, more than a year and a half before the liquidation commenced, a circular was sent by the directors to the holders of discount and bonus shares, calling their attention to recent decisions "under which," it was stated, "it would appear that certain liabilities are, in law, attached to these shares." The holders of discount shares were recommended to exchange them for preference shares at the rate of ten discount shares for one preference share; the holders of bonus shares were advised to surrender them to the company. These suggestions, however, were not adopted by the appellant, who was a large shareholder holding bonus shares and discount shares, as well as preference shares. All his shares were entered on the register as fully paid, and he continued to hold them all until the winding up. Upon the facts being then investigated, he was placed on the list of contributories in respect of 215 bonus shares, as the holder of shares on which nothing had been paid, and in respect of 4,460 discount shares, as the holder of shares on which there remained a liability of £4 10s. per share. There were, besides, 1,680 preference shares standing in his name. The chief clerk certified that they were all fully paid. Kekewich, J., however, decided that only 1,112 were fully paid, and that of the rest one was paid to the extent of £2 10s., while 567 were wholly unpaid. The appellant, having duly paid the former calls, objects to the call now proposed, on the ground that the shares standing in his name ought, by reason of the terms on which they were issued, to be treated as fully paid-up to the extent not required for the payment of the company's debts and the costs and expenses of liquidation.

Whatever colour there may be for the appellant's contention in regard to his bonus and discount shares, there can be none, it seems to me, in regard to his preference shares. They were not issued on special terms at all. They were meant to be paid for in full in the ordinary way. But it was held by the learned judge that the consideration for which they were issued could not be treated as payment in cash, and that if it amounted to payment in any other form there was no registered contract to satisfy the requirements of the Act of 1867.

As regards the shares which the directors purported to issue on special terms, it would perhaps have been more regular, and certainly it would have raised the question more plainly, if, instead of merely resisting the liquidator's summons, the appellant had made a substantive application asking the court to rectify the list of contributories or to make a declaration in his favour controlling its effect. Anyhow, the burthen lies upon him. It is for him to show that he has some equity clear enough and strong enough to relieve him from the ordinary consequences of his present position.

In the present state of things the application of the liquidator would seem to be a matter of course. It stands unchallenged on the records of the court that some of the contributories have discharged in full their obligation to the company, while others have not done so. Why should not those who have paid more than their proportionate share of the general liability call upon those who are behindhand for contribution? It was said that the statute does not in terms provide that calls are to be made for the purpose of equalizing the payments of members. That is quite true. The right to contribution does not depend on statute any more than it depends on contract. It is one of the plainest of equities; and although no doubt in the case of limited companies where there are successive issues of capital it may sometimes operate unexpectedly, and perhaps even harshly, on shareholders who come in at the very last moment, the apparent hardship is really due to their own want of prudence.

Why, then, I ask, is the appellant to be relieved from the obligation of contributing his proportionate share of the losses of the undertaking? It was said that there was a "social contract" to which effect ought to be given now that the rights of creditors are out of the way. There, as it seems to me, lies the fallacy. How was the supposed contract made? Who gave the requisite authority for making it? Not the company, nor the shareholders, nor any representative body of shareholders. It is beyond the powers of a limited company to limit the liability of shareholders in a manner inconsistent with the conditions of the memorandum of association. The directors, therefore, had no authority from the company to issue shares at a discount, or on any terms relieving the shareholder from liability to pay in full. The shareholders had no power to authorize the directors to do on behalf of the company that which the company itself could not authorize them to do. The articles of association no doubt empower the directors to issue shares on such terms as they think fit; but that must mean, of course, on such terms as they think fit consistently with the provisions of the Companies Acts. The articles in express terms purport to authorize the directors to issue shares at a discount. That provision, however, is in contravention of the Companies Act, 1862, and simply void; neither the company nor the shareholders, even if they had been unanimous, could have empowered the directors to do anything of the kind. If the directors acted without authority, how can their action bind those who are supposed to have given them authority, but who, in fact, gave them none? The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company; but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law; and the whole thing was void. The company, however, improperly placed the names of the discount shareholders on the register, and they allowed their names to remain there until their remedy against the company was gone; and now they cannot be heard to say that they were not shareholders.

Your lordships were reminded that there was a judicial decision, for several years unreversed, which sanctioned the issue of shares at a discount. That is so. But it must be remembered that at the time when that decision was pronounced the current of authority had drifted somewhat away from the true principles of the Act of 1862. As soon as those principles were re-asserted and re-established by your lordships' House in *Trevor* v. *Whitworth*, it became

clear again—clear, I think, beyond argument—that the shares of a company limited by shares could not be issued at a discount. The issue of shares at a discount is just as much an unauthorized reduction of capital as the purchase by a company of its own shares. And so it was held by the Court of Appeal in the *Almada and Tirito case*, and afterwards in this House in the *Ooregum Gold Mining Co.'s case*. Speaking for myself, I must say I do not think that the *Ooregum case* laid down any new law. It was no new departure. The governing principle is stated as plainly and as emphatically in *Dent's case*, L. R. 8 Ch. App. 768, in 1873 by the Lord Chancellor (Lord Selborne), as it was by any of the noble and learned lords who took part in the *Ooregum case* in 1892.

Holding, as this House afterwards held in the *Ooregum Gold Mining Co.'s case*, that the memorandum of association of a limited company has the effect of prescribing as well as of limiting the liability of it members, Lord Selborne points out, as has been pointed out over and over again, that, with certain exceptions not material for the present purpose, section 12 of the Act of 1862 forbids any alteration in the conditions contained in the memorandum. "It is," says his lordship, "quite certain that, under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void." Nothing can be more to the point than that. So far the *Ooregum Gold Mining Co.'s case* goes: but it was not, I think, meant to go further. And, indeed, several of the noble and learned lords who took part in the judgment in that case guarded themselves against being supposed to determine or prejudice the present question. It may be that the principle on which the decisions in *Dent's case* and the *Ooregum case* proceed leaves little room for the appellant's contention. Still, if it could be shown that the appellant has any equity to be relieved from further liability—if the court could be "satisfied of the justice of the case," to use the words of the Act of 1862—I do not think the decision in the *Ooregum case* would be a fatal bar. Nor, with all deference to the view thrown out by the Court of Appeal in the case of *In re Weymouth and Channel Islands Steam Packet Co.*, would it be a sufficient objection that the contract, if there be a contract, was one with the company and not with the shareholders. If directors, being duly authorized in that behalf, invite persons to take shares on certain terms varying the rights of members *inter se*, acceptance of the invitation must, I think, establish a contractual relation between the members themselves. But really all the arguments urged on behalf of the appellant, however they may be presented—and they were presented in various ways—must go back to contract as the foundation and starting-point. It was said, and said truly, that the directors might have issued shares with a preferential right as regards capital in the event of winding up, in which case the ordinary shareholders would have had no right to contribution, and then it was urged that to that extent, at any rate, effect should now be given to what was described as the intention of the parties. I could have understood that argument if I could have found a contract. It may well be that one party to a contract cannot escape from his obligations by pleading incapacity to perform them in full if the other party is willing to take something less than that which he bargained for. But if there is no contract, but only an agent acting without authority, I cannot see what equity there is to compel a principal to submit to one set of conditions because his agent has attempted ineffectually to bind him to another and a different set; nor is the case of the party disappointed by reason of the agent's want of authority, bettered by the circumstance that the relief he is seeking is not only different from but inconsistent with the position he would have occupied if the authority of the agent had been sufficient.

Some things were introduced into the discussion which are hardly matters of argument. It was said that if effect were to be given to the view of the Court of Appeal it would lead to great hardship in many cases. Perhaps it may. There is plenty of hardship in almost every case of winding up. But I must say I cannot see any particular hardship in the present case. The appellant was warned in time, but he chose to disregard the warning. If a man will remain on dangerous ground after he has been told of the risk, I do not think he has much reason to blame the persons who invited him there, especially when those who gave the invitation did their best to set things right by giving warning in time. Then it was said that some of the members now claiming contribution may have bought their shares in the market for less than the price asked from the discount shareholders. But surely the owner of a thing, whether he has paid much or little for it, is entitled to all the rights attached to it. It was said, further, that some of the claimants were the very persons who sold to the company the property which has turned out such a disastrous bargain. Can your lordships go into that matter? There is no evidence that the company gave too much for the property they bought. The failure of the company proves nothing. Is it not enough that the shares were, in fact, fully paid, and the honesty of the transaction is not impeached? These are small matters, and hardly, I think, worth noticing. But the question before the House is very serious and very important. It would be, I think, much to be regretted if your lordships were compelled to yield to the arguments of the appellant. These companies are the creature of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors, perhaps even more; shareholders are not partners for all purposes; they have not all the rights of partners; they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act. A limited company cannot in matters within the conditions of its memorandum go on leading, as it were, two lives, one strict and precise and regular, and the other a life of greater freedom and laxity, substituting the easier yoke of "social contract" for the rigour of statutory directions. The confusion would be hopeless. Take the present case as an example. The questions are comparatively simple when you get to a winding-up; but in the meantime, what is the position of a so-called discount shareholder? Can calls be made upon him? If so, can calls be made to develop the business or only to meet the demands of creditors? Has he any right of recourse against the other shareholders? Then how about transfer? The directors could not allow these shares to be transferred on a certificate stating that they were fully paid, or they—see *Hirsche* v. *Sims*, [1894] A. C. 654, 43 W. R. Dig. 36—would be the only persons liable for the breach of trust in issuing them as fully paid. It is not necessary, I think, to pursue this point further. It seems to me that you would be met by practical difficulties at every turn if

you were to accede to the view presented by the appellant.

I am of opinion that the judgment must be affirmed.

Lord MORRIS.—I am of opinion that this appeal should be dismissed.

I see nothing to limit the application of section 25 of the Companies Act, 1867, to the case of a creditor and the company—it applies as much to a shareholder or sets of shareholders and the company. It is general in its terms, applying to all cases of the issue of shares. Any agreement or resolution of the company to issue shares on terms short of full payment was consequently illegal—and the liquidator is bound to bring the appellant's shares to the same level of payment as the other shareholders by making a call for the purpose of levelling up. This appears to me clear on the statute, and to be the principle decided in the *Ooregum case*.

I entirely agree with the full reasons for arriving at this result which my noble and learned friend Lord Davey is about to read, and which I have had the advantage of seeing.

Lord DAVEY.—The Railway Time-Tables Publishing Co. (Limited) was registered on the 4th of January, 1886, under the Companies Acts as a company limited by shares. The memorandum of association contains the following clause: "The capital of the company is £30,000, divided into 6,000 shares of £5 each, with power to increase the capital and to issue any shares in the original or in any new capital as preferential, or guaranteed, or deferred shares." I do not know what was meant by "guaranteed shares," as distinguished from "preferential," and no explanation of that term has been offered at the Bar. No articles were registered with the memorandum. The regulations adopted for the conduct of the affairs of the company were, therefore, in the first instance, those contained in Table A in the first schedule to the Companies Act, 1862. All the original shares (except the ten subscribed for in the memorandum) were issued to the vendor as fully paid up under a registered contract, and it is not disputed that they were rightly so issued. They have been dealt with, and large numbers of them are in the hands of the general public.

By a special resolution passed and confirmed on the 25th of May and the 11th of June, 1886, the capital was increased to £40,000 by the creation of 2,000 additional shares of £5 each. Of these shares 600 were issued and paid up in cash, 500 were issued as what is called "bonus shares," and the remaining 900 were issued as what is called "discount shares." By a second resolution, passed and confirmed on the same dates, new articles of association were adopted in place of Table A. The material articles for the present purpose are those numbered 4, 41, 42, and 140, which are in the following terms:

4. "The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such person on such terms and conditions, and at such times, as the directors think fit, and either at a discount, premium, or otherwise."

41. "The company may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient."

42. "The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company, and with a special, or without any, right of voting."

Article 140 provides for the distribution of surplus assets in course of a winding-up in a manner not apparently differing from the usual way, and concludes with these words: "But this clause is to be without prejudice to the rights of holders of shares issued upon special conditions."

The bonus shares were issued to subscribers for debentures in the company as fully paid-up, without any consideration in money or money's worth except the subscription for the debentures. The discount shares, after being offered to the existing shareholders at the price of £1 per £5 share, were issued to Mr. Henry Hoare as fully paid up, in consideration of the payment of 10s. per share, or (in other words) at a discount of £4 10s. per share. Mr. Welton, the present appellant, is the holder of 215 discount shares, which he acquired for a nominal consideration from Hoare. As to 205 only of these shares agreements were duly filed in accordance with section 25 of the Companies Act, 1867. The appellant has been placed on the list of contributories for the whole of these 215 shares as wholly unpaid. The appellant is also the holder of 4,460 discount shares which he also acquired from Hoare for a nominal consideration. As to 460 only of these shares agreements were filed. The appellant has been placed on the list of contributories as the holder of 4,460 shares, upon which £4 10s. remains unpaid. There was a further issue of preference shares, some of which were held by the appellant, but as to these the question is a different one, and I will mention it later.

Calls have been made in the course of winding-up on the bonus and discount shares, the proceeds of which (it is assumed) are sufficient for the payment of the debts of the company and the costs of winding-up. The liquidator now proposes to call up the balance of £2 5s. per share on the bonus and discount shares, for the purpose of adjusting the rights of the contributories *inter se*.

The appellant disputes the right of the liquidator to make the call for that purpose, and contends that, as between him and the other shareholders, his shares should, by reason of the terms on which the same were issued, be treated as paid up to the extent not required for payment of debts or costs of winding-up. This contention has been rejected by Kekewich, J., and by the Court of Appeal, following the previous decision of the latter court in the *Weymouth Steam Packet Co.'s case*.

The appellant's case was argued with great ability, and, as presented by his counsel, it had not only an appearance of plausibility, but an attractive air of fairness and good faith. He argued that, as between themselves, the shareholders were bound to give effect to the contract upon which the appellant had become a shareholder so far as they legally could do so, and although that contract could not have effect given to it as against creditors, there was no legal principle which should prevent the court from giving effect to it in a question *inter socios*; and, further that the rights of contributories *inter se* must be determined with reference to that contract. A full consideration of the case since the argument, has satisfied me that we cannot accede to the appellant's contention consistently with what has been decided by this House in the *Ooregum Gold Mining Co.'s case* and the settled principles of law applicable to joint stock companies incorporated with limited liability. The question now before the House was, it is true, left open in the *Ooregum case*, but the solution of it seems to me logically and necessarily to follow from what was decided in that case.

Let us ask what is really meant by the issue of a share at a discount? It means that although less than the nominal amount, or even (as in the case of

the bonus shares) nothing whatever, has been paid up on the share, it is to be treated for all purposes of the company, and to be placed on the same footing as regards the rights of the shareholders, as if it had been fully paid up in cash. The consequence as regards the distribution of surplus assets in case of a winding-up would seem to be that the discount shareholder would have the right (*a*) if all the other shares were fully paid up to participate in the surplus in proportion to the shares; or (*b*) if some of the other shares were not fully paid up, to require a call to be made upon them, and to have the proceeds of such call distributed as surplus assets, or (which is the same thing) to have the difference between the amount considered as paid up on the discount shares and the amount actually paid up on the cash shares paid to the discount shareholder before any distribution of the residue of the surplus assets. In the present case, the appellant is resisting a call upon him, but the extent to which his argument must necessarily go in other conceivable cases should be considered. If the contract that no call shall be made upon the discount shareholders is valid as against shareholders, although not as against creditors, the result would also seem to be that the discount shareholder would be entitled to be recouped the calls which he had been obliged to pay contrary to the contract out of surplus assets before distribution, and then to participate *pari passu* in the ultimate residue (if any). If this be not so, the amount of calls which the holders of discount shares have to pay would depend on the promptness with which the liquidator might be able to realize the assets and pay the debts out of them, instead of making a call. Counsel for the appellant, in answer to a question which I took the liberty to ask, said that the company might make calls on the discount shares while the company was a going concern. But why? If he had had the courage of his argument, he would have replied "No," because the creditors have no rights whilst the company is a going concern except to sue the company, and the question is then entirely one *inter socios*. In short, the argument (in my judgment) must be that, except for the purpose of payment of debts and costs on a winding up, no call can be made upon a discount share beyond the specified amount, and, as between themselves, the contract is that no calls shall be made on the shares in question.

Now let us see what was decided in the *Ooregum Gold Mining Co.'s case*, and what was the basis of the decision. It was, in the first place, held in this House that the capital mentioned in the memorandum was intended to be the real capital of the company—that is, the capital represented by money or money's worth, and not merely the nominal capital for the purpose of fixing the proportionate rights of the members *inter se*. And it was further held that section 8 of the Companies Act, 1862, requiring the memorandum to contain the amount of the capital divided into shares of a fixed amount, combined with the statutory limitation of liability in section 38 (*a*), is equivalent to a statutory requirement that such fixed amount shall be payable in money or money's worth. "It seems to me," says the Lord Chancellor, "that the system thus created, by which the shareholder's liability is to be limited by the amount unpaid upon his share, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with the shareholders that they should not be liable for the amount unpaid on their shares, although the amount of their shares has been in accordance with the Act of Parliament fixed at a certain sum of money."

It is, therefore, in my opinion, conclusively decided that the obligation to contribute to the assets of the company in one way or another the nominal amount of the shares is part of the statutory constitution of every joint-stock company limited by shares, embodied in its memorandum of association, and therefore not alterable by the company or by the unanimous consent of all the shareholders. It is a liability which the company cannot release or relieve the shareholder from. On the one hand, there is the liability to pay; and on the other hand there is the correlative right of every shareholder to insist on the due performance of the conditions of the memorandum.

It is familiar law that no article can be valid or binding upon the shareholders which is in conflict with the memorandum or with the general law. Nor does it admit of doubt that shareholders equally with creditors have the right to invoke the conditions contained in the memorandum and resist any infraction of them; and, in fact, until the winding-up takes place a creditor has no right to do so. That was the principle on which both the cases of *Hutton* v. *Scarborough Cliff Hotel Co.* were decided. Doubts have been entertained as to the correctness of the decision in those cases, and it has been thought that the priority between existing shareholders and the holders of new share capital created under a power is one of those matters of internal management which, if not expressly settled by the memorandum, may be settled by the articles. Dissent from the decision in the second case of *Hutton* v. *Scarborough Cliff Hotel Co.* has been expressed by one of your lordships in this House—Lord Macnaghten, in the *British and American Trustee and Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 416, 417—and it has recently not been followed in the Court of Appeal—*Andrews* v. *Gas Meter Co.*, *ante*, p. 321, [1897] 1 Ch. 361. In this case there is no doubt, after the decision in the *Ooregum case*, that the obligation to pay up the amount of the shares flows from and is part of that which the Act requires to be stated in the memorandum, and the shareholders have a right to the performance of that condition.

The social contract is to be found not in the articles alone, but in the memorandum and articles, and as much in the former document as in the latter. Therefore, in the ultimate adjustment of their rights *inter se*, which takes place before the final dissolution of the company, regard must be had to the primary obligation of every contributory to contribute the amount of his share to the assets of the company, and according to the ordinary principle of equity the contributories have the right to have the adjustment made on the basis that all have satisfied or will satisfy their primary obligation to the company. I do not think that any article or regulation of the company which ignores that primary liability or purports to provide for the adjustment of their rights on any other basis could validly be made, because it would be inconsistent with the memorandum as interpreted by this House. This opinion, I should observe, is perfectly consistent with a regulation being made for priority to certain shareholders on the distribution of surplus assets when ascertained and got in. But no contributory can take or retain anything out of the surplus assets until he has satisfied his primary obligation either by payment of or being debited in account with the amount remaining unpaid on his shares.

If this reasoning is sound, there is, in my opinion, an end of the appellant's case, because so much of article 4 as purported to empower the directors to issue shares at a discount is *ultra vires* the company altogether, and everything purporting to have been done under it is a nullity as against both shareholders and creditors in a winding-up. Article 140 must be

read as applying only to special conditions which the company could legally attach to shares. No shareholder can derive any right as against his co-shareholders, or to have assets distributed otherwise than in accordance with law from an act of the directors or the company which is *ultra vires*.

But it is argued that the company might have done the same thing in another way—for example, if they had conferred on the bonus and discount shares a preference in distribution of capital which was within their powers. My present opinion is that in the particular circumstances of this case such a provision would probably have worked out the same result, although by a different road, as issuing the shares at a discount, but liable to calls for payment of debts. But I have already shown that in other perfectly conceivable circumstances the result would have been widely different, and the holders of the discount shares (if valid) might be entitled not only to be preferentially recouped out of surplus assets the calls they had paid, but also to participate in any remaining assets on the footing that their shares were paid up in full, or to have calls made upon other shareholders for the purpose of adjusting their rights, although they had not themselves, in fact, contributed towards the company's assets. I cannot, therefore, agree that the company could have done the same thing as issuing the shares at a discount *inter socios* in another way, and I think they could not. However, the company did not make the contract for attaching a priority to the shares. What the directors purported to do was to issue these shares free from liability for calls (altogether or beyond 10s. per share), and they no doubt believed they could do so, and intended to do so. It appears to me that it would be contrary to principle and unsound to split up a contract made *alio intuitu*, and convert it into a very different contract which the parties never thought they were making, because the contract as made cannot be carried into effect, but a similar result might in certain circumstances, and to a limited extent, be arrived at in a different way. Such a proceeding would not be giving effect to the contract, but making a new contract.

Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an *exceptio personalis* against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders. There is no suggestion here of any such private agreement outside the machinery of the Companies Acts. The parties interested in opposing the appellant seem to be the present holders of the original shares and of the new shares issued for cash. They may or may not be the same persons as were holders of shares at the time of the issue of the bonus and discount shares.

In the view that I take it is not necessary to decide the point; but I am of opinion, having regard to the language of section 25 of the Act of 1867, that the appellant could not have succeeded according to any view of the law as regards those bonus and discount shares, in respect of which no agreements have been filed.

There is a third class of shares mentioned in the case as preference shares. These shares were apparently issued as cash shares, and the contest has been whether they were in fact paid up. By an order of the 14th of June, 1893, some of the appellant's preference shares were declared to be fully paid, others wholly unpaid, and one to be paid to the extent of £2 10s. There is no appeal against this order, and I fail to understand what question can now arise respecting these preference shares.

I am therefore of opinion that the appellant has failed to show any special conditions attached to the issue of any of the three classes of shares held by him of which the court can take cognizance, and the rights and interests of himself and his co-contributories must be determined and adjusted on the basis that the appellant as well as the other contributories have contributed or will contribute the full amount of their shares to the company's assets. The appeal should, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Slaughter & May.*

Solicitor for the respondent, *C. T. Whinney.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — April 8.

PEARCE v. GARDNER. (a.)

Contract—Memorandum in writing—Letter—Envelope—Statute of Frauds, s. 4—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

Where a letter, which is relied on as a memorandum in writing of a contract to satisfy section 4 *of the Statute of Frauds or section* 4 *of the Sale of Goods Act,* 1893, *does not itself contain the name of the person to whom it is written, but is proved to have been sent enclosed in an envelope addressed to that person, the letter and the envelope ought to be considered as one document.*

Application for judgment or a new trial in an action tried before Grantham, J., and a jury.

The plaintiff sought to recover damages for breach of an alleged contract on the part of the defendant to sell to the plaintiff a bed of gravel for £60.

The question was whether there was a sufficient memorandum in writing of the contract to satisfy section 4 of the Statute of Frauds or section 4 of the Sale of Goods Act, 1893.

The plaintiff relied on a letter signed by the defendant and received by the plaintiff through the post. It commenced with the words "Dear Sir," and did not contain the plaintiff's name, but it was sent enclosed in an envelope addressed to the plaintiff. The jury found that the letter contained all the material terms of the contract.

Grantham, J., gave judgment for the plaintiff.

The defendant applied for a new trial or judgment.

Blake Odgers, Q.C., and *H. A. Forman*, for the defendant.

Atherley-Jones, Q.C., and *Compton Smith*, for the plaintiff.

Lord ESHER, M.R.—The question is whether the letter and the envelope can be considered as one document. I adopt that which is said in Dart on Vendors and Purchasers (6th ed.), p. 253: "In the case of a letter, if the name of the party to whom it is addressed appear in an indorsed direction, or be written at the foot of the letter, no difficulty on the above point can arise: if an envelope be used, the name may often not appear in the letter; but the

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

court, it is conceived, would receive evidence connecting the envelope with the enclosure." In my opinion we must hold that the letter and the envelope constitute one document. There is, therefore, a sufficient memorandum in writing, and the appeal must be dismissed.

LOPES and CHITTY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Hicklin, Washington, & Pasmore.*

Solicitors for the defendant, *Grundy, Izod, & Grundy.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) March 13, 15; April 5.

In re WILLIAMS.
WILLIAMS *v.* WILLIAMS. (*a.*)

Will—Construction—Absolute gift in confidence—Precatory trust—Condition.

Where a testator gave his residuary estate to his wife absolutely in fullest confidence that she would carry out his wishes—viz., during her life pay the premiums on a policy on her own life (which was her own property), and at her death bequeath the moneys arising therefrom, and also from another policy on the testator's life, to his daughter,

Held (Rigby, L.J., dissentiente), *that the words "in fullest confidence" were only an expression of desire on the part of the testator, and that the wife therefore took the residuary estate free from any obligation either by way of precatory trust or of condition.*

Appeal from a decision of Romer, J.

The question involved was whether, on the construction of the testator's will, his widow was bound to bequeath the moneys arising from two policies therein mentioned to her daughter, or whether she had a discretion in the matter.

The will is fully stated in the judgment of A. L. Smith, L.J., and it is enough to say here that the testator gave his residuary estate to his wife absolutely, in the fullest confidence that she would carry out his wishes—namely, keep up the premiums on a policy of £1,000 on her life, and which was her own policy, and by her will bequeath to their daughter all moneys payable on the same as well as the moneys payable on a policy of £300 on the testator's life. The testator's own policy, apart from the £300, was worth more than the moneys payable on the £1,000 policy.

On the death of the testator his wife took possession of his property. She died in 1896, having by her will bequeathed the £300 policy to her daughter, but left the £1,000 policy away from her. The daughter claimed the money from her mother's executors.

Romer, J., held that there was no obligation on the mother to leave the £1,000 policy to her daughter, and from this decision the daughter appealed.

Neville, Q.C., and *Arthur Rutherford*, for the appellant.—This is a precatory trust. The law is well settled: *Wright* v. *Atkyns*, 1 T. & Russ. 143, at p. 157; *Wood* v. *Cox*, 2 My. & Cr. 684; *Re Hamilton*, 43 W. R. 577, [1895] 2 Ch. 370. [LINDLEY, L.J.—After all it comes round to this: What is the intention, and what is the true construction?] No man can betray the confidence reposed in him by a will, and then take a benefit under the will: Jarman, last ed., p. 415; *Re Adams and Kensington Vestry*, 32 W. R. 883, 27 Ch. D. 394; *Mussoorie Bank* v. *Raynor*, 31 W. R. 17, 7 App. Cas. 321; *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253; 37 W. R. Dig. 205. Here you have the strongest imperative words that can be used—"in fullest confidence."

Levett, Q.C., and *F. J. Lewis*, for the executors of Mrs. Williams's will.—There is no trust. In the only case in which it was held that there was a trust to leave by will it was held that the trust was equivalent to a power to appoint. [RIGBY, L.J.—If a testator gives something to A., and directs A. to leave it by will to B., is that a trust or not?] It is; but in that case B. takes under the testator's will, and A.'s will has no effect at all. Here the testator begins with an absolute gift to his wife. He then expresses a confidence that she will pay premiums, but makes no provision for the payment of these premiums. He then expresses a confidence that she will make a will and leave the property to their daughter. To constitute a trust you must have imperative words. *Wright* v. *Atkyns* is in our clients' favour. [RIGBY, L.J.—In that case the persons to benefit were not ascertained.] If you apply the principle laid down in *Wood* v. *Cox* it is in favour of the respondents: *Lambe* v. *Eames*, 19 W. R. 659, L. R. 6 Ch. App. 597; *Re Hutchinson and Tenant*, 26 W. R. 904, 8 Ch. D. 540. [RIGBY, L.J.—The principle in all those cases was that if you made a power override an absolute gift the wife got nothing.] Here, if you make a power to leave by will override an absolute gift the wife cannot leave by will at all: *Re Adams and Kensington Vestry*. Here the testator creates no obligation, but simply expects that his widow will leave the policy to his daughter: *Re Diggles, Gregory* v. *Edmondson; Re Hamilton; Hill* v. *Hill, ante*, p. 371, [1897] 1 Q. B. 483. Here we are not dealing with a will which creates a trust in regular words, but with one which in one part creates a trust and in another employs the words "in fullest confidence." If these words create a trust you must in effect strike the word "absolute" out of the will. If there be a trust at all it only affects the £300 policy, and the widow has given this to her daughter. Then, as to the other property, the testator gives his own property to his wife in trust that she will give hers to her daughter. This is not a case of election at all. The doctrine of precatory trusts has never been applied to a case where a valid direct trust would not have been created.

Medd, for the surviving trustee of the testator's will.—There is no trust on my client. If there is a trust at all it affects the widow only: *Re Diggles, Gregory* v. *Edmondson.*

Neville, Q.C., replied.

Cur. adv. vult.

April 5.—LINDLEY, L.J.—The question to be determined is whether the testator's widow had a discretion reposed in her or an obligation imposed upon her with respect to the £1,000 policy if she accepted the property bequeathed to her by her husband's will. This depends on the language of the will.

There can be no doubt that equitable obligations whether trusts or conditions can be imposed by any language which is clear enough to show an intention to impose an obligation and is definite enough to enable the court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that if property is left to a person in confidence that he will dispose of it in a particular way as to which there is

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

no ambiguity such words are amply sufficient to impose an obligation. Nothing can be plainer than Lord Eldon's statement to this effect in *Wright* v. *Atkyns*, 1 T. & Russ, at p. 157. The books are full of cases decided in accordance with the doctrine—see *Shovelton* v. *Shovelton*, 32 Beav. 143; *Curnick* v. *Tucker*, L. R. 17 Eq. 320, 22 W. R. Dig. 275; *Le Marchant* v. *Le Marchant*, 22 W. R. 839, L. R. 18 Eq. 414, in all of which the devise or bequest was to the devisee or legatee absolutely; see also other cases cited in Lewin on Trusts, 1310, ed. 8. But still in each case the whole will must be looked at, and unless it appears from the whole will that an obligation was intended to be imposed no obligation will be held to exist. Moreover, in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference. It would, however, be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts and equitable obligations to deal with property in a particular way can be imposed by any language which is clear enough to show an intention to impose them. The term "precatory" only has reference to forms of expression. Not only in wills, but in daily life, an expression may be imperative in its real meaning, although couched in language which is not imperative in form. A request is often a polite form of command. A trust is really nothing except a confidence reposed by one person in another and enforceable in a court of equity. In one sense it is true to say that a trust of property cannot be created by a person who is not entitled to that property. But there is no difficulty is disposing of one's own property upon condition, express or implied, that the person who takes it shall do something himself—*e.g.*, shall dispose of his property in a particular way indicated by the owner of the property which he accepts. Moreover, a condition of this kind is enforceable in equity and need not amount to a common law condition—*i.e.*, a condition involving a forfeiture of the property taken subject to the condition, if that condition is not performed.

Instances of conditions enforceable in equity will be found in *Messenger* v. *Andrews*, 4 Russ. 478; *Re Skingley*, 3 Ma. & G. 221; *Wright* v. *Wilkin*, 9 W. R. 161, 10 *ibid.*, 403, 2 B. & Sm. 232, 259. The whole equitable doctrine of election, when a testator disposes of property not his own, is based upon the principle that a court of equity will enforce performance of implied conditions on which property is given and accepted.

Having made these preliminary observations I return to the testator's will. He has in terms given his property to his wife absolutely in confidence that she will herself leave the policy moneys by her will to her daughter, and he has appointed his wife and another person to be executors and trustees without indicating any duty which they are to perform as trustees, as distinguished from executors. These circumstances show, and I think conclusively show, that he did not intend his wife to be tenant for life only of the £300 policy. The £1,000 policy not being payable until her own death she could not be tenant for life of that.

The legal effect of a devise of real estate to a person in fee in confidence that he will leave it by will to somebody else was considered, and to a great extent settled by the House of Lords, in the celebrated case of *Wright* v. *Atkyns*, a full account of which will be found in Sugden's Law of Property, pp. 376 *et seq.* There property was devised to a Mrs. Atkyns in fee in confidence that she would leave it by will to the testator's "family." Sir Wm. Grant (17 Ves. 255) and Lord Eldon (19 Ves. 299) held that family meant heir-at-law, and that Mrs. Atkyns took only an estate for life. It followed from this that she was not entitled to commit waste. The House of Lords reversed this decision, and held that Mrs. Atkyns took an estate in fee and could not be restrained from committing waste. The injunction which had been granted pending the appeal (see 1 V. & B. 313) was, of course, dissolved. The case came again before Lord Eldon upon an application to restrain Mrs. Atkyns from applying the proceeds of the sale of any timber she might cut to her own use (see T. & R. 143). Lord Eldon there stated that on reconsideration he had no doubt that the House of Lords was right in deciding that Mrs. Atkyns took an estate in fee and not for life (1 T. & Russ. 154); but he nevertheless directed that the proceeds of any timber cut by her should be preserved until it could be decided to whom they would belong on Mrs. Atkyns' death. She again appealed from this decision to the House of Lords; and the House of Lords reversed it and held her entitled to those proceeds for her own benefit. The House did not decide who would be entitled to the property on her death, and did not decide whether she was under an obligation to devise the property to the testator's heir-at-law, or to any member of his family, if that word included other persons. But the House did decide that whatever "family" meant and whatever Mrs. Atkyns' obligations might be she took the property in fee simple; and that whoever might take the property under her will would take it as her devisee and not, as I understand the case, as an appointee under a power conferred on her by the testator. (See Sugden's work, above quoted, at pp. 381, 385, 387.) This point is extremely important.

This case goes far to show that the widow of the testator in the present case took his property absolutely and not for life only; and I am of opinion that she did so take. I have, moreover, no doubt that she took it absolutely in the sense of taking it free from the control of her co-trustee. But, further, I think that James, L.J., was right when he said in *Irvine* v. *Sullivan*, 17 W. R. 1083, L. R. 8 Eq. 673, that absolutely may refer to extent of interest, but it may mean a great deal more, and that its natural grammatical meaning is unfettered and unlimited—*i.e.*, unlimited in point of estate, and unfettered in respect of any condition or trust.

Lord St. Leonards in his work on the Law of Property, published in 1849, wrote as follows (see p. 375): "The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that if a testator really means his recommendation to be imperative he should express his intention in a mandatory form, but this conclusion was not arrived at without a considerable struggle." The more modern authorities, from *Lamb* v. *Eames* to *In re Hamilton*, show how strong the tendency now is to recognize this sensible rule.

The particularity with which the testator has stated what his wishes were, removes all difficulty in giving effect to those wishes if they are expressed in language which is shown by the will to be intended to be imperative, but such particularity does not supply the want of imperative language. The testator has employed the same language with respect to his own policy as with respect to his wife's. He has shown no intention of imposing an obligation on her in respect of one of them, and not in respect of the other. I feel great difficulty in holding that he has not left his own policy to her absolutely free from all trust and condition, and the difficulty of

making any distinction between the two policies forces me to the conclusion that the widow is not put to her election as regards her own policy. I might not have come to this conclusion if he had not dealt with both policies in the same way, for to put her to her election as to her property does not fetter her enjoyment of his. The case is, in my opinion, one of great difficulty, and I am quite aware that there are decisions in the books which, if followed, would be in the daughter's favour. But our task is to construe the will before us, and other cases are useless for that purpose except so far as they establish some principle of law. There is no principle except to ascertain the intention of the testator from the words he has used, and to ascertain and give effect to the legal consequences of that intention when ascertained.

Having given the case my best attention, I have arrived at the conclusion that the testator has not used language sufficiently clear to impose upon his widow an obligation to leave either policy to his daughter. I believe, further, that he refrained from language imperative in its terms, such as upon trust or upon consideration, and that he used the language which he did because he really intended to trust his widow's discretion with respect to his daughter, and not to provide for his daughter himself by putting a legal fetter on his widow's power of disposition of her own policy or of the property which he left her. I read the will as expressing a wish that his daughter should have both policies unless his widow should see reason for otherwise disposing of them; but I do not find in the will a command to his widow to leave the policies to his daughter if his widow should think right to dispose of them otherwise.

The appeal ought, I think, to be dismissed.

SMITH, L.J.—I agree with the judgment of my brother Romer, and will state as shortly as I can why I do so. I have to construe the will of a testator according to its language, in view of the surrounding circumstances known to him when he made his will. The circumstances were these. The testator, who was a doctor at Mold, had a wife, two sons, and a daughter Lucy. He had property worth, we are told, about £2,000, including therein a policy upon his own life for £300, and his wife had in addition a policy running upon her life for £1,000 which belonged to her. In these circumstances the testator made his will. As regards his two sons, he left them nothing but his medical books and instruments equally between them. As regards his wife, as it seems to me, he left her everything he had in the world to leave, excepting the books and instruments above mentioned. The first material part of the will is this: "And as to all the rest and residue of my estate and effects, both real and personal, including chattels real, subject to the payment thereout of my debts, personal and testamentary expenses, I devise, give, and bequeath the same unto my wife Lucy, her heirs, executors, administrators, and assigns absolutely."

I take it that clearer words of gift, showing a testator's intention that his wife should take for her own benefit all that he had, could not well be found in a will. It is said, however, that, notwithstanding this clear and explicit gift to the wife absolutely, that the words which follow show an intention to cut down these clear words of gift and to impose an obligation, as distinguished from a discretion, upon the wife, either by way of a precatory trust—that is, an implied trust—or by way of implied condition, that the wife was to leave by will her £1,000 policy and also the proceeds of the testator's £300 policy to their daughter Lucy.

The words are these, and this is the second material part of the will: "In the fullest confidence that she will carry out my wishes in the following particulars—namely, that she pays the premiums due and to become due during her life in respect of the policy for £1,000 on her own life, and that she by her will leaves the moneys to become due and payable under such policy, and also the moneys to become payable . . . under the £300 policy on my life to my daughter Lucy if she survives my wife, in trust for her sole and separate use, . . ." and he appointed his wife and the Rev. Mr. Williams executors and trustees of his will.

In my opinion no distinction can be drawn as to what the testator meant as regards the £1,000 policy belonging to his wife and the £300 policy belonging to himself, for each are placed in one and the same category. What the testator intended as to the one, in my judgment, he intended as to the other.

It should be noticed that, when the testator wished to create a trust, he does so by apt words, "in trust for her sole and separate use," and he appoints trustees, obviously well knowing what the words "trust" and "trustees" mean.

Why am I to hold that the testator, after such a clear gift to his wife absolutely, as I read it, for her own absolute benefit, when he used the words "in the fullest confidence that she will carry out my wishes in the following particulars," meant and intended the same thing as if he had said "in trust for my daughter Lucy"? It seems to me erroneous to say that each expression meant the same thing. Why use different words? It would not, I think, be in accordance with the ordinary canons of construction to hold that the different expressions meant one and the same thing. That the testator had implicit faith in his wife appears to me clear, for he left her everything in the world which he had to leave, with the meagre exception of the medical books and instruments, and that he placed full reliance in her carrying out his wishes I do not doubt, but that he imposed a trust precatory or otherwise upon her I cannot think. If he had intended an obligation by way of trust why did he not say so, and instead thereof merely express a confidence—that is, a reliance or hope—that she would carry out his wishes.

In the will the words "confidence" and trust are used in contrast to each other.

Moreover, how could the testator have meant to impose a trust as regards property which did not belong to him but to her.

In my judgment the testator imposed no implied trust upon his wife in favour of his daughter Lucy either as regards the £1,000 policy or the £300 policy, the proceeds of which last, as before stated, he left absolutely to his wife to deal with as she pleased.

I come now to the other alternative—viz., that the testator left his wife his property upon an implied condition that if she took his property she was to do the following acts: (1) Pay the premiums becoming due during her life upon her £1,000 policy; (2) that she should leave this policy so kept up to the daughter Lucy; (3) that she should leave the proceeds of the £300 policy which fell in to her upon the testator's death also to the daughter Lucy.

Where is the obligation to be found in the will that the wife after receiving the £300 under the policy upon the death of the testator, and which was left to her absolutely to do as she pleased with, was nevertheless to leave the £300 to the daughter Lucy? Why was the widow not entitled to spend the £300 if she desired to do so, and where is the obligation to lay by the equivalent, if she spent it, for Lucy?

Again, assume the widow became unable to pay the premiums falling due upon the £1,000 policy during her life. Why then, was the testator's pro-

perty represented by the £2,000 to go over and away from the widow, or what was to happen to it?

Where is all this to be found in the will? I cannot think that the testator left his property to his wife upon any implied condition at all any more than he left it clogged with a precatory trust. In my opinion he left his property to his wife wholly unfettered by either.

Lindley, L.J., has reviewed the authorities and I agree in his judgment, but I wish to add a few remarks upon some of the cases which have occurred during the last quarter of a century, for it is said that I am bound by authority to hold contrary to what I am doing, and I think these cases show I am not so bound.

I first refer to the case, in 1871, of *Lambe* v. *Eames*, wherein James, L.J., used this notable language when dealing with a case of precatory or implied trust: "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where, in many cases, the father of the family never meant to create trusts, must have been a very cruel kindness indeed." This is a remarkable statement coming from the source it does.

I will next take the case, in 1878, of *In re Hutchinson and Tenant*; there a testator gave all his property to his wife "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so."

Sir George Jessel followed *Lambe* v. *Eames*. [His lordship read the judgment, and continued:] This judgment of Sir George Jessel exactly expresses my view of the true construction of the will in the present case, and I adopt it and agree with it. It is said that I am wrong because the daughter Lucy in the present will is a definite individual, and therefore the object of the implied trust is well defined, whereas the word family in the case before Sir George Jessel was not so, and the object of the trust was therefore too uncertain to imply a trust. This does not appear to me to have been Sir George Jessel's view, for he said family meant children and therefore the object was sufficiently defined, yet, though this was so, he held there was no trust.

Again in 1884, in *Re Adams and the Kensington Vestry*, the court certainly approved of what James, L.J., had said in *Lambe* v. *Eames*, and of what Sir George Jessel had said in *In re Hutchinson and Tenant*. Cotton, L.J., saying: "But undoubtedly, to my mind, in the later cases, especially in *Lambe* v. *Eames* and *In re Hutchinson and Tenant*, both the Court of Appeal and the Master of the Rolls shewed a desire really to find out what, upon the true construction, was the meaning of the testator, rather than to lay hold of certain words which in other wills had been held to create a trust," and the learned lord justice expresses his opinion "that some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust." I do not say that a precatory or implied trust may not still be created and exist, for I apprehend it may, or that an estate may not be left upon an implied condition, or in other words, subject to election, but I do say that, acting with a desire to find out what the will in the present case means, I cannot say that there is any implied trust or implied condition, and I cannot believe that such was the true intention of the testator.

In the case of *In re Hamilton* the court affirmed, and followed *Adams and Kensington Vestry*. In the case of *Hill* v. *Hill* in the other division of this court, although no authority upon the will in hand, there are observations by the lords justices therein which are by no means antagonistic to the judgment I have arrived at. For the reasons above I think that this appeal should be dismissed.

RIGBY, L.J.—In this case the court is called upon to determine whether, on the true construction of the will of the testator, his wife, to whom, in the first instance, he gave his residuary real and personal estate in the following terms, "I give, devise, and bequeath the same unto my wife Lucy, her heirs, executors, administrators, and assigns, absolutely," was or was not by the words which followed made subject to a condition in favour of his daughter Lucy as to a policy of life assurance for £1,000 on the life of and belonging to the wife; in other words, whether she is subject to the doctrine of election as to the policy. A great deal has been said in argument and a great many cases cited as to what are awkwardly and, in my opinion, incorrectly called "precatory trusts." As I understand the law of the court, this phrase is nothing more than a misleading nickname. When a trust is once established it is equally a trust and has all the effects and incidents of a trust whether declared in clearly imperative terms by a testator or deduced upon a consideration of the whole will from language not amounting necessarily and in its *primâ fâcie* meaning to an imperative trust.

In the present case the question is one of condition or election, not of trust, as the testator could not declare a trust of his wife's property, but the cases as to trusts are so closely analogous that they must be examined, and it will be seen that the same doctrine has been laid down as to conditions and trusts. In theory I do not think that there ever has been, at any rate for a century, any doubt as to the principles on which a trust or condition should be deduced, if at all. If in some cases those principles were departed from, such cases must be treated as inconsistent with and overruled by the general current of authority. No authoritative case ever laid it down that there could be any other ground for deducing a trust or condition than the intention of the testator as shown by the will taken as a whole, though, no doubt, in older cases that intention was not unfrequently inferred on insufficient grounds. The general intention was always treated as the matter to be ascertained, but it was from very early times pointed out that there could be no imperative obligation unless the subject-matter and the objects were both clearly ascertained.

On these fundamental points there never has, in my opinion, been any real difference, though the application of them to particular instances has not always been satisfactory.

As early as 1782, in *Harland* v. *Trigg* (a leading case on this subject), 1 Bro. Ch. Cas. 142, Lord Thurlow said: "I think every will ought to be construed according to the intention of the testator where it can be collected"; and again, "I had a doubt whether the family could not claim some interest in the subject, but when I came to consider I take the rule of law to be this, that two things must concur to constitute these devises, the terms and the object." In that case the subject was clearly defined.

In the second suit of *Wright* v. *Atkyns*, hereafter dealt with particularly, Lord Eldon lays down the same law. First, that the words must be imperative; secondly, that the subject must be certain; thirdly, that the object must be as certain as the subject.

Again, Lord Langdale in *Knight* v. *Knight*, 3 Beav. 172, says: "As a general rule it has been laid down that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or

wished to dispose of that property in favour of another, the recommendation, entreaty, or wish is held to create a trust. First, if the words are so used, that upon the whole they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. In simple cases there is no difficulty in the application of the rule thus stated. If a testator gives £1,000 to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish."

In the instance so given by Lord Langdale it is to be assumed that there is nothing in the will to prevent the words of request from being imperative. Very slight indications throwing doubt upon this might be sufficient to lead to a contrary conclusion. Lord Langdale can have had no doubt arising from the fact that the death of A. B. may be taken as the time when the gift is to take effect, or he would not have called this a simple case.

I have carefully examined all the authorities cited in argument, and many others, with the view not of comparing the words of one will with those of another, but of ascertaining whether any doubt has been thrown upon the principles so enunciated, and I cannot find a single case binding upon this court, or, indeed, any other, since the date of *Wright* v. *Atkyns*, in which they are in any way called in question. I find, indeed, repeated and, having regard to older decisions, most salutary warnings that the intention, having regard to the whole will, must always prevail, and statements that the doctrine must not be extended, but nothing to impeach the principles themselves. This, of course, is a different thing from saying that the principles have always been rightly applied, which I should not like to affirm, though I do not know any case binding on this court in which they have not.

The careful discussion of authorities contained in Lord St. Leonards' work on the law of property as administered in the House of Lords (1849, pp. 375-400) seems to me to be important as containing the most exhaustive examination of these cases, and particularly as showing that the obligation, if any, may as well take the form of a condition as a trust.

The first case dealt with is *Wright* v. *Atkyns*. There the testator gave "all his leasehold, freehold, and copyhold estates" (a mixed property descendible according to different rules) unto his mother and her heirs for ever in the fullest confidence that after her decease she would devise the property to his family. There were two suits, the first by the testator's uncle and heir-at-law at his death, the main object of which was to establish an incumbrance, though incidentally a question as to timber arose. The second was by the devisees of the uncle and a lady who became the testator's heir-at-law on the uncle's death, and the main object in that suit was to ascertain the rights of the devisee as to timber. No final decision as to the construction of the will was arrived at except as to the estate taken in the first instance by the wife and her power to cut timber and apply the proceeds for her own use. Incidentally points of importance were decided on two appeals to the House of Lords.

In the second suit I may at once state that the only unsolved difficulty depended, in my opinion, on the question whether the objects were described with sufficient certainty by the word "family." Sir Wm. Grant held (but wrongly, as was decided by the House of Lords, and afterwards admitted by Lord Eldon) that the wife was tenant for life impeachable for waste, and Lord Eldon, though with much hesitation, declined to reverse his decision. Both judges treated the question as to the meaning of the word "family" as creating the real difficulty, and the reports of the appeals by Lord St. Leonards to the House of Lords shows that the same question was really treated there as the material one. Lord St. Leonards was counsel for the wife throughout, and gives at p. 377 the principal reasons on each side in the first appeal, which may be summarized as follows: For the appellant (1) No trust or trusts for descendants and not for heir-at-law only; (2) That if by construction Mrs. Atkyns was in equity bound to leave the estates at her death to the testator's family, she was entitled to all rights incident to an owner in fee simple. For the respondents (1) Trust for heir-at-law of testator; (2) Appellant simply tenant for life in equity, therefore impeachable for waste. From the elaborate note of the argument of Lord St. Leonards, pp. 377 to 381, it appears that the first point raised for the defendant turned entirely upon the uncertainty of the meaning of the word family. This point was not decided. Lord Redesdale said in his opinion (p. 381) that Mrs. Atkyns was tenant in fee not impeachable for waste (p. 382), but went on to say that the "question ought not to be prejudiced, no person being before the House properly to contest it." Those persons are, he said, "those capable under a will executed by Mrs. Atkyns. There may be no such persons." He also said, "court may hold the words only recommendatory." From the context it appears that the last words had reference to the uncertainty of the objects. Lord Redesdale's opinion on these points was not so obscurely expressed, but it was extra judicial, and not intended to prejudice any question.

The only decision of the House of Lords on this first appeal was that Mrs. Atkyns was not tenant for life, and that the injunction order so far as it depended on the assumption of her being only tenant for life must be reversed (p. 382). The testator's uncle and heir-at-law was by this time dead and could not take under a will of Mrs. Atkyns. In a suit brought by his devisees and the heiress-at-law of the original testator (p. 384), Lord Eldon allowed Mrs. Atkyns to cut timber in a husbandlike manner, directing an account and security for the sale moneys or payment into court. Lord Eldon adopted the view that she was owner in fee subject to a trust or condition (inclining to the view that it was a trust but not deciding the point), and expressed his own opinion (at p. 163 of 1 T. & Russ.) that the wife was entitled to keep the timber money, but did not see how he could avoid keeping the money in *medio* to abide the decision on the construction of the will which would be given on the wife's death. He got at length into the difficulties which would attend the interpretation of the words "my family," but, of course, decided nothing. A second appeal was then brought to the House of Lords. Lord St. Leonards gives (at pp. 385-388) a note of the opinions of the noble and learned lords, from which I make the following extracts:

Lord Redesdale (p. 385): "Not imperative where the objects are uncertain or the thing is unascertained. Here persons very inaccurately ascertained 'his family.' Mrs. A. has at law the fee. It may be said subject to a condition, but that cannot be fully decided till her death" (p. 385). "No person has now or during her life can have more than a possibility of benefit, for the persons taking must take by her devise, and must be living at her death," and, again; "Supposing the words to be imperative (in the book the

word is printed inoperative, but this must be a mistake), yet the interest vested in Mrs. A. is precisely the same as if the gift was upon condition." "In case of such a condition the property remains in the party till the condition is performed, and if it becomes impossible the fee remains." "Though the question cannot now be decided as to the fee simple, yet with respect to the enjoyment of the property during her life she has a right to have her rights declared." In this last point Lord Erskine and Lord Eldon concurred, and it was the only point actually decided on the second appeal. It is impossible, however, to read the opinions of the Lords without seeing how far they had advanced as to the construction. See Lord Redesdale, p. 387: "Can anyone have a doubt of the testator's intention in giving her the fee. Under subsequent words the persons are to take by her devise. They take out of her fee simple, which fee simple is only controlled by the condition, &c." I do not say that it was finally decided that assuming family to ascertain the objects sufficiently, the will operated by way of condition, and not in creation of a trust, but the legality of such a construction was clearly recognized and acted upon. Lord St. Leonards in his final comments on the case said (p. 388): "The great question was left undecided —viz., whether a trust was created and for whom. It was treated as clear that the words were sufficient to create a trust, if the object were clearly ascertained." If this meant that no condition was involved it is obviously in contradiction with almost all that Lord Redesdale said. It must have referred to the state of things after the death of the wife if she died without devising in favour of the objects indicated by the testator, in which case her heir-at-law or devisees would be trustees for such objects.

The next case dealt with by Lord St. Leonards is that of *Meredith* v. *Heneage*, which he characterizes (at p. 391) as one of the most embarrassing cases that ever called for judicial decision. The case was decided in the Court of Exchequer in Equity before Richards, C.B., and Graham, Wood, and Garrow, BB., and is very elaborately reported in 10 Price 230. Richards, C.B., and Garrow, B., held that there was no obligation imposed upon the devisee, Graham and Wood, BB., that there was, but as Wood, B., held that the trust which he inferred had been complied with by a will made by the devisee of the original testator there was a majority of three to one in favour of that will. The case was appealed to the House of Lords and the judgment confirmed, and a short report is given in 10 Price p. 306; but it is not possible from this report to ascertain the grounds on which the decree was supported. The will to be construed was very special in its terms. I refer to the report to show the principles on which such cases ought to be decided were stated in substantially the same manner as above. At p. 264 Richards, C.B., says on the question whether the words used were imperative, "It must be admitted that it is purely a matter of intention to be collected from the words of the instrument as in all other cases upon wills where no rule of law interferes." The subject of gift, supposing the directions to be imperative, did not appear to be in doubt; it was "the whole of my said estate together and entire." After dealing with the question whether on the whole will there was an imperative obligation on the devisee and deciding it in the negative on grounds mentioned below, the Chief Baron proceeds (p. 273) to deal with the question whether the objects are sufficiently pointed out and comes to the conclusion that they were not. Garrow, B., merely concurred in the judgment pronounced by the Chief Baron. The other learned judges, though they arrived at different conclusions, did so by applying in their own way the same principles. What appears to have led Lord St. Leonards to the opinion which he expressed as to the difficulty of the case (an opinion fully shared by all the judges who gave judgment in it) was no doubt the strong contrast between the words which seemed to give the devisee the entire control and those which seemed to impose an obligation. They occurred in the same sentence, and were "unfettered and unlimited in full confidence and the firmest persuasion that," &c. The learned Chief Baron from a careful consideration of the context came to the conclusion that it was intended that the devisee should be entirely free to do as she pleased, but very great importance was attached to the fact that in an earlier part of the will what *primâ facie* would have been a trust could not by reason of a discretion being given to the devisee as to the amount to be settled be so treated.

I have dealt with these authorities at length in order to show that a substantial agreement as to principle had been arrived at long before the decisions beginning with *Lambe* v. *Eames*, which have been cited as though they in some way altered the law on this subject. Without going through these *seriatim*, I may say that in every case the conclusion that the words relied upon did not create an imperative trust was based, as I think, upon some uncertainty, either as to the subject or as to the objects of the supposed trust. Many learned judges (no one more clearly than Lord Eldon in *Wright* v. *Atkyns*) have expressed regret that they could not free themselves from the effect of previous decisions; but the fact that they nevertheless felt themselves bound shows that those decisions, when properly understood, cannot be departed from. Of course, the Court of Appeal cannot, in recent cases, be assumed in any way to alter the settled law on the subject, or to have assumed a jurisdiction to deal with the question as if it were independent of authority.

The cases of *Wright* v. *Atkyns* and *Meredith* v. *Heneage* are further important, the first as making it clear, in my judgment, that a condition that a devisee or legatee shall give by will may be established on the same principles as a trust, and if established is a perfectly good condition, notwithstanding that it could only operate through a gift by the devisee or legatee, and not through the operation of the will of the original testator; the second, because, in my judgment, it carries the case against the daughter, and in favour of the wife's contention, as far as any case to be found in the books. In the words of Lord St. Leonards (p. 391): "It amounts to a decision that clear words of gift to a devisee for his own benefit *free from control* shall not be cut down by subsequent words which may operate as an expression of a desire without disturbing the previous devise." I know of no better guide to the construction of the will before us. In the application of these or any other words to the construction of a particular document, different minds will often arrive at different conclusions, and whatever confidence I have in the enunciation of principles above set forth, I cannot feel so sure, in the face of the opposite conclusion arrived at by Romer, J., that my construction is the right one. My confidence in the result at which I have arrived is, of course, much further shaken by the fact that my learned brothers differ from me. I have, however, come, after much consideration, to a conclusion contrary to theirs, for the following reasons:

I ask, first, is it clear that the testator intended his wife to have the free control in the wide sense required for the decision of the case of the property given to her? All depends upon the word "absolutely." That word certainly implies that she was to

take and have vested in her the whole property independently of control on the part of the other person named in the will as a trustee or anyone else, and, indeed, as I think with reference to the present case, free from any trust in her. But does the word as here used fairly involve that she was to be free from any condition? We cannot decide this apart from the context, but certainly though the word may, it does not necessarily, involve this conclusion. I take it only to mean (in strict analogy to what James, V.C., in *Irvine* v. *Sullivan* decided it to mean in the will before him) that she takes beneficially though *not* unconditionally as to the entire property, but subject so far as necessary to any condition afterwards imposed. (2) Are the words which follow the gift words which independently of any context may operate as an expression of a desire only? I think not. The words are "in the fullest confidence that she will carry out any wishes in the following particulars, viz." Then follow words as precise and clear as words can well be with reference both to the subject-matter, the object, and the way in which that object is to take and enjoy the moneys under the two policies belonging, the first (as to which alone our decision is required) to the wife, the second to himself. If the will had mentioned the wife's policy only I should have thought that not only the gift but the form and manner of the gift was completely explained. The testator must be taken to have known that he could not impose a trust, properly so called, on his wife's property, but he might wish to make it plain that whilst he intended all his own property to go to his wife, he equally intended that part of hers should go to his daughter if a will of the wife would give it. In my judgment the words used are quite sufficient to express that intention, and to operate legally by subjecting the wife to the equitable condition called an election. I do not think that this could fairly be said to be inconsistent with the full gift of his own property before made to the wife.

Passing on to the policy for £300 on his own life, and observing that it is dealt with in precisely the same manner as the other policy, it seems to me that as there is no reason to the contrary, and the will must necessarily be construed as giving rise to a condition with reference to the £1,000 policy, it would be a strained and unreasonable construction to imply a trust instead of a condition with regard to the other when a condition would at least be equally apt for carrying out the presumed intention of the testator. The will would then amount to this: "I give my wife all my property absolutely—that is to say, for an unlimited interest at law and in equity—but I make it a condition that she shall by will leave the money arising from the two policies to our daughter Lucy or make compensation for not doing so." Under this Lucy could only take if she survived Mrs. Williams, and owing to the way in which the provision is made for her, she could only take the policies for £1,000 and £300 as a legatee of Mrs. Williams. In fact she does so as to the £300. No question arises with regard to it. But as to the £1,000 policy, Mrs. Williams having elected to take against the will with reference to it, must make compensation out of the interest taken by her under the will.

This appears to me to be the conclusion most in accordance with principle and authority. Above all, it has the advantage of carrying out what to me appears to be the plain intention—that the daughter should, if capable of taking under the wife's will, have the right to do so, being to that extent as much an object of the testator's bounty as the wife herself.

Appeal dismissed.

Solicitors, *Norris, Allens, & Chapman*, for *J. M. Quiggin & Bros.*, Liverpool; *Maples, Teesdale, & Co.*, for *J. G. Roberts*, Mold; *Simpson & Co.*, for *Kelly, Keene, & Co.*, Mold.

High Court of Justice.

Q. B. Div. (Wright, J.) — May 8.

WILKINSON AND WIFE v. DOWNTON. (a.)

Tort—Practical joke—False statement causing injury to health—Cause of action.

The defendant, by way of a practical joke, made a false statement to the female plaintiff to the effect that her husband, the male plaintiff, had met with a bad accident. The female plaintiff was thereby seriously injured in her health.

Held, that an action for damages would lie.

Trial of action by Wright, J., and a jury.

The plaintiffs, who were husband and wife, sought to recover damages in respect of a false statement made by way of a joke by the defendant to the female plaintiff to the effect that the male plaintiff had been severely injured in an accident, whereby the female plaintiff suffered a severe shock and injury to her health.

The facts are fully stated in the judgment:

The jury in answer to questions left to them found that the defendant spoke the words alleged; that he meant them to be heard and acted upon, and that they were heard and acted upon; that they were false to his knowledge; and that the illness of the female plaintiff was the effect of the shock from the words.

The jury found that the damages caused by the illness of the female plaintiff amounted to £100, and that certain expenses, apart from the illness, to the amount of 1s. 10½d. had been incurred.

Warburton and *A. N. Talbot*, for the plaintiffs.

Abinger, for the defendant.

WRIGHT, J., after stating what was the cause of action as set out in the statement of claim, proceeded as follows: The defendant, in execution of what he seems to have regarded as a practical joke, represented to the female plaintiff that he was charged by her husband with a message to her to the effect that her husband had been smashed up in an accident, and was lying at the Elms public-house at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to bring him home. All this was false. The effect of the statement on the female plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences, at one time threatening her reason, and entailing weeks of suffering and incapacity to her, as well as expense to her husband for medical treatment of her. These consequences were not in any way the result of previous ill-health or weakness of constitution, nor was there any evidence of predisposition to nervous shock or of any other idiosyncrasy. In addition to these matters of substance there is a small claim for 1s. 10½d., the cost of the railway fares of persons sent by the female plaintiff to Leytonstone in obedience to the pretended message. As to this 1s. 10½d. expended on railway fares on the faith of the defendant's state-

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ment, the case is clearly within *Pasley* v. *Freeman*, 3 T. R. 51. It was a misrepresentation which was intended to be acted on to the damage of the plaintiff, and which was in fact acted on.

The real question is as to the £100, the greatest part of which was given as compensation for the female plaintiff's illness and suffering. It was argued for her that she was entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by *Pasley* v. *Freeman*, and *Langridge* v. *Levy*, 2 M. & W. 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement, intending it to be acted on, must make good the damage naturally resulting from its being acted on. Here there was no *injuria* of that kind. I think, however, that the verdict may be supported on another ground.

The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical pain to the female plaintiff—*i.e.*, to infringe her legal right to personal safety, and has in fact thereby caused physical pain to her.

That proposition, without more, appears to me to state a good cause of action, there being no justification alleged for the act. This wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite, was imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is, whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant. Regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind, I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects, under the circumstances, upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.

The other question is whether the damage was, to use an ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority I should give the same answer, and on the same ground, as to the last question, and say that it is not too remote. Whether, as the majority of the lords thought in *Lynch* v. *Knight*, 9 H. L. Cas. 577, 10 W. R. H. L. Dig. 4, the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought, the possible infirmities of human nature ought to be recognized, it seems to me that the connection between the cause and effect is sufficiently close and complete.

It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an *injuria* to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action. One is the case of *Victorian Railway Commissioners* v. *Coultas*, 37 W. R. 129, 13 App. Cas. 222, where it was held in the Privy Council that illness, which was the effect of shock caused by fright, was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in *Pugh* v. *London, Brighton, and South Coast Railway Co.*, 44 W. R. 627, [1896] 2 Q. B. 248, as open to question. It is inconsistent with an earlier decision in the Court of Appeal in Ireland (see *Bell* v. *Great Northern Railway Co.*, 26 L. R. Ir. C. L. 428, 39 W. R. Dig. 137, where the Irish Exchequer Division declined to follow *Victorian Railway Commissioners* v. *Coultas*), and it has been disapproved in the Supreme Court of New York (see Pollock on Torts, 4th ed., p. 47).

On these grounds it seems to me that the case of *Victorian Railway Commissioners* v. *Coultas* is not an authority on which this case ought to be decided.

A more serious difficulty is the decision in *Allsop* v. *Allsop*. 8 W. R. 449, 5 H. & N. 534, which was approved in the House of Lords in *Lynch* v. *Knight*. In that case it was held by Pollock, C.B., and Martin, Bramwell, and Wilde, BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander which had occurred there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case, nor can such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person was in a precarious or dangerous condition, and another person falsely told him that his physician had said that he had but a day to live. In such a case if death ensued from the shock caused by the false statement, I cannot doubt that the case might be one of criminal homicide, or that if a serious aggravation of illness ensued, damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions, such as *Jones* v. *Boyce*, 1 Stark. N. P. 493; *Wilkins* v. *Day*, 32 W. R. 123, 12 Q. B. D. 110; *Harris* v. *Mobbs*, 27 W. R. 154, 3 Ex. D. 268, are cited in Beven on Negligence as inconsistent with the decision in *Victorian Railway Commissioners* v. *Coultas;* but I think that these cases are to be explained on a different ground—namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which, therefore, ought to be regarded as itself the direct and immediate cause of the damage. In *Smith* v. *Johnson* (unreported), decided in January, 1897, by Bruce, J., and myself, we held that where a man was killed in sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock of fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence; but that was very different from the present case.

There will be judgment for the plaintiffs for £100 1s. 10½d.

Solicitor for the plaintiffs, *J. E. Waters*.

Solicitor for the defendant, *G. E. Philbrick*.

Q. B. Div.
(Hawkins and Wright, JJ.) } May 7.

REG. v. THE GENERAL MEDICAL COUNCIL. (a.)

Dentist—Medical practitioner—Registration—Pupil—

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Declaration—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 37.

A person who, at the date of the passing of the Dentists Act, 1878 (22*nd of July*, 1878), *was a pupil to a dental practitioner, but whose articles as a pupil expired in October*, 1878, *is not entitled to be registered under section* 37 *of the Dentists Act*, 1878, *unless he has complied with section* 7.

Rule *nisi* for a *mandamus* against the General Medical Council commanding them to show cause why they should not place the name of Isidore Spero upon the register of dental practitioners under the Dentists Act, 1878.

Section 6 of the Act describes the persons who are entitled to be registered under the Act. These include (*c*) "any person who is at the passing of the Act *bonâ fide* engaged in the practice of dentistry or dental surgery."

Section 7 prescribes the steps to be taken by those seeking registration with a proviso that "a person shall not be registered under this Act as having been at the passing thereof engaged in the practice of dentistry unless he produces or transmits to the registrar, before the first day of August, 1879, information of his name and address, and a declaration signed by him in the form in the schedule to this Act, or to the like effect."

Section 37 provides that "Any person who has been articled as a pupil and has paid a premium to a dental practitioner entitled to be registered under this Act in consideration of receiving from such practitioner a complete dental education, shall, if his articles expire before the first day of January, 1880, be entitled to be registered under this Act as though he had been in *bonâ fide* practice before the passing of this Act."

The applicant was a pupil at the date of the passing of the Act (22nd of July, 1878). He was articled to a person entitled to be registered under the Act. His articles commenced in April, 1875, and expired in October, 1878. He did not make any application to be registered, nor did he sign the declaration required by section 7 before the 1st of August, 1879. He did not, in fact, make his application till some years afterwards. The General Medical Council refused to place his name upon the register. Whereupon this rule *nisi* was obtained.

Muir Mackenzie showed cause.—The applicant not having complied with the requirement of section 7 was not entitled to be registered.

Willes Chitty, in support of the rule.—Persons applying to be registered under section 37 are not bound by the provisions of section 7. The Legislature could not have intended this to be the case, because there would be a difficulty in the case of persons whose articles expired before the 1st of January, 1880, but after the 1st of August, 1879. It could not be supposed that those persons were entitled to be registered while yet in a state of pupilage. The form of declaration given in the schedule is not so framed as to be applicable to the case of persons applying to be registered under section 37.

HAWKINS, J.—The rule must be discharged. It is certain that it was not at first intended that anyone should be entitled to be registered who was not in *bonâ fide* practice at the passing of the Act. That being the case, it was afterwards thought fit for, no doubt, good reasons to make an exception in favour of a number of persons who intended to embark on the career of dentistry, and whose articles would not expire till a considerable time after the passing of the Act. It was thought fair to let them in under certain restrictions—to admit them as though they had been persons entitled to be registered under the Act. Accordingly section 37 was passed. The applicant paid a premium to a person entitled to be registered under the Act and his articles expired before 1880, so that he was within section 37. He therefore became entitled to be registered under the Act, not absolutely, but as though he had been in *bonâ fide* practice at the passing of the Act. That is to say that he was put in the same position as a person who was in *bonâ fide* practice at the passing of the Act. What would have entitled such a practitioner to be registered? That is to be found in section 7. What reason is there why a person who is put in the same position for the purposes of registration as though he came within section 6 (*c*) should not be under the same obligations? I confess I can see none. The object of the Act was that there should be a declaration containing the name and address of the person to be registered. The declaration was to be in the form given in the schedule "or to the like effect." I agree that without alteration it is not applicable. But under the authority of the words "to the like effect" it might be framed by the use of different words so as to meet the case. I see no reason why the words should not be added: "I am pupil of So-and-so. My articles expired before 1880."

WRIGHT, J.—I am of the same opinion. The natural meaning of section 37 is that persons applying to be registered under it must submit to the same conditions as persons desiring to be registered under section 6 (*c*). I wish to say that I express no opinion as to persons whose articles expired after the 1st of August, 1879.

Solicitor for the General Medical Council, *T. W. Farrer*.

Solicitor for the applicant, *Bertram Jacobs*.

Q. B. Div.
(Hawkins and Wright, JJ.) May 6.

DERBYSHIRE (*Appellant*) *v.* HOULISTON (*Respondent*). (*a*.)

Adulteration — Food — Butter — False warranty — Scienter—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 27.

By section 27 *of the Sale of Food and Drugs Act*, 1875, *every person who shall give a false warranty in writing to any purchaser in respect of an article of food or drug sold by him as principal or agent shall be guilty of an offence under this Act and be liable to a penalty.*

Held, that no offence was committed within that section by D., who had given a warranty in writing that butter sold by him was pure, although in fact it was adulterated, because it was not proved that at the time D. gave the warranty he had reason to know or knew that it was false.

This was an appeal by case stated from a conviction under section 27 of the Sale of Food and Drugs Act, 1875.

The case set out the following facts: On the 22nd of August, 1896, the appellant, who traded at Manchester as a provision merchant, purchased from a person named Maloney a quantity of butter, with a warranty in writing that it was pure butter. On the 8th of September one Martin Hopkins bought some of this butter from the appellant and received from

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

him a similar warranty as to its quality. On the 16th the respondent, who was an inspector under the statute, purchased from Hopkins a sample of this butter, which was exposed for sale in his shop and marked "Pure butter, 10d." Upon analysis the butter was found to contain 23 per cent. of water.

The inspector thereupon instituted proceedings against Hopkins under section 6 of the Act of 1875 for having sold butter "not of the nature, substance, and quality demanded." Hopkins proved that he had purchased the butter in question from the appellant with a written warranty, and the summons was dismissed.

The inspector then took proceedings against the appellant under section 27 of the Act for having given a false warranty in writing in reference to an article of food sold by him. The appellant proved that he had purchased the butter from Maloney with a written warranty that it was guaranteed "pure Irish butter," and had been sold by him in the same condition as he received it, and he pleaded this as a defence under section 25.

The summons was heard by F. J. Headlam, Esq., a stipendiary magistrate for the city of Manchester, who was of opinion that the proof of warranty would have been a good defence to these proceedings had they been instituted by a purchaser, but he held that in proceedings like the present by an inspector it was unnecessary to prove that the accused when he gave the warranty to Hopkins knew that it was false; and that on the facts proved the appellant's defence failed.

C. A. Russell, Q.C. (with him *F. H. Mellor*).—The conviction ought to be quashed, for the magistrate found that the appellant had no reason to believe that the warranty was false at the time he sold the butter to Hopkins. By sections 6 and 9 two offences (both of the same class) are created—namely, selling an adulterated or altered article to the prejudice of the purchaser, and under those sections it is unnecessary to show that the seller knew at the time that the article was not of the nature, substance, and quality demanded by the purchaser: *Betts* v. *Armstead*, 36 W. R. 720, 20 Q. B. D. 771; *Pain* v. *Boughtwood*, 38 W. R. 428, 24 Q. B. D. 353. The offence of giving a false warranty is a different class of offence, and guilty knowledge must be proved. For the purposes of this case it is immaterial to consider whether the defence given by section 25 is applicable to the giving by mistake of a false warranty or not, but I submit that it is, at any rate where the inspector himself has purchased from the defendant. [WRIGHT, J.—The defence is only applicable when the charge is that of having sold the informant an article not of the nature, substance, and quality demanded.]

Lawson Walton, Q.C. (*Reginald Brown* with him).—An unlawful intent is no part of the offence of giving a false warranty. If it were, the word "wilfully" would be found in the sub-section of section 27 under which these proceedings are instituted. It is as reasonable to assume that the word "wilfully" was purposely omitted by the framers of the statute as to contend it was a mere accidental omission. At any rate no word requiring the proof of *scienter* occurs in this sub-section, and as it ought to be construed strictly, the conviction should stand. If the conviction be quashed the effect will be to render the Act inoperative to a great extent. A man then could with impunity sell adulterated food and drugs so long as he took care to refrain from ascertaining whether the warranty he received with the goods from the foreign exporter was true or false. Nor could the exporter be brought to book owing to the expense and difficulty in most cases of enforcing any penalty obtained against him.

HAWKINS, J.—The question we have to determine is an important one, and it is this: Has the appellant been rightly convicted under section 27 of having given a false warranty in writing as to the quality of the butter he sold, when there was no evidence before the magistrate that at the time he sold the butter under that warranty he knew or had reason to believe the warranty was false? [His lordship then read the 27th section, and continuing, said:] Now, it is sub-section or paragraph 3 of this section that applies to this case, and it is quite clear to my mind that the meaning of the sub-section is that every person who shall *wilfully* give a false warranty shall be liable to the fine; in other words he shall be liable only if it is proved that he did so with an unlawful intent. In the 2nd and 4th sub-sections the framers of the Act were careful to put in the word "wilfully," and, therefore, had the appellant been charged with either of the offences set out in the other sub-sections, he could not have been convicted unless it was shown he "wilfully" did it.

But the question we have to decide is, What is the true construction to be placed upon the words as they stand in sub-section 3 of this 27th section? Can a man be convicted of giving a false warranty when he honestly believes, and upon reasonable grounds, that it was true, or can he only be convicted if it is proved that at the time he gave the warranty he knew that it was false? It seems to me clear that the framers of the statute intended that to constitute the offence of which the appellant here was charged, the false warranty must be proved to have been falsely given. The offence is associated in the same section with three other offences, in each of which an unlawful intent is an element. It is true that there are cases—for instance, under the Explosive Act—where guilty knowledge is presumed against the accused unless the contrary is shown, but that is never done except in cases where the Legislature has very clearly indicated that it intends to punish a man for a particular offence of which he was not morally guilty. I am of opinion that under this section 27 a man cannot be convicted of the offence of giving a false warranty unless it is proved that he knew at the time he did so that the warranty was in fact false. That guilty knowledge has not been shown to have existed in the present case, and consequently the case must be sent back to the magistrate, for the conviction to be quashed.

WRIGHT, J.—I am of the same opinion. In my judgment given in the case of *Sherras* v. *De Rutzen*, 43 W. R. 526, [1895] 1 Q. B. 918, which was a case where a conviction had been improperly obtained against a licensed person, who had supplied liquor to a constable on duty under the *bonâ fide* belief that he was not on duty, I collected the various authorities for future easy reference in support of the proposition that a *mens rea*—evil intention or knowledge of the wrongfulness of the act—is an essential in every offence of this character, unless that presumption is clearly displaced by the language of the statute itself. That a guilty knowledge is a necessary element in the offence with which the appellant is here charged is indicated by the use of the word "false," which implies a knowledge of falsity of the warranty. It is moreover, further indicated on the principle of *noscitur a sociis*, since the offence is set out in the same section with several other offences, all of them requiring a guilty knowledge to be proved. It was argued that this construction of the meaning of the language of the section was opposed to the intention

of the framers of the Act, whose object was to protect the buyer. I cannot say what the intention of the framers of the Act was, and all we have here to do is to decide the effect of the language used according to the ordinary rules of construction. On that principle it seems to be beyond doubt that the conviction was wrongly obtained, and must be quashed.

Appeal allowed.

Solicitors for the appellant, *Crowders & Vizard*, for *Hockin, Raby, & Beckton*, Manchester.

Solicitors for the respondent, *Austin & Austin*, for *Thomas Hudson*, Manchester.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) — May 24.

FORTESCUE *v.* MERCANTILE BANK OF LONDON. (*a.*)

Solicitor—Remuneration—Sale of property subject to incumbrances—Sale by second mortgagee—Scale fees—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Schedule* I., *Part* I., *r.* 9.

Rule 9 *of Schedule* I. *to the General Order made under the Solicitors' Remuneration Act*, 1881, *which provides that, where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, held to apply to a sale by a second mortgagee.*

Appeal by the defendants from the refusal of Bruce, J., to order a review of taxation of a bill of costs.

The owner of a rent-charge, having mortgaged it to secure a sum of £3,800, granted a second mortgage thereon to the defendant bank to secure a sum of £100. The defendants realized their security by selling the rent-charge, subject to the first mortgage, for £185. The solicitor who conducted the sale for the defendants delivered his bill of costs containing an item of £35 for negotiating the sale, and an item of £40 for deducing title and completing the conveyance.

The plaintiff having brought this action as assignee of the mortgagor to recover from the defendants the balance of what was due from the defendants to the mortgagor, the defendants sought to deduct from the gross balance the amount of the costs incurred by them in respect of the sale.

The plaintiff thereupon obtained an order for the taxation of the bill of costs, and upon such taxation the master disallowed £30 out of the item of £35, and disallowed £35 out of the item of £40.

The question was whether the present case was within rule 9 of Schedule I., Part I., to the General Order made under the Solicitors' Remuneration Act, 1881. That rule is as follows: "Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption."

The master was of opinion that the rule did not apply to a sale by a second mortgagee, and that in the present case the scale fees ought to be calculated on the sum of £185 only.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The defendants carried in the following objections to the taxation:

"The defendant bank objects to the disallowance by the master of £30 out of an item of £35, and £35 out of item of £40, scale fees charged in the bill of costs herein, on grounds following:

"Because where, as here, the property is sold to some third party subject to an incumbrance, the amount of the incumbrance is to be deemed a part of the purchase-money;

"Because the master was wrong in law in introducing an exception to such rule in case a property is sold by a second mortgagee, and in restricting such rule to the case where the property is sold by the mortgagor personally or by his trustee in bankruptcy;

"Because the solicitor for the second mortgagee selling the freehold rent-charge subject to a prior incumbrance for £3,800 is entitled to the scale fee both for negotiating and for deducing title, calculated on purchase-money of £3,985, and not on £185 only, and the master has no power (except in the special case provided for by rule 9, which is not this case) to calculate the solicitor's scale fees on the price of the equity of redemption only instead of on the total purchase-money."

Bruce, J., disallowed the objections.

The defendants appealed.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the defendants, cited *In re Grey's Brewery Co.*, 56 L. T. N. S. 298, 35 W. R. Dig. 193; *In re Gallard, Ex parte Harris*, 36 W. R. 592, 21 Q. B. D. 38.

English Harrison, for the plaintiff.

Lord ESHER, M.R.—We must construe the words of rule 9 of this schedule according to their ordinary meaning. The rule says that "where a property is sold"—that must mean sold by anybody—"subject to incumbrances," then "the amount of the incumbrances is to be deemed part of the purchase-money"—*i.e.*, part of the money paid by the purchaser for the property purchased. Here the property purchased was the rent-charge, and the purchaser gave for it, not merely £185, but he became liable to pay also £3,800—*i.e.*, he has given by way of purchase £3,985. The vendor's solicitor is therefore entitled under the rule to payment based on the sum of £3,985. This construction seems strange at first sight, but on consideration there is nothing unreasonable in it. He found a purchaser who was willing to give for the property £3,800 *plus* £185. We cannot depart from the plain words of the rule, and the appeal must be allowed.

A. L. SMITH and CHITTY, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *Thomas Charles.*

Solicitor for the defendants, *G. B. W. Digby.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — April 9.

GUARDIANS OF THE POOR OF ST. OLAVE'S UNION (*Appellants*) *v.* GUARDIANS OF THE POOR OF THE CANTERBURY UNION (*Respondents*). (*a.*)

Poor law—Settlement—Computation of time—Period of residence in a hospital—Poor Removal Act, 1846 (9 &

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

10 *Vict. c.* 66), *s.* 1—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

The Divided Parishes Act, 1876, *s.* 34, *enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years" as would have created a* status *of irremovability, he shall be deemed to be settled therein.*

Held, that the expression "term of three years" meant three consecutive years.

Dorchester Union *v.* Weymouth Union, 16 *Q. B. D.* 31, *approved.*

The Poor Removal Act, 1846, *s.* 1, *provides that, in computing the period of residence which shall render a person irremovable from a parish, the time during which such person "shall reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum . . . or as a patient in a hospital . . . shall for all purposes be excluded."*

Held, that the proviso included the temporary residence of a patient in a hospital, and was not limited to cases of compulsory confinement.

Decision of the Divisional Court (ante, *p.* 302) *affirmed.*

Appeal of the respondents from the decision of the Divisional Court (*ante*, p. 302) on a case stated by the Recorder of Canterbury.

On the 1st of April, 1896, Edward James Farr, aged nine years, became chargeable to the respondent union.

On the 24th of April, 1896, an application was made to two of the justices of the city of Canterbury for an order for the removal of the pauper from the respondent union to the appellant union, and an order was that day made on such application adjudging the pauper to be legally settled in the parish of Rotherhithe, in the appellant union. From this order the appellants appealed.

The pauper was the lawful son of Arthur Farr and Ellen Farr and was born on the 1st of April, 1887, in the Greenwich union.

Ellen Farr died on the 22nd of June, 1888, and shortly after her death Arthur Farr sent the pauper to live with a relative in the respondent union, with whom he remained till he became chargeable.

On the 23rd of July, 1892, Arthur Farr remarried, and on the same day went to reside in the parish of St. Mary, Rotherhithe, in the appellant union, not having previously resided there. From that time until his death he continued to have his residence and home in the appellant union.

On the 1st of May, 1895, Arthur Farr was admitted into the Brompton Hospital for Consumption, situate outside the appellant union, where he remained until the end of June. He then went to a convalescent home in connection with the hospital at Sandgate (also outside the appellant union) where he remained until the 29th of July, 1895, when he returned to his home in the appellant union. He remained there until his death on the 15th of April, 1896.

Arthur Farr went to the hospital intending to return to his home in the appellant union as soon as he was well enough to do so. During his temporary absence his wife remained in his house and kept his home together by means of an allowance which his employer made to him.

The recorder confirmed the order of removal subject to this case.

The Divisional Court allowed the appeal.

The respondents appealed.

By the Poor Removal Act, 1846, s. 1, "No person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years (reduced to one year by 28 & 29 Vict. c. 79) next before the application for the warrant. Provided always that the time during which such person shall be a prisoner in a prison or shall be serving her Majesty as a soldier, marine, or sailor, or reside as an inpensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned."

By the Divided Parishes Act, 1876, s. 34, "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render him irremovable, he shall be deemed to be settled therein . . ."

Dickens, Q.C., and *Hohler* (*Joseph* with them), for the present appellants.—The period of voluntary residence in a hospital, such as in this case, is not to be excluded from the computation of period residence. The words "as a patient in a hospital" in the proviso in section 1 of the Poor Removal Act, 1846, are governed by the word "confined," and refer only to cases of compulsory detention in a hospital, as, for example, the detention of a woman in a hospital after her confinement under 13 Geo. 3, c. 82, ss. 14, 15. But assuming that the proviso does apply to this case, the residence of the pauper's father in hospital did not prevent the father acquiring a settlement in the appellant union. The time spent in the hospital is to be excluded "for all purposes" in the computation of time; that means that it shall neither tell in making up the three years nor shall operate as a break in the residence, if altogether residence has continued for three years, as is the fact here. The Divisional Court held that they were bound by *Dorchester Union* v. *Weymouth Union*, 16 Q. B. D. 31, 34 W. R. Dig. 135, but that case is inconsistent with *Hartfield* v. *Rotherfield*, 17 Q. B. 746, and was wrongly decided. During the time that the pauper's father was in the hospital he always had the intention to return to his home in the appellant union as soon as he was well enough to do so, and this *animus revertendi* made him constructively a resident in the appellant union: *Reg.* v. *Abingdon Union*, 18 W. R. 981, L. R. 5 Q. B. 406.

Macmorran, Q.C., and *Harper*, for the present respondents.—The proviso in section 1 of the Poor Removal Act, 1846, is not restricted to cases of compulsory confinement in hospitals. Secondly, it was rightly decided in *Dorchester Union* v. *Weymouth Union* that the three years' residence referred to in section 34 of the Divided Parishes Act, 1876, must be consecutive. That case was approved of by the House of Lords in *Reigate Union* v. *Croydon Union*, 38 W. R. 295, 14 App. Cas. 465.

Lord ESHER, M.R.—In my opinion the term of three years mentioned in section 34 of the Divided Parishes Act, 1876, must mean three consecutive years. Settlement is to be acquired by a residence in each of such years, which would render the person residing irremovable. Unless there is such a residence in each of the years the condition is not fulfilled. In order to ascertain what circumstances would render the person irremovable, it is necessary to refer to the Poor Removal Act, 1846; and if we read into that Act the effect of the later statutes, we find that residence for one year next before the application for a warrant is to make a person irremovable. Then there is a proviso that the time during which a person is in hospital is not to be counted. It is said that the words used in the section are "confined

. . . as a patient in a hospital," and that this means compulsorily confined. I do not agree with this reading of the section. I think that the governing word applicable to the case of a patient in a hospital is to "reside" and not "confined," and in my opinion that is how the statute should be read. Then it was said that Lord Campbell had decided in *Hartfield* v. *Rotherfield*, 17 Q. B. 746, that in such a case as this, the time when the father was in hospital was to be treated as if it never existed, and that, therefore, there was a three years' residence in the appellant union sufficient to satisfy section 34 of the Act of 1876. I do not think that Lord Campbell gave any such decision, but even assuming that he did, the reasoning in *Dorchester Union* v. *Weymouth Union* is more satisfactory to my mind. I find it impossible to differ from the conclusion arrived at in that case, and it is admitted that if that decision is to be upheld, the judgment of the Divisional Court must be affirmed. As to the other point, whether Arthur Farr while in the hospital had any *animus revertendi*, I think that, for the reasons which I have given, that question is excluded in the construction of the section. The appeal must be dismissed.

LOPES, L.J.—The question in this case is as to the meaning of the expression "term of three years" in section 34 of the Divided Parishes Act, 1876, and the question is whether it means three consecutive years. It was held in the *Dorchester Union* v. *Weymouth Union* that it does mean three consecutive years. It was contended by Mr. Dickens that that case was wrongly decided, and that it ought to be overruled. It is important to observe that that case has in effect been adopted by the House of Lords in *Reigate Union* v. *Croydon Union*, in which Lord Watson, referring to section 34, treats it as meaning a residence of three consecutive years. Then section 34 provides that the residence must be under such circumstances as would, in accordance with the several statutes in that behalf, render the person irremovable. In order to ascertain what these conditions are we must refer to the Poor Removal Act, 1846. Section 1 of that Act deals with certain breaks in the residence which are to be deducted from the qualifying period, one of which is the time during which the person is a patient in a hospital, and it is contended that the use of the word "confined" in the section shows that the period of residence in a hospital is only to be deducted when the person is compulsorily confined there. I think that the section ought to be read in the way the Master of the Rolls has suggested. I think it would be altogether contrary to the intention of the section if we held that there was no disruption, unless the detention in the hospital is compulsory. Otherwise a person might reside for three years in a hospital at the public expense, and thereby acquire a settlement. Therefore, excluding the time Arthur Farr spent in the hospital it follows that he did not acquire a settlement in the appellant union, and that his son has no derivative settlement in that union. I do not think the question of an *animus revertendi* applies in this case at all.

CHITTY, L.J.—I am of the same opinion. With reference to the question arising on section 34, I think that the decision in *Dorchester Union* v. *Weymouth Union* is correct, and that the three years' residence must be consecutive. The expression "term" imports a continuous residence, and the words "in each of such years" confirm that view. I entertain no doubt on the question, and Lord Watson in the House of Lords treated it as a matter beyond doubt.

With regard to section 1 of the Poor Removal Act, 1846, I think that even if a strict grammatical construction requires that the word "confined" should be read with the words "as a patient in a hospital," I do not think that it would have the effect contended for. To my mind it would be extraordinary if the Legislature had been directing its attention to the isolated case of compulsory detention in a hospital which has been referred to—namely, a woman in a lying-in hospital. I think the word "reside" in the earlier part of the section is applicable to the case of a patient in a hospital. I agree with what has been said as to the *animus revertendi*.

Appeal dismissed.

Solicitors for the appellants, *Arkcoll, Cockell, & Chadwick.*

Solicitors for the respondents, *Speechley, Mumford, & Co.*, for *John Plummer*, Canterbury.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Chitty, L.JJ.) — Dec. 17.

LORD GERARD (*Appellant*); KENT COUNTY COUNCIL (*Respondents*). (*a*.)

Highway — Extraordinary traffic — Person by whose order such traffic has been conducted—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

The appellant was the owner of a house and park at which he was carrying out building and other operations. Before any materials were ordered by the appellant samples were submitted to him, and if approved the person proposing to supply the material was asked to quote a price for it delivered free at the park. Orders were then given from time to time to the person who was to supply the material to deliver it at the park in such quantities as were required, but before giving such orders there was no contract entered into for the supply of any specified quantity of materials, nor was the appellant bound to take any materials at all. The persons to whom the orders were given employed and paid traction-engine owners to haul the goods to the park. The appellant neither directed nor had any control over the mode of carriage of the materials, though he knew that the delivery would be by traction engines. The carriage of the materials along the road was extraordinary traffic within section 23 *of the Highways and Locomotives (Amendment) Act*, 1878, *and damage was thereby caused to the road.*

Held, by Lord Esher, M.R., *and* Rigby, L.J., Lopes, L.J., *dissenting, that the appellant was not the person by whose order the traffic was conducted within the meaning of section* 23, *and was not, therefore, liable for the extraordinary expenses in repairing the road caused thereby.*

Appeal from the judgment of the Divisional Court (Cave and Wills, JJ.) upon a special case stated by quarter sessions for the Eastern Division of the County of Kent.

The appellant was summoned in July, 1895, by the respondents, who were the authority liable to repair the main roads in the county, under section 23 of the Highways and Locomotives Act, 1878, to answer a claim for damage done to the Faversham and Ashford main road by conducting excessive weight and extraordinary traffic along the same to the lodge-gate at Eastwell-park, the residence of the appellant. The

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

justices at petty sessions adjudged that the appellant was liable to pay for the extra expenses thereby caused. The quarter sessions reversed this order, subject to a special case.

The appellant was the owner of a mansion-house and park known as Eastwell-park, and in 1893 and 1894 building and other operations on an extensive scale were carried on there by his order. Several firms of contractors were employed on different portions of the work. Besides the work so done by contractors a considerable amount of work in the park was done by the appellant himself under the superintendence of a servant named Kavanagh. With regard to the supply of materials for the work executed for the appellant, before any materials were ordered, samples were submitted to and approved by the appellant, or by the architect or clerk of the works on his behalf, and when the sample was approved, the person proposing to supply the material was asked to give a price for it, the price in every case being an inclusive price for the material delivered free at Eastwell-park. When a sample of any materials had been approved and an inclusive price agreed on, orders were from time to time given to the person who was to supply the material to deliver it at Eastwell-park in such quantities as were from time to time required. In no case was any contract entered into for the supply of any specified quantity of materials, nor was the appellant bound to take any materials at all. The materials consisted of bricks, brick rubbish, cement, and gravel, and the persons to whom the orders were given for the supply of the materials employed and paid traction-engine owners to haul the materials to Eastwell-park.

It was contended on behalf of the appellant that he was not liable for any part of the expense incurred in repairing the road, as he was not the person by whose order the traffic was conducted, as the materials were ordered at a price which included delivery, and as he neither directed nor had any control over the mode of carriage of the materials, and neither engaged nor paid the persons by whom such carriage was conducted.

It was contended on behalf of the respondents that the appellant was the person by whose order the traffic was conducted, the orders given by him for the materials being the effective orders which set the traffic in motion.

The quarter sessions found that the traffic was extraordinary traffic, and that such traffic had done damage to the road; that the materials ordered for the work were all ordered upon the terms of their being delivered at the park at prices which included delivery, and that the appellant neither directed nor had any control over the mode of carriage of such materials, though he knew that the delivery would in fact be conducted by traction engine, and that it would not have been practicable to deliver in any other manner at the price named.

Upon these findings the quarter sessions held that the appellant was not the person by whose order the traffic was conducted, and reversed the order of petty sessions, and dismissed the summons.

The question for the opinion of the court was whether, having regard to the above findings, the quarter sessions were right in law in holding that the appellant was not a person by whose order the extraordinary traffic was conducted.

The Divisional Court held that the quarter sessions were wrong, and restored the order of the petty sessions.

The appellant appealed.

Channell, Q.C., and *Edwardes Jones*, for the appellant.

R. M. Bray and *Hohler*, for the respondents.

The following cases were referred to in addition to those mentioned in the judgments: *Great Northern Railway Co.* v. *Witham*, 22 W. R. 48, L. R. 9 C. P. 16; *Hill* v. *Thomas*, 42 W. R. 85, [1893] 2 Q. B. 333; *Kent County Council* v. *Vidler*, 43 W. R. 273, [1895] 1 Q. B. 448.

Cur. adv. vult.

Dec. 17.—Lord ESHER, M.R.—The question before the quarter sessions was whether there had been extraordinary traffic along this road, and whether damage had been caused by that traffic, and the sessions decided that in the affirmative. The next question was whether that traffic was conducted by the order of Lord Gerard so as to make him liable for the extra expense so caused. The sessions answered that question in the negative. The Divisional Court came to a contrary conclusion. The case raises the question, what is the true construction of section 23 of the Highways and Locomotives Act, 1878; and then, what is its proper application to the facts of this case?

I will first state my view of the true construction of section 23 of the Act, that is, what is the meaning of the words "by whose order" the extraordinary traffic is conducted? Upon the one hand, it seems clear to me that those words cannot mean merely the person for whose advantage the traffic is conducted. If there were nothing more than that it could not be said that the traffic was conducted by his order. Upon the other hand, I do not think it can be said that the words are confined to an order given to a servant who is bound to obey. It must be larger than that. Therefore, we must find an explanation between those two extremes. I think the best explanation is that the person by whose order the traffic is conducted may comprise the person by whose decision and determination the traffic in question has been brought along the road in question. If, therefore, that person makes up his mind that the traffic which is to be sent to him shall go along a certain road, and makes a contract with the tradesman to convey the goods or materials along that road, and, if the tradesman accepts that contract, the person so making that contract with the tradesman is a person by whose decision and determination that traffic has been carried along that road. The mere fact that he has contracted with a tradesman to do it for a certain price does not prevent it being done by his order. But, supposing a landowner lets certain land on building leases and enters into an agreement with a contractor whereby the contractor is to build houses on the land, and to pay the landowner certain ground-rents, the materials which the contractor carries along the road would be carried, in one sense, for the benefit of the landowner, as the latter would be entitled to certain ground-rents, but the contractor would be the person to determine what materials should be carried, and along what roads the materials should be carried, and it is impossible to say that that traffic would be conducted by the order of the landowner. It is impossible to exhaust all the cases. We can only lay down the rule, and the application of that rule to the facts of the particular case will be a question of fact in each case.

I desire to make two further observations. There may be extraordinary traffic conducted along a road and no one liable for the damage caused thereby. People who go independently to a race meeting form an instance. The persons who have established the racecourse are not persons by whose order that extraordinary traffic is conducted. Each person who passes along that road to the racecourse does not cause

that extraordinary traffic. There would be extraordinary traffic along that road, and yet no one would be liable. Again, there may be more than one person liable for conducting extraordinary traffic along a road. For instance, if a person like Lord Gerard is having a house built and enters into a contract by which the contractor is to bring the materials along a particular road, if the contractor brings the materials along that road and thereby causes extraordinary traffic along it the contractor would be liable, and, in my opinion, the person who was having the house built would also be liable as having directed the materials to be brought along that road.

That being my view of the law, it becomes necessary to apply it to the facts stated in the special case. If the question as to who gave the order to conduct this extraordinary traffic is dealt with as a question of fact—that is, who, in fact, gave the order within the interpretation I have given of the section—the quarter sessions must themselves draw the inference of fact, and can not ask this court to do so. Here the quarter sessions have drawn the inference of fact, because they have found that Lord Gerard was not the person by whose order the traffic was conducted. But I do not think it advisable in this case to treat the matter so strictly, for the magistrates have found other facts and have asked the court in effect whether in law they were prevented from coming to that conclusion on the facts. I think the court should give its decision as to the meaning of the statute, and should decide the application of that law to the facts of this case. Lord Gerard was having certain alterations made at his mansion-house at Eastwell-park and also some improvements made in the park. He entered into a contract with certain persons, who, it is clear, were not Lord Gerard's servants, but persons entering into a contract with him, to supply certain materials at prices inclusive of delivery. The contracts were made with contractors and not with servants. If a mere servant had given the order for conducting the traffic, the order would be his master's order. But a contractor is in a different position. The quarter sessions arrived at certain findings, and upon those findings they held that Lord Gerard was not the person by whose orders the materials were carried along the road in question. There is no finding as to what roads there were in this district. But taking Eastwell-park as the centre of the district, if the materials could be sent from any direction, it is impossible to say that Lord Gerard determined the road along which the materials were to come. Lord Gerard deliberately declined to have anything to do with the place from which the materials were to be brought. The contractor had to determine that. There was no contract obliging the contractor to bring the traffic along the road in question. The contractor had to bring the materials to Eastwell-park, and he had power to determine from what place and along what road they should be brought.

That being so, the quarter sessions were right in holding that there was no determination or decision by Lord Gerard that the traffic in question should come along the road in question, and, if so, it was not by anything he did that the traffic was conducted along this road. The decision, therefore, of the Divisional Court must be reversed, and the order of quarter sessions restored.

LOPES, L.J., read the following judgment: I have not arrived at the same conclusion as the rest of the court in this case. The question upon which the opinion of the court is asked is whether, having regard to the findings, the justices in quarter sessions were right in law in holding that Lord Gerard was not a person by whose order the extraordinary traffic caused by the carriage of the materials ordered for the works at Eastwell-park was conducted. The justices were of opinion that the traffic caused by the carriage of materials for the works carried out for Lord Gerard, under the superintendence of one Kavanagh, was extraordinary traffic, and they found that such traffic had done damage to the road, and assessed the amount of such damage at £750. They found that as regards such work Kavanagh was not a contractor but a servant of Lord Gerard. They found as facts that the materials ordered for the work were all ordered upon the terms of their being delivered at the park at prices which included delivery, and that neither Lord Gerard nor Kavanagh directed or had any control over the mode of carriage of such materials; but that they knew that the delivery would, in fact, be conducted by traction engines. They held on these findings that neither Lord Gerard nor Kavanagh was a person by whose order the traffic was conducted, and that neither was liable for what was done by the persons who actually conducted such traffic.

The question is an important one. We are bound by the facts as found by the justices, but by section 2 of the Supreme Court of Judicature Act, 1894 (57 & 58 Vict. c. 16), in appeals like the present power is given to the court hearing the appeal to draw any reasonable inference of fact which might have been drawn by the court of quarter sessions. I infer from the facts stated that Lord Gerard knew that the materials in question would be brought by the nearest and most convenient road, and that the nearest and most convenient road was the one in respect of which the present claim is made against him. The court below reversed the decision of the court of quarter sessions, and held that Lord Gerard was the person liable.

In the years 1893 and 1894 Lord Gerard, the owner of a mansion-house and park known as Eastwell-park, was carrying on building operations on an extensive scale. A portion of the work was done by independent contractors, but besides such works a considerable amount of work in the park was done by Lord Gerard himself under the superintendence of Kavanagh, who, in superintending the work, was acting as a servant to Lord Gerard, and was paid a commission by Lord Gerard on the amount expended. Before any materials were ordered samples were submitted and approved by Lord Gerard, and when a sample was approved the person proposing to supply the materials was asked to give a price for it, such price in every case being an inclusive price for the materials delivered free at Eastwell-park. It was left to the person supplying the materials to bring them to Eastwell-park in any way he thought fit. The case may be illustrated thus: A person who is proposing to build a large mansion himself, without employing any architect or contractor, orders from a large number of different tradesmen the materials requisite for the work, the materials to be delivered at a price inclusive of carriage, and the tradesmen to be at liberty to deliver the materials in any way they think best. The different tradesmen deliver the materials, and in so doing cause damage to the roads by conducting excessive weight or extraordinary traffic along the same. In such circumstances can it be said that such damage is not caused by the order of the person who is building the house? Is he not the person by whose order such excessive weight or extraordinary traffic has been conducted over the roads in question? It is not the case of an independent contractor who undertakes the work and who has everything under his control, and over whom the building owner can exercise no dominion. About

such a case I express no opinion, though I think there is much to be said in favour of the view taken by Wills, J., of the case of such independent contractor in the court below.

The case of *Lapthorn* v. *Harvey*, 49 J. P. 709, was a case of an independent contractor, and does not govern this case. In *Williams* v. *Davies*, 44 J. P. 347, a different view seems to have been taken from that taken in *Lapthorn* v. *Harvey* as to the person liable when there was a contract for the carriage of goods. There Williams purchased certain timber near a railway station, and contracted with one Davies for the carriage of a portion of the timber. No particular route was prescribed, nor any particular mode of carriage. Davies duly performed his part of the contract with Williams, and was duly paid therefor. The highway was greatly damaged, and Williams was summoned for the extraordinary expenses incurred in consequence. The justices made an order against Williams, and the court (Lush and Bowen, JJ.) upheld the order. Lush, J., said: "As to the person who causes the extraordinary traffic, I think it is of no consequence whether the purchaser of the timber causes it by his own wagons or those of his contractor hired by the day or for longer periods, for it is equally by his order." This view, however, of the effect of the section was dissented from by Lord Coleridge, C.J., and Mathew, J., in *Lapthorn* v. *Harvey*.

In *Reg.* v. *Ellis*, 30 W. R. 613, 8 Q. B. D. 466, a farmer purchased about sixty tons of manure at a place about four miles distant from his farm. His foreman employed the appellants, who were proprietors of traction engines and wagons, to cart the manure to his master's farm at the rate of 9d. per ton. The foreman pointed out to the appellants the place where the manure was to be deposited, but no further directions were given as to the mode in which it was to be conveyed. It was in evidence that the foreman employed the appellants knowing that they owned traction engines, and would be likely to use them in carting the manure, and because there was no other way of getting it carried within the necessary time. The road was the only road by which the spot indicated by the foreman for the deposit of the manure could be reached. The manure was carried by the appellants' engines and did damage to the highway. The appellants were held by the justices to be the persons "by whose order" the traffic had been conducted; and the Divisional Court thought there was sufficient evidence to justify this finding. In that case there was a special finding that the traffic was conducted by the order of the appellants. As to the first question raised by the case—viz., whether the sessions were right in holding that the appellants were the persons by whose order the traffic was conducted—all Field, J., says is that there was sufficient evidence that the traffic was conducted by order of the appellants. The question of the proper construction of the words of the Act of Parliament seems to have been scarcely argued, and not dealt with in the judgment except as I have stated. I cannot think this case an authority of much weight, and if it means what is suggested, I do not agree with it. It appears to me that the materials in question in this case were conducted by the order of Lord Gerard. If it had not been for the orders he gave to the persons who supplied the materials, these materials would never have passed over the road. They were persons merely employed to bring the materials, and were consequently put in motion solely by the order of Lord Gerard. All those persons had done was simply to quote a price at which they were prepared to deliver materials, and then Lord Gerard, knowing that they had quoted that price and that they meant to deliver by traction engine, and by the nearest and most convenient road, said, "Send me the materials." The sole and effective cause of these materials passing over the road was the order of Lord Gerard. Is it to be said, if I order a truck of coals from a coal merchant, and his wagons, owing to the excessive weight of the coals, do damage, that the damage is to be attributed to the order given to the carter by the coal merchant and not to my order, which is the effective cause of any action being taken by anybody? Take the illustration I suggested of a person himself, without any contractor, building a house in his park; he buys the different materials necessary for its construction from twenty different tradesmen, and the materials in the aggregate, by their excessive weight, cause damage to a road. It is impossible to say what particular portion of the materials caused the damage or by whom that portion was carried. But it was all ordered by the person building the house. In such a case, if the contention of Lord Gerard is right, the highway authority would be powerless and would have to look to twenty different persons without the means of discovering which was the offender. The object the Legislature had in view was to enable the highway authority to recoup the excessive expenditure not unfrequently occasioned by extraordinary and exceptionally heavy traffic arising from building and similar operations of a temporary kind and from other causes by which the road accommodation provided for all alike at the public expense is sometimes abused by individuals for their private purposes. The Legislature surely must have intended the person who by his initial order brought the excessive weight on the road to bear the burden of the damage, and not those who simply obeyed and acted in conformity with the order. I read "by whose order" as if it was "in consequence of whose order." This seems to have been the opinion of Lush and Bowen, JJ., in *Williams* v. *Davies*; it is the opinion of Cave and Wills, JJ., in the court below; and it is the view which I take of the meaning of the words "by whose order such weight or traffic has been conducted," as applied to the circumstances of this case. I think this appeal should be dismissed.

RIGBY, L.J., read the following judgment:—This is an appeal from a decision of the Divisional Court as to the proper answer to be given to a question submitted for the opinion of the High Court by a special case stated by a court of quarter sessions. The question is whether, having regard to the findings in the case, the justices in quarter sessions were right in law in holding that Lord Gerard was not a person by whose order certain extraordinary traffic was caused by the carriage of the material ordered for works carried on by him at Eastwell-park. The traffic is to be taken to be extraordinary traffic within the meaning of the Highways and Locomotives Amendment Act, 1878, s. 23, and no question arises as to the amount to be paid by Lord Gerard if he is a person by whose order the traffic was conducted. The traffic treated as extraordinary traffic consisted in the carriage by traction engine over part of the Faversham and Ashford main road to Eastwell-park of materials to be used upon works being done by Lord Gerard in his park there under the superintendence of one Kavanagh, who is to be treated for the purposes of this case as the agent of Lord Gerard. If Lord Gerard had not wanted the material for the works that he was carrying on, the extraordinary traffic would not have been conducted, and he of course shared in the advantage derived from it, though the persons supplying the material and the traction-engine owners also had their shares. It is clear, however, both on authority and on the words of the Act,

that the mere fact of the person deriving advantage from the extraordinary traffic is not sufficient to fix him with liability for the expenses. There was nothing illegal in the extraordinary traffic, and Lord Gerard cannot be held liable unless it was conducted by his order within the meaning of section 23 of the Act of 1878. To make that section applicable there must be, first, extraordinary traffic and expenses occasioned thereby; and secondly, some person by whom, in some reasonable sense of the words, the extraordinary traffic has been ordered to be conducted. If there be no such person, as, for instance, where the extraordinary traffic is made up of single loads of no excessive weight brought upon the roads by separate independent people, the result would be that no persons would be separately chargeable, and the expense of repairing the roads must fall as it would have done if the section had not been passed.

The question, then, being whether the traffic was conducted by Lord Gerard's order, it is material to observe that in the case and in the judgments of the Divisional Court the word "order" is used in a sense which, if not examined into, may occasion some ambiguity. The learned judges in the Divisional Court may have been, and for myself I think they were, right in the conclusion at which they arrived, that there was not as to any of the materials any contract by Lord Gerard to take, or by any person to supply, before the giving of what are called "orders" to deliver at Eastwell-park. In this view the so-called "orders" are in law nothing more than offers to accept at a price provisionally arranged and when delivered at Eastwell-park, the quantities of materials therein mentioned, if found to be according to samples previously exhibited, and no person was by contract or otherwise under any legal obligation to obey any of the so-called orders. Whenever they were acted upon, the persons to whom they were addressed found it to their interest to accept and act upon them. Assuming that traffic might, in a reasonable sense, be said to have been ordered to be conducted by the person who wanted the materials, if he gave directions for their being brought from one specified place to another, there is nothing like that in the present case. No one of the offers made by Lord Gerard specified any place from which the materials were to come, or the road by which they were to be brought. If the materials were according to sample it was a matter of indifference to Lord Gerard from what place or by what route they arrived at Eastwell-park, and he would not have been at liberty to refuse acceptance by reason of the place from which or the road by which they were brought. Until the materials were delivered at Eastwell-park and accepted as being according to sample, the property did not vest in Lord Gerard. If any materials had been rejected as not being according to sample, Lord Gerard could not have been held responsible for their carriage to and from Eastwell-park. He had nothing in law to do with the owners of the traction engines, who entered into their own contracts for the carriage of the materials to be tendered at Eastwell-park with the owners of them quite independently of Lord Gerard. It is, however, found in the case that Lord Gerard knew that the materials would be delivered by traction engine, and it is also found it would not have been practicable to deliver in any other manner at the prices named. It is not found, nor can it be reasonably inferred from the actual finding, that he knew from what place or by what road the materials would be delivered. The case itself shows that there was at least one road other than that in question by which some materials were and others might have been delivered at Eastwell-park.

In *Lapthorn* v. *Harvey*, 49 J. P. 709, Lord Coleridge, C.J., and Mathew, J., sitting as a Divisional Court, held that a person who had contracted with a sub-contractor for the carriage of stone, leaving him to carry it as he pleased, was not liable for his having, by employing traction engines, conducted extraordinary traffic and occasioned damage within the meaning of the Act. It seems to me that this case can only be distinguished from the present in any way that might be unfavourable to Lord Gerard by the circumstance that there was one contract carrying the whole of the traffic, and that there was nothing in that contract from which it could be inferred that haulage by traction engine was at the date of it in contemplation of the parties sought to be made liable. On the other hand, the materials carried were the property of the persons sought to be made liable, who themselves contracted for the carriage of them; so that their connection with the carriage was closer there than that of Lord Gerard in the present case. In the later case of *Hobbs* v. *Tunbridge Wells Local Board*, 49 J. P. 679, heard before a court of petty sessions, the facts were substantially the same as in *Lapthorn* v. *Harvey*, except that the firm who contracted for the haulage were owners of traction engines. There does not appear to have been any finding that the local board knew that traction engines would be used. Lord Bramwell, however (who happened to be chairman of the sessions), in dealing with the case, refers to both these points in such a way as to make it reasonably clear that no such finding would have changed his view as to the applicability of the section. This decision was, of course, in no way binding on the Divisional Court, and cannot, indeed, be cited as an authority or as having more weight than an extra-judicial opinion of an eminent judge. It was not referred to in the judgments of the learned judges; but if the reasoning is sound it is very important for the decision of the present case. It seems to lay down that to contract for the carriage of heavy materials with traction-engine owners, not specifying or requiring that traction engines shall be used, is not to give an order for conducting the traffic within the meaning of the Act, though both parties to the contract might know well enough that traction engines would in all probability be used.

The learned judges in the court below seem to have thought that the principle of *Lapthorn* v. *Harvey* is only applicable where the traffic is conducted for the performance of a pre-existing contract. But I am unable to see how the legal position of a person, who by making one general contract gives occasion for the extraordinary traffic, can be better than that of one who gives a series of invitations to others for the delivery of materials the carriage of which in the aggregate constitutes the extraordinary traffic.

The case of *Williams* v. *Davies*, 44 J. P. 347, as reported, does not, in my judgment, afford any rule applicable to the present case. From the case there stated it appears that the defendants contracted with Davies (who happened to be the surveyor of the highway board) for the carriage of a portion of the timber at a certain rate per foot of timber; that in pursuance of the contract Davies, with his own carriages and horses, hauled a portion of the timber, and the defendants paid him the agreed price for the work done by him; that the defendants with their own carriages and horses hauled the remaining portion; that the total quantity of timber hauled was sixty-seven loads, but that no evidence was given or tendered as to how much was hauled by Davies and by the defendants respectively. Davies, by his certificate, certified that the defendants conveyed the timber with their horses and carriages, and by horses

and carriages hired by them for the conveyance of such timber. The main question appears to have been whether or no the conveyance of the sixty-seven loads was extraordinary traffic. The judgment was delivered by Lush, J., and the only passage in the judgment which touches the present question is the following: "As to the person who causes the extraordinary traffic, I think it is of no consequence whether the purchaser of the timber causes it by his own waggons or those of his contractor, hired by the day or for longer periods, for it is equally by his orders." From this it would seem that the court took the view expressed in the surveyor's certificate, that the contract amounted to a hiring of the wagons, in which case the conclusion would be undoubtedly right. Whether this was the correct inference from the facts stated may be doubtful; but at any rate the judgment lays down no rule of law applicable to the present case. Here it is clear that Lord Gerard did not hire the traction engine or any of them. In *Reg.* v. *Ellis*, 30 W. R. 613, 8 Q. B. D. 466, material was carried from one fixed place to another, and there was only one road by which this could be carried.

The conclusion seems to be that on the balance of authority, as well as on the construction of the Act apart from authority, Lord Gerard did not do anything which could in law amount to an order for conducting this traffic or any part of it, and cannot, therefore, be held liable in respect of it.

Appeal allowed.

Solicitors for the appellant, *Meynell & Pemberton.*

Solicitors for the respondents, *Prior, Church, & Adams*, for *Warner & Turner*, Maidstone.

High Court of Justice.

Chan. Div. } Kekewich, J. } April 28.

HARRIS v. SLEEP. (a.)

Practice—Receiver—Salary—Security—Premiums paid to guarantee society—Liability.

Where in an action for dissolution of partnership one of the partners is appointed receiver, or receiver and manager, without a salary, and has to find security for his fidelity, he is properly allowed out of the assets the amount paid by him as premiums to a guarantee society for furnishing such security.

It is otherwise, however, where he is appointed with a salary, as in that case he is bound to pay out of his own pocket whatever expenses are reasonably incurred by him in finding security, whether by bond or sureties or through a guarantee society.

This was a summons in an action for dissolution of partnership to vary the master's certificate, the facts being as follows:

The plaintiff and the defendant had carried on a partnership business at Plymouth as makers of agricultural implements.

On the 25th of January, 1892, the usual judgment for dissolution and accounts was pronounced and the defendant was thereby appointed receiver and manager of the business on his undertaking to act without salary.

In pursuance of an order of the 26th of October, 1893, the defendant bought the business at a valuation. In the accounts which he brought in as receiver from the date of his appointment to the date of the purchase he claimed to be allowed two insurance premiums of £25 each, paid by him to a guarantee society under guarantee for his fidelity as receiver, the society becoming his sureties under a bond dated the 25th of February, 1892, for £5,000 given by him as receiver and manager.

The master, by his certificate made on the 22nd of February, 1897, allowed the two payments of £25.

The plaintiff now applied to vary the certificate by disallowing these two payments.

Renshaw, Q.C., and *F. Thompson*, for the plaintiff.—The practice is not uniform, and this is a case where such payments should not be allowed out of the assets, but should come out of the receiver and manager's pocket.

Warmington, Q.C., and *Mark Romer*, for the defendant.—The defendant was appointed as receiver and manager without a salary, and is entitled to be recouped out of the assets the amount he paid for obtaining his sureties.

KEKEWICH, J.—The question which arises is this: When a receiver or a receiver and manager is appointed with a salary, it is considered—and the practice is uniform—that he is bound to pay whatever expenses are reasonably incurred by him in finding security, whether by bond or sureties or through a guarantee society. About that there seems to be no question.

The question which arises here for the first time is, What ought to be done where a receiver or a receiver and manager is appointed without remuneration, but has to find security?

My senior master, Mr. Lionel Clarke, has here allowed the premiums which the receiver has paid to a guarantee society. He has done so after a consulta- with his brothers, and it seems to be the uniform practice in my chambers. It is suggested that there is a want of uniformity in the practice in other chambers. I might have referred the matter to a committee of the masters, but instead of that I have chosen to consult Mr. Burney and Mr. Church as representing the experience of other chambers. Mr. Church, notwithstanding his long experience, says that he cannot remember the question ever having occurred, but also says that he should allow the payment. Mr. Burney says that the case has occurred in his experience, and that the payment ought to be allowed.

I think, therefore, that there is not that want of uniformity which has been suggested, and therefore I allow these payments.

Solicitors, *Law & Worssam*, for *Bond, Pearce, & Bickle*, Plymouth; *Robbins, Billing, & Co.*

Chan. Div. } Kekewich, J. } April 9, 10, 13.

In re PARKER.

PARKER v. OSBORNE. (a.)

Will—Construction—Gift to nephews—Illegitimacy.

A testator by his will gave to his "wife's nephew, J. W. R. (nominatim), *all my silver spoons and my gold spectacles," and he gave one moiety of his residuary estate to trustees upon trust for "all and every the nephew and niece and the nephews and nieces of my said wife."*

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

J. W. R. was the illegitimate son of a brother of testator's wife.

Held, following In the Goods of George Ashton, [1892] *P.* 83, 40 *W. R. Dig.* 203, *and* In re Deakin, Starkey *v.* Eyres, 43 *W. R.* 70, [1894] 3 *Ch.* 565, *that the testator had sufficiently indicated his intention that J. W. R. should take, and that, therefore, notwithstanding his illegitimacy, he was included in the class of "the nephews and nieces of my wife."*

Bagley *v.* Mollard, 1 *Russ. & My.* 581, *and* In re Hall, Branston *v.* Weightman, 35 *W. R.* 797, 35 *Ch. D.* 551, *considered and not followed.*

Isaac Parker by his will made the 25th of June, 1889, after making provision for his wife, gave "to my said wife's nephew James William Robinson all my silver spoons and my gold spectacles," and he gave one moiety of his residuary estate to trustees upon trust for "all and every the nephew and niece and the nephews and nieces of my said wife."

The testator died on the 21st of September, 1893, and his widow died in 1896.

This was a summons taken out by the trustees of the will to determine the question whether the said James William Robinson, Oliver Thomas Robinson, deceased, and Charles Henry Robinson, deceased, who were the illegitimate children of William Robinson, deceased, the brother of testator's widow, were entitled to share in the gift by the testator of one moiety of his residuary estate to the nephews and neices of his wife.

The testator's wife had also legitimate nephews and nieces.

Gatey, for the trustees.

Renshaw, Q.C., and *Freeman*, for the illegitimate nephews and nieces.—It is true that the old cases are against illegitimates sharing (*Bagley* v. *Mollard*, 1 Russ. & My. 581; *In re Hall, Branston* v. *Weightman*, 35 W. R. 797, 35 Ch. D. 551; *Megson* v. *Hindle*, 28 W. R. 866, 15 Ch. D. 198), but the tendency of modern cases is in favour of illegitimates taking where it may be gathered from the will that such was the intention: *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304, 40 W. R. Dig. 284. In that case a testator divided the residue of his estate among his "relatives hereinbefore named," and in his will he had called persons who were not legitimately connected with him his "cousins," and the House of Lords held that that was sufficient to indicate the intention that such persons and even their children should take under the term "relatives": *In the Goods of George Ashton*, [1891] P. 83, 40 W. R. Dig. 203. *In re Fish, Ingham* v. *Rayner*, 42 W. R. 520, [1894] 2 Ch. 83, only decided that where a legitimate relative sufficiently answered the description of a legatee given in the will, it was not to be said that because there was another person bearing the same name who was in the same degree of relationship to the testator, but illegitimate, there was a latent ambiguity in the will, so as to admit of extrinsic evidence being adduced to show that it was the illegitimate relative whom the testator intended to benefit. There the will itself contained no evidence of such intention: *In re Brown, Walsh* v. *Brown*, 62 L. T. N. S. 899, 38 W. R. Dig. 216; *In re Deakin, Starkey* v. *Eyres*, 43 W. R. 70, [1894] 3 Ch. 565; *In re Bryon, Drummond* v. *Leigh*, 30 Ch. D. 110, 34 W. R. Dig. 218.

Ryland, for legitimate nephews and nieces.—*Smith* v. *Lidiard*, 3 K. & J. 252. In *Seale-Hayne* v. *Jodrell* neither *Bagley* v. *Mollard*, nor *In re Hall*, nor *Megson* v. *Hindle* are referred to, and therefore they are not overruled by that case.

Cur. adv. vult.

KEKEWICH, J.—The sole question for decision is whether the defendant James William Robinson, who takes a legacy under the title of my wife's nephew James William Robinson, can share the residue given to "all and every the nephew and niece and nephews and nieces of my said wife," he being in truth not a nephew, but an illegitimate child of a deceased brother of the testator's wife.

There were other illegitimate children of the same brother, and these died in the testator's lifetime, and their issue may claim under an alternative gift, but this judgment is concerned only with James William Robinson. I have said that he was not a nephew, and that is undoubtedly true. The term nephew or niece as much postulates the marriage of the brother or sister parent of the person designated, before his or her birth as the term child postulates that of the testator himself, or other the person alluded to as father or mother. There is ample authority for this proposition if authority be needed. Therefore James William Robinson cannot take under the gift of residue standing alone, and what I have to decide is whether the language in which a legacy is given to him alters this interpretation.

I promised to study the many authorities cited before pronouncing judgment, and that has been done. The first to be mentioned is necessarily *Bagley* v. *Mollard*. It is distinctly and directly against the applicant: and it is only one example, though probably the most pointed example of authorities on that side, but it is only one of a class extending over a long period, see *In re Hall, Branston* v. *Weightman*. These authorities are not impugned by some of the later cases in which the subject has been discussed, but the later cases do seem more and more to open the door for the admission of those born out of wedlock, and in particular to sanction a construction in their favour if it can fairly be extracted from the language of the will. To this class belongs *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 E. & I. App. 265. Lord Cairns, at pp. 282, 283, gives two possible cases. The first is out of the question here. Is the second applicable? Not so according to *Bagley* v. *Mollard*, and the weight of that authority must be removed before one can answer that question in the affirmative. It is said to have been removed by the decision in *Seale-Hayne* v. *Jodrell*. I confess to entertaining great difficulty in arriving at that conclusion. In that case both in the Court of Appeal and in the House of Lords the decision was rested on the particular language of the will in question, and there was undoubtedly language far more favourable to the illegitimate relatives than can be found here. It was urged by Mr. Renshaw that the first part of Lord Herschell's speech in moving the judgment of the House was independent of the words "hereinbefore named," but it is impossible to read that speech, or even that part of it as if those words had been omitted from the will. A similar remark applies to the language of Lord Hannen, and Lord Macnaghten dwells on the referential words. According to the report no cases were cited in the House of Lords, and I can hardly suppose that it was intended to overrule a series of authorities without mention of them. These authorities were cited in the Court of Appeal (38 W. R. 721, 44 Ch. D. 590), and except by insisting on the importance of construing each instrument by itself the members of the Court of Appeal did not endeavour to impugn them. It is useless to inquire what they would have done in the absence of the referential words, but Lindley, L.J., speaks of the difficulty as "a formidable one," p. 611 of 44 Ch. D.

But it seems to me that the judges have treated the decision in *Seale-Hayne* v. *Jodrell* as of wider application than unassisted I should be disposed to

think it. That was apparently the view of Stirling, J., in *In re Deakin, Starkey* v. *Eyres*, though, as he was aided by surrounding circumstances, it may be not so clear an interpretation of the decision as it otherwise would have been. Yet referring to his earlier judgment in *In re Brown, Walsh* v. *Brown*, where *Bagley* v. *Mollard* and *In re Hall, Branston* v. *Weightman* were both cited, it is observed that the same learned judge came to a similar conclusion without the assistance of the House of Lords—that is, with only the decision of the Court of Appeal in *In re Jodrell, Jodrell* v. *Seale*, before him. I must regard these decisions of Stirling, J., as authorities in favour of the applicant. There is also the judgment of the President of the Probate Division in *In re Ashton*. That was not argued on the authority of the old cases, which, indeed, were treated as supplanted by those of modern date, and the President's note of *In re Jodrell, Jodrell* v. *Seale*, [1892] P., at p. 88, shows that he considered it to be independent of the words "hereinbefore named," and on these facts I might safely disregard these judgments without want of respect to their learned authors. Falling back on the older cases never expressly overruled, never, so far as I am aware, commented on adversely by name, and frequently followed, my position would be unimpeachable.

But I cannot shut my eyes to the many judicial utterances pointing to a conclusion different from that of the older cases, and mainly dependent on the wholesome rule that for the construction of a will with a view to discovering the testator's meaning one must pay strict attention to the language of that one will, unfettered by rules—other than those of a technical character—which may have properly influenced the construction of another.

And, bearing that in mind, I cannot but recognize the consistency with the modern view of the judgments of the President and Stirling, J., or the inconsistency which a judgment on different lines would introduce. Even though a construction of this will, according to *Bagley* v. *Mollard* might be judicially sound, it would, I opine, start a wave of uncertainty in the current of authority, which it is a judicial duty to avoid. It being permissible to enlarge the class of nephews and nieces so as to include those who are illegitimate, if the testator has indicated his intention that this should be done, and especially if he has furnished a dictionary by means of which his language may be interpreted, I cannot hesitate to say that as regards James William Robinson the indication is here and the dictionary is forthcoming. All other questions must be left open. There must be an inquiry, the evidence on which I will endeavour to limit, so as to prevent the small fund vanishing in costs, and on that inquiry any other claims can be considered, and any other points can be raised and argued.

All that I decide is that James William Robinson, notwithstanding his illegitimacy, is included in the class of "my wife's nephews and nieces."

There is some evidence to show that this conclusion might be supported by surrounding circumstances, such as weighed with Stirling, J., in one of the cases above mentioned. Not much was made of this in argument, and it is better here to say no more of it than that it has not influenced my decision.

Solicitors, *F. Douglas Alloway*, for *F. W. Richardson*, Burton-on-Trent; *James Cornford; Woodcock, Ryland, & Parker.*

Q. B. Div. (Pollock, B., and Bruce, J.) — March 29, 30; May 11.

In re ESTATE DUTY PAYABLE ON THE DEATH OF THE SECOND EARL COWLEY. (*a.*)

Inland revenue—Estate duty—Tenant for life and remainderman—Value of estate—Deductions—Incumbrances created by tenant for life and remainderman under joint power of appointment—Annuities charged upon estate in favour of remainderman during life of tenant for life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.

By the will of a testator who died in 1863 *property was limited to trustees (subject to prior charges) upon trust for A. for life, with remainder to his sons in tail. By deed executed in* 1887 *A. and B. (the tenant in tail) barred the entail and reserved to themselves a joint power of appointment over the property, the limitations in default of the exercise of the power, being to A. for life, with remainder to B. in tail. They then joined in creating mortgages by which in exercise of their joint power they appointed the fee simple of the property to the mortgagees to secure sums amounting at the death of A. to* £230,000. *Part of these sums was applied in redeeming existing incumbrances on the life estate of A. and otherwise for his benefit, the remainder being paid to or for the benefit of B. By a resettlement executed in* 1888 *the joint power of appointment was preserved, and certain annuities in favour of B. during the life of A. were charged upon the property, and subject thereto it was limited to A. for life, with remainder to B. for life, with remainders in tail. A. died in* 1895.

Held, that, in determining the value of the property passing on A.'s death, the whole of the mortgage debt of £230,000 *ought to be deducted, but that no deduction ought to be made in respect of the capital value of the annuities which ceased to be payable to B. on the death of A.*

Section 7, *sub-section* (1), *of the Finance Act,* 1894, *does not apply to cases falling under sub-section* (7) (b) *of the same section.*

Petition of the third Earl Cowley under section 10 sub-section (1) of the Finance Act, 1894, from the decision of the Commissioners of Inland Revenue.

By his will dated the 27th of June, 1863, and proved on the 20th of August in the same year, the late Earl of Mornington devised his real estate to the use of trustees upon trust out of the rents and profits to pay the interest on certain mortgage debts (all since discharged) and to keep in repair and insured certain parts of his estate and to pay such parts of certain annuities bequeathed by his will as the income of his residuary personalty should be insufficient to pay (of which annuities two only were subsisting at the date of the death of the second Earl Cowley). Subject and charged as above mentioned, the testator's real estate was to be held upon trust for the first Earl Cowley for life and after his death for the second earl for life, and after the death of the second earl for the first and every other son of the second earl successively in remainder in tail male with remainders over. The will also gave powers to the tenants for life of jointuring and charging portions, and contained provisions for the sale of the settled lands and for application of the proceeds in the purchase of other lands to be similarly settled, or in investments in securities to be held upon the like trusts as if the same were laid out in the purchase of lands.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The first earl died on the 15th of July, 1884, and his eldest son, the second earl, thereupon succeeded in possession to the estates and interests conferred upon him by the above will.

By a deed-poll of the 1st of April, 1865, the second earl in exercise of his power of jointuring under the above will, appointed a yearly rent-charge of £500 to his wife Emily Gwendolen Countess Cowley for her life, if she should survive him, to be charged on the trust estates.

By virtue of divers indentures the life interest of the second earl in the trust estates (and certain policies on his life) became charged with payment to the London Assurance Corporation of several annuities during his life redeemable on payment of the principal sum of £64,248, and also with several mortgage debts amounting together to the principal sum of £80,000.

The petitioner was the only son of the second earl, and attained the age of twenty-one years in his father's lifetime on the 13th of January, 1887.

On the 14th of January, 1887, the second earl and the petitioner executed a disentailing deed (which was duly enrolled) whereby the interests in the trust property created by or under the powers of the above will and preceding the estate tail of the petitioner (except the life estate of the second earl) were preserved, and subject thereto the trust estates were limited to such uses and subject to such powers as the second earl and the petitioner should jointly appoint, and in default of such appointment to the use of second earl for life by way of restoration of the estate vested in him immediately before the execution of that deed with all powers annexed thereto, and after his death to certain uses to secure a jointure of £2,000 per annum to the Countess Emily Gwendolen and to secure portions and to enable the petitioner to create a jointure for his widow (if any) with remainder to the use of the petitioner in tail male with remainders over.

By deed-poll dated the 7th of June, 1888, the second earl (in exercise of his powers in that behalf) charged the trust property with the payment, on his death, of £10,000 and interest as the portion of Lady Eva Cecilia Wellesley.

In the year 1888 an arrangement was effected under which the Prudential Assurance Co. paid off the mortgage debts owing, and redeemed the annuities payable to the London Assurance Co. (taking transfers of their securities) and made a further advance to the second earl and the petitioner jointly, the total sum so paid or advanced by the Prudential being £210,000. That sum was secured to the Prudential by a mortgage of the 8th of June, 1888, to which the second earl, the petitioner, and the Countess Emily Gwendolen (who joined for the purpose of postponing her jointure) were parties. By this mortgage, after a joint and several covenant by the second earl and the petitioner to pay the principal sum of £210,000 and interest, the second earl and the petitioner in exercise of the power of appointment vested in them by the disentailing deed of the 14th of January, 1887, appointed, and also by virtue of their interests therein conveyed, the trust property to the Prudential in fee simple (subject to the annuities then subsisting under the will of Lord Mornington and to Lady Eva C. Wellesley's portion) by way of mortgage to secure the said principal sum and interest.

By a deed of re-settlement of the 9th of June, 1888, after recitals stating that part of the £210,000 advanced by the Prudential was applied in discharging incumbrances on the life estate of the second earl, and that the mortgage to the Prudential was executed by the petitioner on an express agreement that the second earl should join with him in executing the present deed, the second earl and the petitioner, in exercise of their joint power under the disentailing deed, appointed that (subject as in that deed mentioned and subject to the deed-poll of the 7th of June, 1888, and to the mortgage to the Prudential) the trustees should hold the trust property upon such trusts as the second earl and the petitioner should jointly appoint, and in default of such appointment upon trust that the petitioner should receive certain annuities during the life of the second earl, varying in certain events; and subject thereto in trust for the second earl for life by way of restoration of his life estate under the will of Lord Mornington, and after his death (after trusts for securing a sum for the benefit of Lady Eva C. Wellesley and a rent-charge to the countess) upon trust for the petitioner for life, with remainder to his first and other sons in tail male, with remainders over. The resettlement also contained a provision to the effect that as between the second earl and the petitioner the second earl should, during his life, be primarily liable for the payment of the interest on the mortgage debt of £210,000.

By subsequent deeds the trust estates were further charged by the second earl and the petitioner to secure various sums expressed to be advanced to them by the Prudential.

The second earl died on the 28th of February, 1895. At that date the principal mortgage debt owing to the Prudential under the above mortgage and further charges amounted to £230,000, of which £199,987 11s. 8d. had been paid to or for the second earl, and £30,012 8s. 4d. to or for the petitioner.

At the same date the petitioner was by virtue of the provisions of the resettlement in receipt of annuities charged on the settled property amounting to £3,000.

The petitioner, as the person to whom property under the resettlement had passed on the death of the second earl for a beneficial interest in possession, and as accountable for the estate duty accordingly, duly delivered to the Commissioners of Inland Revenue an affidavit with a schedule annexed. Parts I. and II. of the schedule gave particulars of the trust investments and lands, the total principal value shown being £538,426 11s. 1d. Part III. contained "deductions from the principal value of property comprised in Parts I. and II.," and included five items. Items 1, 2, and 3 represented the capitalized values of the subsisting annuities under Lord Mornington's will and of interest payable during two joint lives on the consideration money received for the sale of an advowson, part of the trust estate comprised in that will. These items, together amounting to £9,140 17s., were allowed by the Commissioners. Item 4 was such part of the mortgage debt of £230,000 as was created wholly for the deceased's own use and benefit—viz., £199,987 11s. 8d. Item 5 was the capitalized value of the life annuity of £3,000 enjoyed under the resettlement by the petitioner at the death of the deceased—viz., £65,200. These two items were disallowed by the Commissioners. The net principal value chargeable with estate duty would be, on the basis of the deductions claimed by the petitioner, £264,098 2s. 5d., and according to the determination of the Commissioners, £529,285 14s. 1d.

The petitioner in his appeal claimed that the whole of the £230,000 secured on mortgage, and also the £65,200, the capitalized value of the annuities, ought to be allowed as deductions from the principal value of the estate.

Haldane, Q.C., and *Henry Fellows*, for the petitioner.—The whole of the mortgage debt of £230,000 ought to be deducted, or at least so much thereof as

was received by the deceased or applied for his benefit. The mortgage and further charges were made upon the whole fee simple of the property under the paramount joint power of appointment reserved to the second earl and the petitioner by the disentailing deed and the resettlement. Consequently, the property passing on the death of the second earl (or deemed so to pass under section 2 (1) (*b*) of the Finance Act, 1894) was the equity of redemption only, and it is only upon the value of the property so passing that estate duty is chargeable: Finance Act, 1894, s. 1 (1). If the mortgage debt be not deducted the Crown will be receiving duty upon the interest of the mortgagees, which in no sense passed on the death. Sections 1 and 2 of the Finance Act are the sections which impose the tax, and the only question is what property passed or is to be deemed to have passed on the death within the meaning of these sections. The estate of the mortgagees did not pass, but the property subject to the whole mortgage debt did pass, and it is only on the value of the property less that mortgage debt that duty is payable. As to the part of the mortgage debt which was paid to or for the benefit of the second earl that is within the allowances permitted to be made by section 7 (1) of the Act. This sum was an incumbrance created by dispositions made by the deceased for full consideration wholly for his own benefit and took effect out of his interest. And the value of the benefit accruing from the cesser of the second earl's interest was the value of the whole property less the interest of the mortgagees (section 7 (7)). But it is not necessary to claim the benefit of the allowances under section 7, for the property taxable under sections 1 and 2 is the equity of redemption only. The cesser of the annuities mentioned in item 5 of the affidavit caused no benefit to accrue, because the petitioner, who was the annuitant, also took the estate upon which they were charged. The capital value of the annuities is not to be deemed to have passed under section 2 (1) (*b*).

Sir R. E. Webster, A.G., and *Sir R. B. Finlay, S.G.* (*Vaughan Hawkins* with them), for the Crown.—The mortgage debts are not a proper subject for deduction. They are not a charge upon the whole property, for under the will and subsequent settlements the property could never be dealt with as a whole. The second earl and the petitioner could not charge the fee; the incumbrances created by them under the joint power in the disentailing deed must be read into that deed which created the power (*Braybrooke* v. *Attorney-General*, 9 W. R. 601, 9 H. L. Cas. 150; *Attorney-General* v. *Chapman*, 40 W. R. 79, [1891] 2 Q. B. 526), and they only affected their successive interests in the property. The interests in the property taken by particular persons are immaterial for the purposes of this Act. The whole property "passed" under sections 1 and 2, and the fact that there are charges on certain interests in it must be disregarded. The interest of the second earl extended to the whole income of the property (except for the small over-riding charges in respect of which deductions have been allowed), and this is the "value of the benefit accruing" within section 7 (7). The sum received by the second earl from the mortgagees cannot be deducted under section 7 (1) because the incumbrances did not take effect "out of his interest." Those words must mean "out of the interest which he transmits," not "out of the interest which determines on his death," which would be an absurdity; the second earl could not charge anything beyond his life interest; the charge on any subsequent interest must have been by the petitioner, and it cannot be contended that a mortgage debt created by a reversioner during the preceding life estate can be deducted from the value of the property passing on the life tenant's death. The £3,000 annuities ceased on the death of the second earl, and a benefit accrued to the property on their cesser; it is immaterial that in the particular circumstances the petitioner received no benefit; the value of the annuities passed on the death, and the Act imposes a tax on the value of property passing, and not on the interests of individuals in that property.

Haldane, in reply.—The doctrine applied in *Braybrooke* v. *Attorney-General* to cases under section 12 of the Succession Duty Act, and in *Attorney-General* v. *Chapman* to the particular circumstances of that case is wholly irrevelant here. The charges here are upon the whole fee simple of the property which the second earl and the petitioner were able to deal with under the joint power given to them by the disentailing deed. If the transaction had been a sale instead of a mortgage, and the proceeds of sale had been invested, it could not be contended that duty would be payable both on the estate sold and on the investments of the proceeds: here the interest of the mortgagees must be treated as if property to that extent had been sold.

Sir R. B. Finlay, in rejoinder.—The form of the mortgage of the 8th of June, 1888, shows that the charge was given on the successive interests; the prior charges on the second earl's life estate were kept alive, and the intention was that there should be no merger of the interests of the second earl and the petitioner.

Cur. adv. vult.

May 11.—The judgment of the COURT (POLLOCK, B., and BRUCE, J.), was delivered by

BRUCE, J.—In this case a petition has been filed by the third Earl Cowley pursuant to rule 1 of the Rules of the Supreme Court made under section 10 of the Finance Act, 1894, for the determination of the amount of estate duty payable in respect of property which, within the meaning of the above Act, passed on the death of his father, the second Earl Cowley.

By the first section of the Finance Act, 1894, it is enacted that in the case of every person dying after the commencement of part 1 of the Act there shall, save as thereinafter expressly provided, be levied and paid upon the principal value, ascertained as thereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called estate duty.

By the second section it is enacted, so far as material to this case, that property passing on the death of the deceased shall be deemed to include "(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

Section 7 contains provisions for determining value. The seventh sub-section of section 7 seems to us to contain the material provisions affecting the present case. By this "the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall (*a*) if the interest extended to the whole income of the property be the principal value of that property; and (*b*) if the interest extended to less than the whole income of the property be the principal value of an addition to the property equal to the income to which the interest extended."

Now, it is admitted that property passed, or what is the same thing for present purposes, that property is to be deemed to have passed within the meaning of the statute on the death of the second Earl Cowley, and the whole contention has been as to the value of

the benefit accruing or arising from the cesser of the interest ceasing on his death.

It has been admitted by the Crown that certain annuities charged on the estate by virtue of the will of William Richard Arthur Earl of Mornington, and numbered items 1 and 2 in Part III. of the schedule of the petitioner's affidavit, referred to in the petition p. 32, par. 32, and the capitalized value of certain interests referred to in item 3 of the same schedule, must be deducted in order to arrive at the value of the benefit accruing. The amount of these three items is £9,140 17s.

The principal dispute has arisen with respect to mortgages on the property amounting in the whole to £230,000. The question we have to determine is whether these mortgages are to be taken into account in assessing the value of the benefit accruing or arising from the cesser of the interest ceasing on the death of the second Earl Cowley. It is quite clear that the interest of the second earl extended to less than the whole income of the property. It extended only to the income of the property after payment of the sums payable in respect of the admitted items 1, 2, and 3 already mentioned. The question presents itself—if the income to which the interest of the deceased extended is to be taken as the income of the property after deducting the charges on the property 1, 2, and 3, why should not the income to which his interest extended be limited in like manner to the amount he was entitled to receive after the interest on the mortgages had been paid?

The argument of the Attorney-General was that the mortgages were not charges upon the property passing on the death of the second earl. He contended that so far as they were charges on the interest which expired on the death of the second earl they were charges on his life interest only.

But it seems clear that by the mortgages in question, the second Earl Cowley as tenant for life and the petitioner as remainderman conveyed or appointed to the mortgagees the whole of their respective estates, and therefore that the charges were charges on the fee simple of the estate and remained in force notwithstanding the death of the second earl, so that the charges were in no respect diminished by the death of the deceased.

With reference to this view of the facts the Attorney-General urged that the charges upon the property so far as they extended beyond the life interest of the second earl were not to be considered because they could not have been created without the concurrence of the third earl and were not, properly speaking, charges on the property passing. But we do not think it is possible to adopt this contention. The life estate of the second earl no doubt never passed, but it was an interest in property and that interest ceased on the death of the second earl, and this property, the interest in which was so determined, is to be deemed (section 2, sub-section 1 (*b*)) to pass to the extent to which a benefit accrues or arises by the cesser of such interest. The value to be determined in this case is not the principal value of the property, but the value of the benefit accruing or arising from the cesser of the interest which existed during the life of the second earl and ceased at his death. In dealing with interests ceasing on the death of the deceased the Legislature deals with interests which in fact do not pass although the property in which the interests subsisted is to be deemed to have passed to the extent above mentioned.

The value of the benefit accruing or arising by the cesser of an interest would be a difficult matter to determine had no rules been laid down in the Finance Act for estimating such value. But the 7th sub-section of the 7th section enacts that the value of the benefit to be determined by the cesser of the interest, in a case where the interest extended to less than the whole income of the property, is the principal value of an addition to the property equal to the income to which the interest extended. In other words, it is to be determined by ascertaining the value of the income to which the interest of the second earl extended. That income was the income which remained after satisfying the admitted deductions 1, 2, and 3, and the amount of interest due on the mortgages. The interest of the second earl was an interest for his life subject to the mortgages, and the mortgages undoubtedly remained subsisting charges at his death. The benefit accruing from the passing of the property was no more than the capitalized value of the income which the second earl actually had a right to enjoy. In other words, it was the value of the income to which the equity of redemption of the life estate of the second earl extended.

For the reasons we have given, we think the value of the benefit accruing or arising from the death of the second earl must be reckoned exclusively of the interest payable at the date of his death to keep down the mortgages and other charges.

In case an objection should be taken to this construction of the statute on the ground that it would lead to the result that in case of a mortgage on a life estate the value of the benefit arising from the cesser of the life interest must be taken to be based upon the income the life tenant received in his lifetime after the payment of the mortgages, we may observe that we think no such conclusion follows. The value of the benefit accruing from the cesser of an interest ceasing on death is to be measured by the extent to which a benefit accrues by the cesser of such interest, and in the case where the mortgage is on the life interest only, so that the charge ceases on the death, the interest ceasing on the death of the deceased would extend to the whole income of the property, because at that moment when the property is to be deemed to have passed the interest ceased to be incumbered. It seems to us that the language of the statute warrants a broad distinction being drawn between cases where the incumbrances cease at the death and cases where the incumbrances remain charges on the property after the death.

In the present case we do not think it necessary to consider whether the estates of the second and third earl merged; it is enough, we think, that the rights of the incumbrancers remained in force on the property after the decease of the second earl, and affected the interests then subsisting whatever those interests were.

We have not referred to sub-section 1 of section 7 because we do not think it applies to cases within sub-section 7 (*b*) of section 7. In cases where the principal value of the property is the measure of the amount of the duty to be paid either generally where the whole estate passes or in cases falling under sub-section 7 (*a*), the rule as to allowances laid down in section 7, sub-section 1, applies. But section 7, sub-section 1, has, we think, no application to a case falling under section 7, sub-section 7 (*b*).

A further question arises with respect to the capitalized value of certain annuities amounting at the death of the second earl to £3,000 per annum charged on the property and payable to the third earl during the life of the second earl. We think that no deduction can be allowed in respect of the value of these annuities because they they were not existing incumbrances at the moment of the passing of the property. It is true that the third earl is not a gainer by the extinction of these annuities because they were payable to him, they were charges for his benefit.

But they did not affect the value of the property passing and cannot be regarded as effecting a diminution of the income to which the interest of the second earl extended.

The result of our judgment is that we allow the second head of the petitioner's appeal which relates to the sum of £230,000 secured by mortgage. As to the fourth head of appeal, which relates to the sum of £65,200, the decision of the Commissioners of Inland Revenue will stand.

The costs of this appeal should be paid by the Crown.

Solicitors for the petitioner, *Collyer-Bristow, Russell, Hill, & Co.*

Solicitor fo the Crown, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Cave and Lawrance, JJ.) March 18.

RUTTER AND ANOTHER (*Respondents*) *v.* OVERSEERS AND PARISH COUNCIL OF CRAYFORD (*Appellants*). (*a.*)

Poor law—Rating—Property other than land—Land—Brickfield—43 Eliz. c. 2, s. 1—Lighting and Watching Act, 1833 (3 *&* 4 *Will.* 4, *c.* 90), *s.* 33.

By section 33 *of* 3 *&* 4 *Will.* 4, *c.* 90, *the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at and pay a rate in the £ three times greater than that which the owners and occupiers of land shall be rated at and pay for the purposes of the Act.*

Held, that "property other than land" meant things ejusdem generis *with "houses and buildings," and did not include a brickfield; and that a foreman's cottage together with all the sheds and machinery for brick-making erected on the property (at any rate so long as that property was assessed as a whole) must be considered as merely ancillary to the brickfield, and therefore the owners of the brickfield were not liable to be rated at the higher rate.*

Case stated on an appeal to the Kent Quarter Sessions on a rating appeal in respect of rates made under section 33 of the Lighting and Watching Act, 1833, on a brickfield belonging to the respondents on this application who were the appellants in the court below.

The quarter sessions held that the brickfield was "land" and not "houses, buildings, and property other than land" within the meaning of the section, and directed that the owners of the brickfield should be rated at 2d. in the pound instead of 6d. as in the rate, and that the rate should be amended accordingly. On this decision the rating authority asked and obtained the statement of a case.

By the Poor Relief Act, 1601 (43 Eliz. c. 2, s. 1), the overseers of the poor are authorized to raise moneys for the relief of the poor "by taxation of . . . every occupier of lands, houses, tithes impropriate or propriations of tithes, coal mines, or saleable underwoods."

By the Lighting and Watching Act, 1833, s. 33, the overseers of the poor of any parish to which the provisions of the Act extend "shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner and have the same powers, remedies, and privileges for levying money for the relief of the poor of the said parish provided always that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the £ three times greater than that at which the owners and occupiers of land shall be rated at for the purposes of this Act."

The case stated that these brickfields had been rated as one property at 6d. in the £ as "brickfield, land used for pipes, and other lands." Of the land included in the assessment twenty-five acres were agricultural land, and as to this there was no dispute. The remainder of the property was used and occupied by the respondents entirely for brick-making. For the purposes of their business several engine-houses with engines and wash-mills had been erected on various portions of the property. On the surface of the ground tram-lines had been laid down by which the brick earth as excavated was conveyed to the wash-mills. The earth, after being treated there was conveyed by lines of pipes to sheds where it was made into bricks. There was also an open shed used as a wheelwright's shop and smithy, and a "tumble-down" stable. The foreman occupied a cottage on another part of the property, and there was also a wharf used for loading bricks into barges. On another plot, described as "hack-ground," was another engine-house with its coal-shed. The clay pits and moulders' huts, situated on one of the plots, consisted of a series of roofed buildings with open sides, containing fourteen machine mixers worked by an engine.

Morton Smith (with him *Hohler*), for the rating authority.—The quarter sessions were wrong in amending the rate. The present assessment is made on the property as a whole. Treated in that light, the whole must be considered as a commercial undertaking with business premises in which capital is invested for trade purposes. These works on the brickfield make it "property other than land," and it ought therefore to be rated at the higher rate. If the court be against this view of the facts, at all events the foreman's cottage, the engine-houses, the pumping-stations, the mills, and especially the wharf, should be separately assessed and the respondents should pay on that assessment at the higher rate.

He referred to *Reg.* v. *Midland Railway Co.*, 3 W. R. 415, 4 E. & B. 958; *Reg.* v. *Vauxhall and Southwark Water Co.*, 5 W. R. 71, 6 E. & B. 1008; *Peto* v. *West Ham Overseers* (1859), 7 W. R. 586, 2 E. & E. 144; *Reg.* v. *Neath Overseers*, L. R. 6 Q. B. 707, 20 W. R. C. L. Dig. 74; *Reg.* v. *Midland Railway Co.*, 23 W. R. 921, L. R. 10 Q. B. 389; *Thursby* v. *Churchwardens of Briercliffe-with-Extwistle*, [1895] A. C. 32, 43 W. R. Dig. 130; *Newport* v. *Newport Local Board*, 2 B. & S. 708, 11 W. R. C. L. Dig. 136; *South Wales Railway Co.* v. *Swansea Local Board*, 4 E. & B. 189; *London and North-Western Railway Co.* v. *Llandudno Improvement Commissioners*, *ante*, p. 350, [1897] 1 Q. B. 287.

Dickens, Q.C. (with him *Tassell*) *contra.*—The decision of the quarter sessions is right. Under the Act of Elizabeth a brickfield for the purposes of rating is "land." It is also land under the Act of 1833. The appellants have failed to show that the buildings erected by the respondent for the purpose of carrying on the works are of such a character as to convert, so to speak, this "land" into "property other than land." I submit that every building mentioned in the case or shown on the plan is merely ancillary to the brickfield, which can therefore only be rated as a brickfield—that is, as "land." Possibly the foreman's cottage and the various engine-sheds and mills might rightly form the subject of a separate assessment, and if so they might then pay a rate as "buildings," but that is not the question here, since

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the rating authority has thought fit to assess the property as a whole.

CAVE, J.—I think that the court of quarter sessions has come to a right decision on the case as it stands. They had only before them an assessment on the property as a whole, and treated as a whole it is undoubtedly land and not buildings or property other than land. Under the Act of Elizabeth making property rateable a distinction is drawn between "land" and "houses." In the Lighting and Watching Act a difficulty arises in certain cases in deciding at what rate property is to be assessed by the introduction of the word "buildings" into the corresponding section. In the present case the property consists of land with buildings thereon. Now, if it is right that it should be rated as buildings then it is liable to assessment at the rate three times as high as if it were assessed as land; and that is the question we have here to decide.

The judges have fluctuated in their decisions on the matter, having at first sought to find a reason for the distinction. At one time it was thought that a good ground of distinction could be found by attributing the meaning of "buildings" in the section to land used otherwise than for agricultural purposes. No doubt this arose from reference to the notion that land used otherwise than for agricultural purposes was intended by the framers of the Act to be rated at a higher rate, because it would derive greater benefit from the application of the Lighting and Watching Act than land in its ordinary agricultural condition did. But as the definition of property other than land in the Statute of Elizabeth included not only coal mines but saleable underwoods it soon became clear that such a principle of division could not be applied. In fact, it cannot now be said that the numerous authorities establish any further principle than this—that when it has been ascertained what was rateable as land under the statute of Elizabeth, then it is necessary to consider whether the property in question, although rateable as land under that statute, is really buildings or really land within the meaning of those terms in the Watching Act in order to determine whether it is liable to the higher or lower rate. But then there are cases where the object of rateability, though clearly land under the statute of Elizabeth, consists both of land and buildings—that is to say, is land covered with buildings. Here, if the land is accessory to the buildings, it must be rated as property other than land, and if the buildings are accessory to the land it must be rated as land. Thus, for instance, if the object of rateability be a plot of land on which a large warehouse has been erected with a courtyard attached for the convenience of carts delivering goods at the house, the land would be in such a case ancillary to the buildings. If there is a piece of land occupied as a farm with a small shed for horses to shelter in, such a building would be, on the other hand, ancillary to the land, and liable only to pay at the lower rate.

In this case the quarter sessions could hardly have come to any other conclusion than that which they came to, treating the assessment as a whole. But it may be that those who framed the rate were wrong, and that they ought to have divided up the assessment. As long as they rated it as one property, I entertain no doubt that the magistrates were right in the view they came to, and if I am asked whether the rating officers ought to have rated it as one complete thing, I am unable to give an answer from the materials I have before me, except as regards the house occupied by the foreman. The house is a house, and not a building other than a house, and if the house is not land, consequently it falls to be rated at the higher rate under the express words of the statute as being a house if it is to be taken separately. If it is to be "lumped" together along with a quantity of land, then I must of course ask myself which is the principal and which is the accessory, and there can be no doubt on the facts stated that the land would be the principal and this building, even although called a house, would be the accessory. Taking the brickfield as a whole, apart from the house, all the engine-houses and sheds are obviously ancillary to the use of the land as a brickfield. Very possibly, therefore, if these were rated separately and apart from the brickfield, their rateable value would be so reduced by their severance from the brickfield that it might be better policy on behalf of the rating authorities to leave them to be assessed as part of the land, but that is a question of common sense for the authorities themselves to decide. For these reasons, taking the brickfield as a whole, the magistrates were, in my opinion, right in reducing the rate, and the appeal must accordingly be dismissed with costs.

LAWRANCE, J.—I am of the same opinion.

Order of sessions confirmed. Leave to appeal given.

Solicitors for the appellants, *Pyke & Parrott*, for *J. & J. C. Hayward*, Dartford.

Solicitor for the respondents, *H. P. Davies.*

Q. B. Div.
(Wright and Bruce, JJ.) Jan. 19.

REG. v. THE CLERK OF ASSIZE, OXFORD CIRCUIT.
Ex parte DANIELL v. SAISE.
REG. v. THE SAME.
Ex parte TREE. (a.)

Coroner's inquest—Criminal law—Inquisition—Validity of—Quarries Act, 1887, *s.* 3.

An inquisition finding that the deceased met his death from injuries to his head and back caused by a fall into a quarry, and that by "the neglect of" three specified persons "to fence or cause to be fenced the said quarry the said" deceased person "fell therein, and that therefore the said" three specified persons "did feloniously kill the said" deceased, is bad upon the face of it, on the ground that, although it stated certain facts, it had not stated any facts showing that there was a duty on the part of the three specified persons to fence the quarry.

In this case two rules *nisi* were obtained to quash certain inquisitions and recognizances.

The facts of the case were these: One George Seabourne met his death on the 26th of December, 1896, by falling into a quarry upon which a highway known as Snuff Mills-lane at Stapleton abutted, but which was not properly fenced in.

From the evidence of the clerk to the urban district council given at the inquest it appeared that A. J. Saise, who was inspector of nuisances to the said district council, reported to that body that, under the Quarries Act, 1887, Snuff Mills-lane was insufficiently fenced, and that two letters of complaint as regards the safety of the said lane from different persons had been communicated to the council, and that in consequence a letter was sent, by order of the council, to the owners of the quarry, pointing out that the quarry required fencing off. The witness further stated that T. Tree, the managing director of the company that owned the quarry, subsequently told him that the dangerous places had been fenced.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The coroner's jury returned a verdict of manslaughter against E. T. Daniell, the chairman of the urban district council; A. J. Saise, the surveyor and inspector of nuisances; and T. Tree, the said managing director. The inquisition found that "the cause of Seabourne's death was injuries to his head and back caused by a fall into a quarry, and so the jurors do further say that by neglect of" the aforesaid persons "to fence or cause to be fenced the said quarry," the aforesaid persons "did felonously kill the said George Seabourne."

Thereupon two rules *nisi* to quash the inquisitions and recognizances were obtained on the ground that the inquisition was bad in law because it not disclose an offence on the part of the applicants.

The Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), s. 3, provides that a quarry within fifty yards of a highway, and not separated therefrom by a secure and sufficient fence "shall be kept reasonably fenced for the prevention of accidents, and unless so kept shall be deemed a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875."

Hon. A. Lyttelton, showed cause.—He contended that the inquisition was sufficiently stated, and cited *Reg.* v. *Pocock*, 17 Q. B. 34, and *Reg.* v. *Ingham*, 29 L. J. M. C. 18. The offence alleged contains all the constituents of manslaughter.

Danckwerts and *Gwynne James*, in support of the rules.

H. Sutton, for the Public Prosecutor.

WRIGHT, J.—I think this inquisition must be quashed. Clearly, if it had been simply found that the three defendants did felonously kill and slay the deceased person, it would have been enough, but I think it appears to be a general rule of criminal pleading, for which a good deal of support can be found in a number of references collected in Archbold's Pleadings and Evidence in Criminal Cases (21st ed., pp. 62, 229, and 230) that although a simple statutory form of indictment or inquisition may suffice, still, if the party chooses to resort to what may be called a special indictment or inquisition the case is altered, and then it appears that every part of the special indictment or inquisition which states the material elements of the offence charged must state it so as in law to state a sufficient matter to support conviction. Of course it is very seldom material, because in the great majority of cases now there is abundant power to amend, but unless that is amended it seems to be fatal on demurrer, and in a proper case upon an application to quash.

I should like to test it in this way. Supposing here at the trial the jury found a special verdict following the very terms of this inquisition, it would be entirely and obviously bad. It seems to me that is a very fair test to apply. There is no common law duty to fence a quarry which is not stated to be so situate as to be a public nuisance. There is no statutory duty to fence it unless it is within a certain distance of a highway, and there is no allegation that the defendants or any of them had any such relation to the quarry as to involve them in a personal liability to fence. Therefore, clearly a special verdict to this effect would have been entirely bad. I do not say that is an absolute test. I do not think it is, but it illustrates the kind of view that may be taken. Then in an ordinary case very likely this court might refuse to quash the inquisition. We are bound by the case of *Reg.* v. *The Great Western Railway Co.*, 36 W. R. 506, 20 Q. B. D. 410, to hold that we sitting in this court are not in any way fettered by section 20 of the Coroners' Act. That only binds courts of assize and so on, but although we have abundant power to quash, we might refuse to exercise it unless we saw there was some substance in the case. Here unquestionably, as regards two of the defendants, there is a most serious defect in the charge against them. I do not think it can be contended for a moment that members of a district council or other body of that kind are liable to a charge of manslaughter simply because they have omitted to exercise powers vested in them to cause other people to fence places. If we thought there was no substance in the objection we should probably have left the matter to be dealt with by the judge at the assizes, who could have satisfied justice. But seeing that the case as against two of the defendants is one of such a character that it would be a gross injustice to make them appear at the assizes and stand their trial upon the coroner's inquisition, I think we ought to interfere and quash this inquisition upon the grounds that I have stated. The reasons I have stated apply equally to the defendant Tree as regards the power to quash, but, of course, his case may appear a different one in substance; I do not say it is. He is said to be chairman of the Quarry Co. It may be there is a case against him. Mr. Danckwerts says there is none. We cannot say there is none, and therefore nothing we say ought to prejudice the right of the Public Prosecutor, if he thinks fit to carry the case further against that defendant. I do not think either of us wish to say for a moment that there is or is not any case against him, but merely that he seems to stand on a different footing to the others. It follows that the recognizances must be quashed without reference to what the form of them is. I should not like to say anything about the form of the recognizance without considering it further, but it seems to be quite unusual to bind over the witnesses to prefer a bill of indictment. I do not remember seeing that in recognizances before. My recollection is that where there is a private prosecutor, then his recognizance is to prefer a bill of indictment, but I am rather inclined to think that the coroner, or whoever drew up these recognizances, has mixed up the two things together, the prosecutor's recognizance and the witnesses' recognizance.

BRUCE, J.—I am of the same opinion. It is quite true that the inquisition contains words which, if they stood alone, would have been a good inquisition, but these words, I think, cannot be separated from the introductory part of the inquisition or from the statement which is coupled with the important words by the word "therefore." The inquisition undertakes or professes to show the particulars under which the duty arose, and it says that because that duty was not performed, therefore there was a felonious act, but the inquisition altogether neglects to set out in the early part of it any facts which impose a duty. The inquisition is as if it stood thus: "The deceased fell into a quarry and was found dead, and therefore the persons named in the inquisition did feloniously kill and slay the deceased." Where the inquisition does condescend to particulars, and when those particulars are insufficient to set out any legal duty or culpable negligence, it must be quashed as bad on the face of it.

With reference to the case against the owner of the quarry, I do not know that I need add anything to what has been said by my learned brother. I may say I understand it to be a general rule of law that a person is not to be held criminally responsible for the neglect of a subordinate, and if he could establish that although there was neglect to fence the quarry, it was not his neglect, but the neglect of a subordinate person, he has power to do so. [*Danckwerts.*—

There are the costs. The coroner has chosen to show cause here.] [WRIGHT, J.—We have no power to order costs.]

Solicitors, *Bridges, Sawtell, & Co.*, for *Thurston & Jolly*, Thornbury; *Rowcliffes, Rawle, & Co.*, for *Salisbury & Griffiths*, Bristol; *Solicitor to the Treasury.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) May 24.

SPOKES *v.* GROSVENOR AND WEST-END RAILWAY TERMINUS HOTEL CO. (No. 1). (*a.*)

Practice—Discovery of documents—Action for fraudulent conspiracy—Ord. 31, *r.* 12.

An order for discovery of documents may be made against a defendant in an action for fraudulent conspiracy. The objection that the production of any document would tend to criminate the defendant can be made by him in his affidavit in answer.

Redfern *v.* Redfern, 39 *W. R.* 212, [1891] *P.* 139, *distinguished.*

Allhusen *v.* Labouchere, 27 *W. R.* 12, 3 *Q. B. D.* 654, *approved.*

Appeal from an order of Grantham, J., at chambers.

The plaintiff, who was a shareholder in the Grosvenor and West-end Railway Terminus Hotel Co., brought the action on behalf of himself and other the shareholders in the company to recover damages.

The defendants were the company, the directors of the company, and certain tradesmen who had supplied the company with goods.

The plaintiff alleged that the defendants other than the company had conspired together to cheat and defraud the company, whereby the company had been damnified.

The plaintiff applied under ord. 31, r. 12, for an order directing Drew, one of the defendants, to make an affidavit of discovery of documents.

The defendant Drew opposed the application on the ground that such an order could not properly be made against a person who was charged with acts which might amount to a criminal offence. Grantham, J., made an order for discovery.

Drew appealed.

Pollard, for the defendant Drew.—The only cause of action in this case is conspiracy; therefore any document relating to the matter in question may tend to criminate the defendant, and he is entitled to take the objection at this stage of the proceedings. In *Allhusen* v. *Labouchere*, 27 W. R. 12, 3 Q. B. D. 654, which was a case of interrogatories, it was, no doubt, held that, where a party objected to answer an interrogatory on the ground that it might tend to criminate him, he ought to take the objection in his affidavit in answer, and was not entitled to have the interrogatory struck out as objectionable. But there is a distinction between interrogatories and discovery of documents. Where it is obvious that discovery of documents is only sought for the purpose of supporting an issue which may render the party liable to punishment, no order ought to be made: *Redfern* v. *Redfern*, 39 W. R. 212, [1891] P. 139; see also *Ex parte Reynolds*, 30 W. R. 651, 20 Ch. D. 294.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

J. Eldon Bankes, for the plaintiff.—According to the decision in *Allhusen* v. *Labouchere* and the general practice, the principle is that, where a person objects that answering a question or making discovery of documents may tend to criminate him, such objection ought to be taken on oath. The objection which the defendant here seeks to raise is really an objection to the production of documents. He ought to make an affidavit, and in his affidavit he can claim that he is not bound to produce any particular documents: see *Seaward* v. *Dennington*, 44 W. R. 696, and *Webb* v. *East*, 28 W. R. 336, 5 Ex. D. 108.

Pollard, in reply, cited *East India Co.* v. *Campbel*, 1 Ves. sen. 246; *Cartwright* v. *Green*, 8 Ves. 405; and *Paxton* v. *Douglas*, 19 Ves. 225.

Lord ESHER, M.R.—This is an action against several defendants for conspiracy to defraud. The plaintiff has taken out a summons asking for an order directing one of the defendants to make an affidavit of discovery of documents. An order made on such a summons is practically a question which has to be answered on oath—Have you any documents relating to the issue in the cause? If you have, give a list of them. The defendant contends that the court ought not to allow the question to be put. The plaintiff does not deny that the defendant may refuse to answer the question if he says on oath that an answer might tend to criminate him, but the plaintiff insists that he ought to be allowed to put the question. I think that in this matter we are bound by the authority of *Allhusen* v. *Labouchere*. It is said that that only decided the case of interrogatories specially so called. But in my opinion the decision is equally applicable to the case where a question is put in the shape of an order for discovery of documents. The decision is this, that, where the person to whom a question is put believes that an answer might tend to criminate him, he cannot object to the putting of the question, and his right of objection only arises when he takes the point by saying in his affidavit in answer—I decline to answer, on the ground that my answer might tend to criminate me.

It is argued that this decision has been overruled in *Redfern* v. *Redfern*. But in my opinion the Court of Appeal cannot have intended in that case to overrule *Allhusen* v. *Labouchere*, which was not even cited in argument. I think that *Redfern* v. *Redfern* was decided on certain peculiarities of divorce law, and must not be taken as a decision on the general law. *Allhusen* v. *Labouchere* is therefore still a binding authority, and the objection which the defendant seeks to raise cannot be taken at this stage. The appeal must be dismissed.

A. L. SMITH, L.J.—This is an action for defrauding a company. The defendant Drew says that an order for discovery of documents ought not to be made against him, because he is not bound to criminate himself. In my opinion discovery of documents and discovery by way of answers to interrogatories on facts stand on the same basis; and whichever kind of discovery it may be, the only method of objection open to a person in the position of Drew is to answer on oath that discovery may tend to criminate him. There are four cases on the subject: *Fisher* v. *Owen*, 26 W. R. 581, 8 Ch. D. 645; *Allhusen* v. *Labouchere*, *Webb* v. *East*, and *Seaward* v. *Dennington*, two of them dealing with documents and two with interrogatories. They all show that the proper time for taking the objection is when the party comes to make oath. No case throws doubt on the rule except *Redfern* v. *Redfern*. There the decision was that discovery ought not to be required from a party to

divorce proceedings, when it was sought for no other purpose than to prove such party guilty of adultery. But the question whether the respondent had been guilty of adultery was one which, by the Divorce Acts, could not be put to her even when she was in the witness box. The Court of Appeal did not in that case overrule any of the other cases.

CHITTY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Henry Kimber & Co.*

Solicitors for the defendants, *Mossop & Bolfe.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) May 27.

SPOKES v. GROSVENOR AND WEST-END RAILWAY TERMINUS HOTEL CO. (No. 2). (a)

Practice—Discovery of documents—Action by shareholder to recover damages for company—Company joined as defendant—Right of plaintiff to discovery from company—"Other party"—Ord. 31, *r.* 12.

Where a shareholder in a company brings an action on behalf of himself and the other shareholders to recover damages for the company, and the company is joined as a defendant to the action, an order may be made against the company at the instance of the plaintiff for discovery of documents, though no relief is sought against the company.

Appeal from an order of Day, J., at chambers.

The plaintiff, who was a shareholder in the Grosvenor and West-end Railway Terminus Hotel Co., brought the action on behalf of himself and other the shareholders in the company to recover damages.

The defendants were the company, the directors of the company, and certain tradesmen who had supplied the company with goods.

The plaintiff alleged that the defendants other than the company had conspired together to cheat and defraud the company, whereby the company had been damnified.

The plaintiff applied under ord. 31, r. 12, for an order directing the defendant company to make an affidavit of discovery of documents.

The defendant company opposed the application on the ground that, as no issue was raised in the action between the plaintiff and the company, such an order could not properly be made against them.

Day, J., made an order for discovery.

The defendant company appealed.

Farwell, Q.C., and *T. M. Stevens*, for the defendant company.

J. Eldon Bankes, for the plaintiff.

Cur. adv. vult.

May 27.—A. L. SMITH, L.J., read the following judgment: This is an appeal against an order of Day, J., ordering the Grosvenor and West-end Railway Terminus Hotel Co. to make an affidavit stating what documents are or have been in its possession or power relating to the matter in question in the action. The question is whether the learned judge had jurisdiction to make the order, for, if he had, I do not doubt upon the facts before us that his discretion was well exercised. The action is brought by a shareholder on behalf of himself and other the shareholders in the hotel company against its directors and certain tradesmen of the company to recover for the company the damages it is said to have sustained by reason of its directors and the tradesmen having, as it is alleged, conspired together to cheat and defraud the company, whereby the company has been damnified. The proper plaintiffs in such an action would obviously be the company, but in the circumstances existing this is not possible, for the impeached directors who have the controlling power in the company do not assent to the company being made plaintiff, and without that assent the company cannot be made plaintiff. To obviate this difficulty it has for many years been the practice of the Court of Chancery in circumstances such as the present to make the company a party to the action as defendant, in which action the plaintiff shareholder asks for an order not that the damages recovered should be paid to him, but to the defendant company, and in this way the otherwise insuperable difficulty of maintaining the action is got over.

This is what has been done in the present case, and the order for discovery at the instance of the plaintiff shareholder against the company as being party to the action has been made by Day, J. That, in the circumstances of this case, the company is a necessary party to the suit I do not doubt, for without the company being made a party to the action it could not proceed. The point is now taken, not by the company, but in truth and in fact by the impeached directors, that as no relief is asked against the company it cannot be put under discovery, and some cases have been cited in support of this proposition which show that a person who is a mere witness cannot be made a party to the suit in order to obtain discovery from him. But this is not what has been done in the present case. The order under which Day, J., has acted is ord. 31, r. 12, of the Rules of the Supreme Court, which is as follows: "Any party may . . . apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents in his possession or power." Why is not the company an "other party" within this rule? The company is defendant in the action in order that the action may be maintained, and to my mind is clearly a necessary party, which a mere witness certainly is not.

It is said that this court, in *Shaw* v. *Smith*, 35 W. R. 188, 18 Q. B. D. 193, has held that the company, in a case like the present, is not within the order, for to constitute an "other party" within the meaning of the order there must be "some right to be adjusted in the action between the company and the plaintiff" (*per* Lord Esher), or "some community of interest" (*per* Lindley, L.J.), or "some question in conflict in the action" (*per* Lopes, L.J.). These judgments were given in a case, not where discovery was sought between a plaintiff and a necessary defendant, but in a case where a question of discovery arose between two defendants in an action, which was a wholly different matter. No case has been cited in which ord. 31, r. 12, has been construed as above between a plaintiff and a defendant who is a necessary party to an action, and I think that the rule, upon its true construction, in a case like the present gives the jurisdiction to order discovery of documents, and that the order of Day, J., must therefore be upheld.

CHITTY, L.J., read the following judgment: This is an appeal by the defendant hotel company, or in their name, from an order made by the judge in chambers on the application of the plaintiff, whereby the appellants were ordered to make the usual affidavit of documents relating to the matters in question in the action. The action is brought by a

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

shareholder on behalf of himself and other the shareholders in the company. It is founded on an alleged wrong done to the company. For such a wrong the company alone can sue at law, and the general rule is the same in equity. (See *MacDougall* v. *Gardiner*, 24 W. R. 118, 1 Ch. D. 13.) But equity has admitted certain exceptions to this general rule, one of which is that where a fraud is committed by persons commanding a majority of votes, the minority can sue by a shareholder. The principle of the exceptions is well illustrated by such cases as *Atwool* v. *Merryweather*, L. R. 5 Eq. 464n, decided by Wood, V.C., in 1867; *Menier* v. *Hooper's Telegraph Works*, 22 W. R. 396, L. R. 9 Ch. App. 350, decided by James and Mellish, L.JJ.; and *Mason* v. *Harris*, 27 W. R. 699, 11 Ch. D. 97, decided by the Court of Appeal. As was said by Sir George Jessel in *Mason* v. *Harris*, the reason for the exception is plain; unless it were allowed, it would be in the power of the majority to defraud the minority with impunity. On the allegations made in the statement of claim this case falls within *Mason* v. *Harris*. The substance of the case set up is a conspiracy on the part of the directors of the company and the manager and certain tradesmen to defraud the company by commissions, excessive charges for goods supplied, charges for goods not supplied, and other means; that the company have in fact been thereby defrauded; and that the persons implicated in the fraud have obtained the control of the company and a majority of votes, rendering it impossible to bring the action in the name of the company. The directors and others charged with the fraud are defendants. To such an action as this the company is a necessary defendant. The reason is *obvious*; the wrong alleged is done to the company, and the company must be a party to the suit in order to be bound by the result of the action and to receive the money recovered in the action. If the company were not bound, it could bring a fresh action for the same cause if the action failed and there was subsequently a change in the board of directors and the voting power. Obviously, in such an action as this is no specific relief is asked against the company; and obviously, too, what is recovered cannot be paid to the plaintiff representing the minority, but must go into the coffers of the company.

It was argued for the appellants that the company was made party for the purpose of discovery only, and authorities were cited to show that, where no relief is asked against a party, he cannot or ought not to be compelled to make discovery. But this argument and these authorities have no bearing on the present case, where, as already shown, the action cannot proceed in the absence of the defendant company, and the company is interested in and will be bound by the result. The order complained of was made under rule 12 of order 31. That rule speaks of "other party"; an order for discovery may be made against "any other party to any cause." It was argued for the appellants that the company was not any other party within the meaning of the rule, and the decision of this court in *Shaw* v. *Smith* was relied upon in support of the argument. But that case is clearly distinguishable. The question there was between co-defendants, and not, as here, between the plaintiff and a defendant. What the court was there considering was whether the term "any other party" meant "opposite party," the expression used in rule 1 of the same order, and whether it ought to be cut down so as to apply only to a party on the other side of the record. The court held that it ought not.

I am of opinion that this case falls within the express provisions of the rule in question, and that there was jurisdiction to make the order.

Lord ESHER, M.R., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Henry Kimber & Co.*

Solicitors for the defendants, *Mossop & Rolfe.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) May 17.

FRANKENSTEIN v. GAVIN AND OTHERS. (*a.*)

Practice—Discovery—Documents—Affidavit of documents—Objection to produce—Conclusiveness of affidavit.

In an action against directors for an alleged fraudulent misrepresentation in the prospectus of a company to the effect that more than 12,000 *cyclists in London alone had enrolled themselves as annual subscribers to the company, the defendants made an affidavit of documents in which they said that they had in their possession* 12,500 *applications by persons wishing to be enrolled as annual subscribers to the company, but they objected to produce these documents on the ground that they formed part of the evidence supporting the defendants' case, and did not support or tend to support the plaintiff's case, and contained nothing impeaching the defendants' case.*

Held, that, there being nothing to show that the affidavit erroneously represented or misconceived the nature of the documents, they were protected from production.

Appeal from Day, J., at chambers.

The action was brought against the directors of a company and the company for the return of the deposit paid by the plaintiff upon an application for certain shares in the company, the plaintiff alleging that he was induced to apply for the shares by, amongst others, a false and fraudulent representation in the prospectus issued by the directors that in London alone more than 12,000 cyclists had enrolled themselves as annual subscribers at £1 6s. per annum. The plaintiff also claimed rescission of the contract to take the shares and damages.

The defendants in their affidavit of documents stated that they had in their possession, amongst others, the following documents: "12,500 applications by persons wishing to be enrolled as annual subscribers to the company," but they objected to produce them "on the ground that they form part of the evidence supporting the defendants' case, and do not support or tend to support the plaintiff's case, and contain nothing impeaching the case of the defendants."

Day, J., reversing the order of the Master, refused to order inspection of the above documents.

The plaintiff appealed.

C. Gregson Ellis, for the plaintiff.—The plaintiff ought to have inspection of these documents. They are the subject-matter of the action, and are the very documents about which the dispute in the action has arisen. The plaintiff alleges that they are not *bonâ fide* applications by persons to be enrolled as subscribers. They may be mere inquiries as to the terms of membership. The defendants have not stated that they intend to put them in evidence at the trial. He referred to *Combe* v. *Corporation of London*, 1 Y. & C. Ch. Cas. 631; *Attorney-General* v. *Emerson*, 31 W. R. 191, 10 Q. B. D. 191.

E. U. Bullen, for the defendant, was not called upon.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Lord ESHER, M.R.—This is an action in which the plaintiff charges the defendants, the directors of the company, with false and fraudulent misrepresentations. He alleges as one of the fraudulent misrepresentations a statement in the prospectus of the company that 12,000 annual subscribers had enrolled themselves in London alone. The defendants in their affidavit of documents state that they have in their possession applications from 12,500 persons wishing to be enrolled as subscribers, but they object to produce them upon the ground, in substance, that they relate to the defendants' case and not to the plaintiff's case, and contain nothing impeaching the defendants' case. What is the law applicable to that state of things? In *Attorney-General* v. *Emerson* this court, after citing the rule laid down by Knight-Bruce, L.J., in *Combe* v. *Corporation of London*, said that the documents were protected from production unless the court was reasonably satisfied, or reasonably certain, that the defendant had erroneously represented or had misconceived the nature of the documents as to which he was swearing. That reduces the question to this, whether we are reasonably satisfied that the defendants' grounds for objecting to produce the document are not correct. I see no reason to doubt that the documents cannot support the plaintiff's case, and can only support the defendants' case, and do not contain anything impeaching the defence. The appeal must therefore be dismissed.

A. L. SMITH and CHITTY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Bentwich; Watkin Williams & Co.*

Solicitor for the defendants, *T. Wilkinson.*

High Court of Justice.

Chan. Div. North, J. — March 27.

In re TOLEMAN.

WESTWOOD *v.* BOOKER. (*a.*)

Will—Administrator pendente lite—*Appointment by Probate Division—Suing administrator* pendente lite *in Chancery Division—Motion to stay action—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 70, 71.

An administrator pendente lite *of the personal estate of a deceased appointed by the Probate Division may be sued by creditors of the estate in the Chancery Division without leave.*

Motion.

The defendant had been appointed by the Probate Division administrator *pendente lite* of the personal estate and receiver of the real estate in an action contesting the validity of the will of James Toleman. After such appointment the plaintiff, suing on behalf of himself and all other creditors, brought the present action by originating summons in the Chancery Division against the defendant as administrator of the estate of James Toleman for (1) an account of certain dealings between Toleman and the plaintiff with reference to certain building and financing operations; (2) as far as necessary administration of the estate and payment of what might be due to the plaintiff; (3) the appointment of a receiver; (4) an account of what was due to the estate of Toleman in respect of a mortgage from the plaintiff to Toleman, and that the mortgage might be redeemed, the plaintiff being willing and offering to redeem the same; (5) sale of the property comprised in the mortgage.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

The defendant had applied by motion in the Probate Division to restrain the present action, and on the motion, that court made an order giving leave to the defendant to defend the present action, and to apply for a stay therein, or to take such other steps as he might be advised; and under the present circumstances the court, without deciding whether or not leave was required, refused to give leave to the plaintiff to commence or continue proceedings in the Chancery Division against the administrator *pendente lite* and receiver, and refused also to restrain the plaintiff from suing the administrator *pendente lite* and receiver in the action *In re Toleman, Westwood* v. *Booker*; and the court gave leave to the administrator *pendente lite* to appeal from such refusal.

The present motion was by the defendant that all proceedings in the chancery action might be stayed, on the ground (1) that the action had been brought against the defendant solely in his capacity as administrator *pendente lite* appointed by the Probate Division in the exercise of its probate jurisdiction, and pending proof the will of James Toleman, and after notice to the plaintiff of the defendant's position, and without leave and in contempt of the Probate Division; (2) that in any case this action was frivolous and vexatious as against the defendant, who had no interest in the estate of James Toleman, and no rights in relation thereto except as such officer aforesaid.

The motion also asked for costs as between solicitor and client.

Ashton Cross and *Priestley*, for the motion.—The defendant as administrator is an officer of the Probate Division, and it is a contempt to sue him without leave (see section 70, Probate Act, 1857). An action cannot be maintained against an administrator *ad litem* to establish the title of the plaintiff as sole next-of-kin of an intestate (*Dowdeswell* v. *Dowdeswell*, 27 W. R. 241, 9 Ch. D. 294). *Ellice* v. *Goodson*, 2 Coll., at p. 9, gives the form appointing an administrator for the purposes of a suit in Chancery, and it is different from the form of appointment in the Probate Division. In *Searle* v. *Choat*, 32 W. R. 397, 25 Ch. D. 723, it was held that a receiver appointed by the court cannot be sued without the leave of the court. Moreover, the administrator is to act under the direction of the Probate Division, and cannot be called upon to account to a creditor in another court. [NORTH, J., cited *Tichborne* v. *Tichborne*, 17 W. R. 832, L. R. 1 P. & D. 730.]

Swinfen Eady, Q.C., and *J. M. Stone*, for the plaintiff, were not called upon.

NORTH, J., after stating the facts and referring to sections 70 and 71 of the Probate Act, 1857, said: In the Chancery Division a receiver may be appointed of the real or personal estate, but in the Probate Division under the Probate Act a receiver cannot be appointed of the personal estate, but an administrator is appointed, which is a much wider appointment. But as there is now a dispute pending as to the validity of the will of the testator the administrator is only appointed *pendente lite*. The idea that after that litigation is ended a creditor against the estate who had commenced an action against the administrator *pendente lite* would have to start *de novo* against the person found to be executor or against a general administrator seems to me to be wrong. If the proceedings are commenced against the administrator *pendente lite* they will be continued against the executor or against the full administrator when he is appointed. The administrator *pendente lite* has all the powers of a full administrator except the power to distribute the residue of the personal estate. Such

an administrator stands no doubt in a peculiar position, and he can apply to the court for directions and can act under its direction; but to say that he is not in the position of a general administrator is to go beyond what the Act says. I think he can be sued. It would be monstrous if he could not, because while the parties are fighting as to who shall have control of the estate the Statute of Limitations might be running and the creditors would be left out in the cold.

In *Tichborne* v. *Tichborne* such an administrator was sued in the Court of Chancery, and a decree for administration was made. I am not prepared to say that on the hearing of the originating summons I should give the plaintiff the relief for which he asks. It might be that the court might give the relief, but on the other hand the court might think it better to order the summons to stand over until a full administrator had been appointed. That is a matter of discretion to be dealt with as it arises, but I see no reason why proceedings on this summons should now be stayed.

Motion refused with costs.

Solicitors, *H. Pumfrey; Baillie & Cato.*

Chan. Div. Kekewich, J. } March 30.

SPILLER *v.* TURNER. (*a.*)

Company—English company trading in colony—Preference and ordinary stockholders—Dividend duty imposed by Colonial Legislature—Incidence of duty.

An English company originally formed in 1841 *by a contract of copartnership, and afterwards incorporated under the Joint Stock Companies Act,* 1856, *carried on business in a colony; and, under the powers conferred on it by its original contract of copartnership, created, guaranteed* 5 *and* 6 *per cent. preference stock entitled to cumulative payment of interest in priority to its ordinary stock.*

The Colonial Legislature imposed a "dividend duty" on the dividends and interest paid on the capital of the company employed in the colony.

Held, that the contract between the various classes of shareholders was an English contract, and therefore that an Act passed by the Colonial Legislature would not affect the rights of the preference stockholders not domiciled in the colony, and that, consequently, the preference stockholders were entitled to receive their interest in full, and that the duty thereon must be paid out of the general assets of the company.

This was a special case stated in pursuance of R.S.C., ord. 34, to obtain the decision of the court as to the manner in which (1) the dividend duty payable to the Government of the Colony of Queensland under the Dividend Duty Act of 1890 of the Legislature of that colony, and (2) the income tax payable to the Government of the Colony of New South Wales under the Land and Income Tax Assessment Act of 1895 and the Income Tax Act of 1895 of the Legislature of that colony—so far as such dividend duty and income tax respectively were imposed upon or payable in respect of the interest payable to the holders of the guaranteed preference stocks, both 6 per cent. and 5 per cent., of the Scottish Australian Investment Co. (Limited) ought, between the different classes of holders of stock (ordinary and preference) of the defendant company, to be borne and paid.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

The action was brought by the plaintiff Spiller on behalf of himself and all other holders of consolidated ordinary stock of the company against the defendant Turner, who was by order authorized to defend on behalf of himself and all other holders of the guaranteed preference stocks, both 6 and 5 per cent., and the company.

The defendant company was originally formed by contract of a copartnership in 1841, and was on the 27th of October, 1856, duly registered under the provisions of the Joint-Stock Companies Act of 1856 (19 & 20 Vict. c. 47), and therefore, by virtue of sections 177 and 196 of the Companies Act of 1862, became governed by the provisions of the Act of 1862, save as otherwise provided by section 196 of that Act.

The provisions of the contract of copartnership so far as were material to the present case were shortly as follows: By article 1 it was provided that the object and business of the company should be the acquisition of and trading in land and real or personal property, as therein provided, in Australia and other British Colonies. By article 2 it was provided that (*inter alia*) the capital could be increased by the issue of new shares either upon the same footing as, or with any special or other preference or priority over, the original shares as therein provided. And it was declared that the company should be deemed to be established in England, and that the principal office or place of business should be in the City of London, and that the directors might appoint branch offices in Australia and certain other colonies as they might think fit.

By article 6 it was provided (*inter alia*) that the directors should possess all usual powers, including powers for appointing agencies in the Australian colonies.

By article 16 provision was made for the determination by the directors, after striking the half-yearly balance, whether any or what half-yearly dividend should be paid, and what sum should be set aside for forming a reserve fund.

By article 22 it was provided that any clauses and conditions of the contract might be rescinded, varied, or added to by such a majority of the stockholders as therein mentioned.

The capital of the company, which originally consisted of £100,000 in shares of £1 each, and which was subsequently converted into "stock," was from time to time increased, and on the 28th of April, 1865, as set forth in paragraph 7 of the special case, in pursuance of a resolution passed by the company, £200,000 6 per cent. guaranteed preference stock was created and issued on the following conditions: that such stock should "bear and be entitled to in perpetuity a guaranteed interest at the rate of 6 per cent. per annum, and" should "have priority in all respects, and as well in respect of principal as interest and arrears of interest (if any) of all stock of the company, and should be transmissible and transferable in the same manner and according to the same regulations and provisions as the other stock of the company, but so that the holders of such stock" should "not in respect thereof be entitled to vote or be qualified to be elected as directors of the company," and certificates for the same under seal of the company were duly issued. In a similar manner, in June, 1879, a sum of £200,000 "5 per cent. guaranteed preference stock" was created, holders of which it was provided, subject only to the 6 per cent. preference stock, should be entitled to receive in perpetuity interest thereon at the rate of 5 per cent. per annum out of the profits of the company accrued and undivided from time to time when such interest became due, and also to receive any arrears of interest

out of profits accrued and undivided subsequent to the date when such arrears became due in preference and priority to any payment out of such profits to the holders of the ordinary stock of the company, and also in the event of the dissolution of the company to receive payment of their principal and all interest and arrears thereof (if any) then due out of the assets of the company in preference and priority to any distribution of such assets among the holders of the ordinary stock of the company, but the holders of such 5 per cent. guaranteed preference stock should not in respect thereof be entitled to attend or vote at any meeting of the company or be qualified to act as directors of the company or to any other privilege or benefit as stockholders of the company other than such as was expressly given by the resolution. And it was provided that the resolutions with respect to such newly-created stocks should form part of the company's regulations or contract of co-partnership, and that such regulations or contract should be read subject thereto, and should be, and thereby were, altered accordingly.

By resolutions of the company in May and June, 1884, a further sum of £200,000 5 per cent. guaranteed preference stock was created and issued on the same footing and conditions as the last issue, and certificates for this and the preceding issue were, under seal of the company, duly issued to all the 5 per cent. preference stockholders, containing a statement of the conditions under which the stock was issued. In 1892 the contract of copartnership was, in exercise of the power therein given, altered so as to increase the company's capital which, at the time this action was brought, amounted to £1,500,000, of which had been issued £200,000 6 per cent. preference stock, £400,000 5 per cent. preference stock, and £500,000 ordinary stock.

The company was never registered or incorporated in or under the laws of any colony in Australia. The head office had always been in London, but the company since its formation had always, and still, carried on its authorized business in the colonies of Queensland and New South Wales and other colonies of Australia, and had thereby made profits.

On the 6th of November, 1890, the Queensland Legislature passed an Act intituled "an Act to impose duties in respect of dividends," by which it was enacted (*inter alia*), section 2: "In this Act 'company' includes every incorporated company or association wheresoever and howsoever incorporated, associated, or formed, and whether under the laws of Queensland or under the laws of any country, and whether under a statute, letters patent, charter, or otherwise, which carries on business in Queensland." (The section also defined "manager" as "the person whose name is notified to the colonial treasurer as the manager of the company under the provisions of the Act.")

Dividend was defined as meaning "every sum of money intended to be paid or credited to or distributed among any members or in any company except in a winding-up or on a reduction of capital, and whether it is called by the name of dividend, bonus, profit, interest, or any other name.

Section 3 provided that "every company carrying on business in Queensland which has not its head office or chief place of business in Queensland is to have a manager residing in the colony and a principal office at which any writ, notice, or other instrument affecting the company may be delivered."

Section 8 provided that "companies which have not their head office or chief place of business in Queensland shall, on or before the 1st of April in each year, by a statutory declaration by their manager, forward to the colonial treasurer particulars of (*inter alia*) the amount of all dividends declared by the company during that year, and the dates when they were respectively declared, and shall at the same time pay to the colonial treasurer a duty equal to the sum of 1s. for every 20s., and a proportionate sum for every part of 20s., or of so much of the total dividends declared by the company during the year as is proportionate to the average amount of the capital of the company employed in Queensland during the year as compared with the total average capital of the company during the year."

A "manager" for the purposes of this Act was appointed by the company, and he, in accordance with the provisions of the Act, in 1891, 1892, 1893, 1894, and 1895 duly made a return to the colonial treasurer of the average amount of the assets of the company in Queensland during that year, and the amount of all dividends declared by the company on its ordinary stock, and at the same time paid to the colonial treasurer a duty equal to 1s. on every 20s. of so much of the total dividends declared by the company on its ordinary stock as was proportionate to the amount of capital employed by the company in Queensland as compared with its total capital, but no return was made or duty paid in respect of interest paid to preference stockholders.

In an action brought in 1895 by the Attorney-General of Queensland the Supreme Court of Queensland delivered judgment in April, 1896, by which the court found that dividend duty on the interest on the preference stock was payable since 1890, and a sum of upwards of £3,500 was paid by the company as such duty due from 1890 to 1895.

From 1896 the company duly paid Queensland dividend duty upon the interest payable to preference stockholders as well as on dividends paid on ordinary shares.

Down to the 1st of January, 1896, the defendant company has paid to the holders of the said 6 per cent. guaranteed preference stocks, and to the holders of the said 5 per cent. guaranteed preference stock, the full amount of the interest payable in respect of such stocks respectively with a deduction only of the income tax payable under the Income Tax Acts of the United Kingdom, and without any deduction in respect of the said Queensland dividend duty. Since the said 1st of January 1896 the defendant company had not paid the interest on the said preference stocks in full, but had deducted therefrom the amount of the dividend duty paid under the Act of 1890 to the Government of Queensland in respect of such interest, and had placed the amount so deducted to the credit of a suspense account to abide the decision of the court upon the questions raised in this action.

The questions submitted for the opinion of the court were:

1. Whether the defendant company is entitled to deduct from the interest payable to the holders of the guaranteed preference stocks, both 6 per cent. and 5 per cent., of the defendant company not only the income tax payable under the Income Tax Acts of the Imperial Parliament of the United Kingdom for the time in force, but also (1) the dividend duty payable in respect of such interest or of part of such interest to the Government of the Colony of Queensland under the Queensland Act mentioned in paragraph 14?

2. In what manner as between the different classes of holders of stocks ordinary and preference of the defendant company the dividend duty ought to be borne and paid?

3. Whether the defendant company is entitled to deduct from the interest which will in the future become payable to the holders of the guaranteed preference stocks, both 6 per cent. and 5 per cent.,

of the defendant company the arrears of the dividend duty paid by the defendant company to the Government of Queensland in respect of interest paid to the holders of guaranteed preference stocks as mentioned in paragraph 22, or whether such arrears ought to be charged to the reserve fund or to future revenue of the company?

4. In what manner as between the different classes of the holders of stocks both preference and ordinary of the defendant company, the arrears of the dividend duty paid by the defendant company as mentioned in paragraph 22 ought to be borne and paid?

Bramwell Davis, Q.C., and *Upjohn*, for the plaintiff.—The preference stockholders are co-partners with the ordinary stockholders in a business intended mainly to be carried on in Australia, consequently they intended to be and are bound by Australian enactments. There are considerable assets in Australia. The "interest" payable to the preference stockholders is really "dividends," and as such should bear a proportionate share of the payment of dividend duty, which should not be thrown entirely on the ordinary shareholders.

Renshaw, Q.C., and *McSwinney*, for the preference stockholders.—This is a question of construction of the contract of partnership, and the rule of construction is the contract itself read by the light of surrounding circumstances: *Stevens* v. *South Devon Railway Co.*, 9 Hare 313; *Henry* v. *Great Northern Railway Co.*, 6 W. R. 87, 1 De G. & J. 606; *Sturge* v. *Eastern Union Railway Co.*, 7 De G. M. & G. 158, 3 W. R. Ch. Dig. 33; *Matthews* v. *Great Northern Railway Co.*, 7 W. R. 233; *Jacobs* v. *Credit Lyonnais* (*London Agency*), 32 W. R. 761; 12 Q. B. D. 589. The rights of the parties to an English contract cannot be varied by Colonial legislation. Again, would it be a good defence to an action on the contract to plead the payment of the Colonial tax as a discharge? *Smith* v. *Buchanan*, 1 East 6, "It is impossible to say that an Act made in one country can be ruled by the law of another," &c. (Lawrance, J.). The plea there, was discharge of the whole, here it is of discharge *pro tanto*. *Bartley* v. *Hodges*, 9 W. R. 693, 1 B. & S. 375 (Whitman and Blackburn, JJ.); this was a colonial case, and Whitman, J., said that a foreign country was on the same footing as a colony—*e.g.*, Maryland is on the same footing as Victoria: *A. Gibbs & Sons* v. *Société des Métaux*, 25 Q. B. D. 399, 39 W. R. Dig. 57.

Bramwell Davis, Q.C., in reply.—According to the judgment of Bowen, L.J., in *Jacobs* v. *The Credit Lyonnais* (*London Agency*), it is a question of intention as to being subject to the laws of a foreign country. In this case the money is paid here, but the operations are carried on in Queensland, though the partners and the capital are English, the profit is made in Queensland. There is in the contract evidence of intention to be bound by the laws of Queensland, so the cases cited against us do not apply: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] App. Cas. 670; *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

KEKEWICH, J.—The plaintiff's case rests on an argument of this character. He says that the class which he represents, the ordinary stockholders, and the class represented by the defendant Turner—that is to say, the 6 per cent. and 5 per cent. guaranteed preference stockholders, whatever their rights may be—are copartners in a concern, one of the essential conditions of which is that the business shall be carried on in the colony of Queensland, and that, therefore, they both recognize the colony of Queensland as having some legislative powers over them, and that no one of them can complain as against the other that those legislative powers have been exercised in such a way as to be to the detriment of one or the other; that they are both bound by the legislative provisions of the colony, and must submit to them whatever may be the consequences. That argument seems to me to rest on a fallacy.

The contract which I have to consider is not the contract of copartnery in that sense—namely, the contract that the business shall be of a certain character, and shall be carried on by certain persons under certain conditions in certain places including the colony of Queensland. What I have to consider is the contract constituted by the resolutions of the company, a contract *inter se* of the ordinary shareholders on the one hand and the guaranteed preference stockholders on the other. That contract is set out as regards one class (and I need not quote it as regards the other class) of guaranteed stockholders in the resolution of the 28th of April, 1865. What the contract is I will consider immediately. But it seems to me that establishes the right of the two classes of shareholders *inter se*, and that it is quite immaterial, for the purpose of considering that, to consider the rights of the shareholders as a body against the company or the powers of the company to carry on business or to submit itself to the law of any colony. I have to construe this contract—that is to say, I have to ascertain what are the obligations and privileges of the parties to this contract. I must look at it according to the rules applicable to such a case as this, from two points of view. First, where was this contract entered into? In England. It is an English company, and this is an English contract. The *locus contractus* is in England. Therefore, if there is nothing more to vary that conclusion the rights of the parties must be considered by English law.

But it is said that I ought to regard the place of fulfilment, that I ought to ascertain what is the *locus solutionis*, and consider whether the *lex* of that *locus* ought not to be applied. There, again, there can be no doubt that the *locus solutionis* is England. The company have their domicil here, the money is to be paid here, it is here where the stockholder would sue for his interest or dividend or whatever it may be properly called, here he would enforce his rights either against the company or against his brother stockholders, and here he would get a part of that enforcement. It follows therefore that, from whichever point of view I look at it, it is an English contract to be construed in accordance with English law. What avails it then that a Colonial Legislature has said that that contract between the stockholders shall not be performed, but that the preference stockholders shall receive, instead of the six per cent. stipulated for in the contract, some lesser sum—*e.g.*, six per cent. with a deduction on account of dividend duty? The preference stockholder may insist upon his rights under the English contract, and can snap his fingers at the Colonial Legislature; subject, of course, to this, that the company, being bound by the enactments of the Colonial Legislature, the preference stockholder may not obtain payment as soon as he otherwise would. That seems to me to be the effect of the cases cited, to which I will not further refer.

That being so, it is immaterial to consider whether the percentage payable to preference stockholders is interest or dividend. For purposes of taxation by the Colonial Legislature it is certainly dividend, and they may treat it as they please. As at present advised I think that here it is not dividend, but interest as distinguished from dividend; but it seems to me immaterial, for whether it be called by the one name or

the other, if once it is decided what the rights of the contracting parties are, the phraseology in which those rights are expressed is of no importance. It appears to me that the guaranteed preference stockholders, as they are called, having stipulated to have 6 per cent., with certain priorities and rights, paid to them, are entitled now to enforce that contract, and say that the 6 per cent. shall be paid, and it is no answer to them to say that the Legislature of Queensland has taxed the company and made them pay a certain sum, which has to be calculated with reference to the 6 per cent. The amount, no doubt, has to be calculated on that basis; but, nevertheless, it is not to be deducted from the 6 per cent., notwithstanding that the Colonial Legislature has enacted that it is to be deducted, because those legislative provisions are of no avail against the provisions of the contract in this country. The question submitted in the special case, whether the defendent company is or is not entitled to make any deduction in respect of the colonial tax, must be answered in the negative; but in view of the suggestion that stockholders domiciled in Queensland may be bound by the Colonial Act, and therefore not be in the same contractual position as other stockholders, I think the judgment ought to be expressed to be without prejudice to any question affecting stockholders who may be domiciled in Queensland.

Solicitors, *Simpson & Co.*

Chan. Div. }
Romer, J. } April 27.

In re BRISTOL (MARQUIS).
GREY (EARL) *v.* GREY. (*a.*)

Settlement—Deed — Construction—Referential trusts—Hotchpot—"Such and the same or the like trusts."

Express trusts were declared by a marriage settlement of a fund settled on behalf of the intended wife comprising powers of appointment of the corpus *and a usual hotchpot clause as regards the unappointed part; and trusts by reference to the before-mentioned trusts were by the same settlement declared of a sum payable under a life policy which had been settled by the intended husband, in default of appointment of the sum under an express power in this behalf in the settlement. The first-named fund was appointed in unequal shares, but no appointment was made of the policy moneys.*

Held, that the two funds must be treated as distinct for the purpose of hotchpot, and not as one aggregate fund.

The principle of construction adopted in Hindle *v.* Taylor, 4 *W. R.* 62, 5 *De G. M. & G.* 577, *and approved and explained in* Trew *v.* Perpetual Trustee Co., 43 *W. R.* 636, [1895] *A. C.* 264, *held not to be applicable in such a case.*

In re Perkins, 41 *W. R.* 170, *distinguished.*

Summons.

By an indenture of ante-nuptial settlement, dated the 30th of June, 1836, and made between the Marquis of Bristol of the first part, Lady Georgiana E. C. Grey (then Hervey) of the second part, the Hon. and Rev. John Grey of the third part, and trustees of the fourth part, the Marquis, who was the father of Lady Georgiana E. C. Grey, the intended wife, settled a sum of £13,000 £3 per Cent. Bank Annuities as her portion, and the said John Grey, who was the intended husband, settled a life policy for £5,000. The trusts of the settled property after the marriage were as follows: As to the £13,000 Bank Annuities (hereinafter called the £13,000 fund), to pay out of the annual produce £100 a year pin money and the premiums on the £5,000 policy, and, subject to the above payments, to pay the income to the husband for life, then to the wife for life, and, subject thereto, the *corpus* to go to such children of the marriage as the husband and wife by deed, or the survivor by deed or will should appoint, and in default of appointment or in case of an incomplete appointment to the children of the marriage equally, but no child taking under any appointment to be made in exercise of the power or powers thereinbefore contained should be entitled to any unappointed part of the said £13,000 fund without bringing the appointed share or shares into hotchpot. And as to the £5,000 assured by the policy (hereinafter called the £5,000 fund), upon trust to pay the income to the wife for life, and subject thereto the *corpus* to go to such children of the marriage as the wife should by deed or will appoint; and in default of appointment, upon such and the same or the like trusts, for such and the same or the like intents and purposes, and with, under, and subject to the same or the like powers, provisoes, and agreements as were thereinbefore declared concerning the £13,000 fund after the decease of the survivor of husband and wife and in default of appointment by them and the survivor of them—except that the ultimate trust of the £5,000 (*i.e.*, in the event of there being no children of the marriage) was for the husband absolutely.

On the 15th of January, 1869, the wife died without having exercised either jointly or separately any power of appointment.

There were three children of the marriage—viz., Frederick T. Grey, the defendant Mary C. Grey, and Charles F. Grey.

The husband by two several deeds dated respectively the 15th of February, 1871, and the 10th of August, 1878, appointed out of the £13,000 fund the sums of £1,800 to Miss Grey, £637 to Charles F. Grey, and £1,000 to Frederick T. Grey, and by his will dated the 25th of July, 1895, appointed out of the same fund £9,000 to Miss Grey. These appointments, with losses on changes of investment and costs, exhausted the £13,000 fund.

On the 11th of November, 1895, the husband died.

The £5,000 being unappointed, this summons was taken out by the trustees of the settlement for the determination of the question whether in distributing the funds subject to the trusts thereof the £13,000 fund and the £5,000 fund were to be treated as one aggregate fund for the purposes of hotchpot and divided accordingly, or whether the £5,000 fund was to be treated as a separate and independent fund and divided irrespective of the appointments of the £13,000 fund.

Younger, for the trustees and one son.

Vaughan Hawkins, for another son.—The appointments must be taken into account in dividing the policy moneys on the principle of construction laid down in *Hindle* v. *Taylor*, 4 W. R. 62, 5 De G. M. & G. 577, pp. 593, 594, and followed in *Trew* v. *Perpetual Trustee Co.*, 43 W. R. 636, [1895] A. C. 264. In *In re Perkins*, 41 W. R. 170, North, J., treated three funds as aggregated for the purpose of hotchpot, though there was only one hotchpot clause, and that came immediately after the gift of the first fund. In *Montague* v. *Montague*, 15 Beav. 565, there were two funds, and the trusts were declared by two separate deeds, which is a different case.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

They also referred to Davidson's Conveyancing, 3rd ed., vol. 3, Part I., pp. 170, 171.

P. Stokes, for the daughter, was not called upon.

ROMER, J.—I do not see my way to hold that the funds settled by this settlement, the £13,000, and the policy moneys, are to be regarded or can be regarded as one for the purpose of the hotchpot. Clearly I would not hold that the trusts of the £5,000 in default of appointment are to be governed by reference to the appointments of the £13,000 if I did not also hold on the other hand that the trusts of the £13,000 in default of appointment must be governed by reference to what was done with regard to the £5,000. Now, the trusts of the £13,000 are themselves very clear, and this is a case of a deed and not a case of a will, and it appears to me it would be a very strong thing indeed for me in this settlement to say that I can alter the trusts of the £13,000 by reason of the subsequent trusts as to the £5,000. The fact is that in this settlement the two funds are really quite distinct. The sources from which they come are different. The trusts of the two funds are essentially different, and the ultimate trusts are especially of necessity different. I cannot help thinking that when reference is made, in dealing with the policy moneys, to the £13,000 trusts, as to what is to happen with the fund in default of appointment, when the children take, that the trusts of the £5,000 are only expressed in a short form by reference to the £13,000 in order to save the necessity of repeating them, and not with an intent to aggregate for the purposes of the settlement the two funds and as it were to make them one.

The cases which have been cited do not enable me and would not justify me in dealing with these two funds as one for the purpose of the hotchpot clause. Of course *Hindle* v. *Taylor* was a case of a will, and the case of a will dealing with charges, and so was the case of *Trew* v. *Perpetual Trustee Co.* The principle of those cases is, I think, well set forth, if I may say so, by Lord Hobhouse in his judgment in the latter cast, [1895] A. C. p. 268. He shows that the cases he was dealing with were cases refering to charges or matters in the nature of charges. He says this: "But in the first place their lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate or trusts in the nature of charges. Of course such may be the intention or effect of a particular will, but in the absence of anything in the will to show such an intention the rule is that the court will not impute it to the testator." I quite agree that where in the will you have trusts declared of one property with reference to the trusts that are previously or subsequently declared of another property then in construing the will you will, so far as possible at any rate, treat the two funds as identical, at any rate for the purposes of not multiplying charges or trusts in the nature of charges; but I think it is limited to that. No case that has been cited before me refers to a case of a hotchpot clause except one, and that is the case before North, J., of *In re Perkins*. There North, J., came to the conclusion that what the testator had done was in effect for all purposes to make three funds, though separately referred to, held upon identically the same trusts, and North, J., held that that will was to be construed exactly as if the testator had simply repeated or referred to the three funds, and then proceeded to declare the trusts of them in the same way. The trusts in that case of the three funds were to be identical.

Now, in the case before me the trusts with reference to the £5,000, so far as material, are not upon the same trusts, but "such and the same or the like trusts and subject to the same or like powers, provisoes, and declarations." As I have already said I cannot gather from this settlement that there was any intention that for the porpose of this settlement the two funds were to be treated as one fund. So that the case relating to a will before North, J., does not apply to the case now before me. Really the case now before me is much more like the case of two funds declared by two separate deeds where the second deed declares the trusts of the second fund by reference to the first. In fact it is more like the case of *Montague* v. *Montague*. For these reasons I hold that the two funds must be treated as distinct for the purpose of provisions of the hotchpot clause.

Solicitors, *T. W. Mitchell; Philip Thornton*, for *C. D. Forster & Co.*, Newcastle-on-Tyne.

Q. B. Div. (Collins, J.) April 1, 2.

EDWARDS v. STEEL, YOUNG, & CO. (*a*.)

Shipping—Masters and seamen—Leaving seamen abroad—Maintenance and passage home—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186, *sub-section* 2 (d).

The plaintiff, a seaman, was living at West Hartlepool, and shipped from that port for a voyage to Madeira and other foreign ports under articles which provided that he might be discharged at a port in the United Kingdom or at a port on the continent of Europe between the Elbe and Brest at the master's option. He was discharged at Antwerp, where, in accordance with the Merchant Shipping Act, 1894, *the master and crew went before the British consul for the purpose of paying off, and the master left the whole matter in the hands of the consul, who provided the plaintiff with a passage to Grimsby. Section* 186 (2) *of the Merchant Shipping Act*, 1894, *provides that where the service of any seaman belonging to any British ship terminates at any port out of her Majesty's dominions the master shall give to that seaman a certificate of discharge, and shall also, besides paying his wages, provide him with, amongst other alternatives*, (c) "*a passage home*," (d) "*or deposit with the consular officer . . . such a sum of money as is by the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home*."

Held, that the plaintiff had been provided with a "passage home" within the meaning of section 186. *A passage home does not necessarily mean a passage to the port at which the seaman was originally shipped. Here it was not necessary to provide maintenance during passage home, as the master, by leaving the whole matter in the consul's hands, had satisfied sub-section* 2 (d). *Section* 186 (4) (a) *does not make expenses incurred by a seaman wages, but merely recoverable as wages. Section* 134 *therefore did not apply here.*

Commercial case.

In this case the plaintiff, a seaman, sought to recover from the defendants, shipowners, passage money home, maintenance, and wages. The plaintiff resided at West Hartlepool, and on the 31st of July, 1896, he entered into a contract at that place with the defendants to serve as a seaman on board the ss. *Capenor* belonging to them, at the rate of £4 per month and rations, and he shipped as such seaman on board the said vessel for a voyage to Madeira and other ports.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister at-Law.

The articles provided that the sailors named in the articles agreed to serve on board the ship on a voyage from West Hartlepool, *via* Bristol Channel, to any port or ports, place or places, not exceeding 75 degrees north and 20 degrees south latitude, trading as might be required within such limits for any period not exceeding one year, and back to a final port of discharge in the United Kingdom, or on the continent of Europe between the Elbe and Brest, inclusive, at master's option. The *Capenor* sailed to Madeira and Pensacola, and the 26th of November, 1896, she arrived at Antwerp, and on the following day the plaintiff was discharged and was paid his wages up to such date before her Majesty's consul at that port.

The master had an interview with the British consul with regard to the discharge of the crew, and, according to the master's account of the interview, it was arranged that the crew should be sent by steamer to Grimsby, and that he (the master) should give to the consul a guarantee for the expenses of sending the crew home.

The plaintiff alleged that before he received his money or signed anything he requested to be sent back to West Hartlepool, and that he also asked for maintenance from Antwerp to that place. This, however the defendants denied.

The master provided the plaintiff with an order for a voyage, but without saying anything as to rations, to the port of Grimsby, and the articles were endorsed by the consul as follows: "I hereby certify that . . . have become discharged at this port by mutual consent with my sanction, and that the master has provided passages to England for those members of the crew who do not rejoin the ship."

On the 28th of November the plaintiff sailed on board the ss. *Ashton*, and arrived at Grimsby on the 29th and at West Hartlepool on the 30th. During his voyage from Antwerp the plaintiff had to pay for his own maintenance. The plaintiff thereupon brought this action to recover maintenance and lodgings at Antwerp from the time of his discharge to his departure for Grimsby, also maintenance on the voyage from Antwerp to Grimsby and train fare from that town to West Hartlepool. His claim was based upon the Merchant Shipping Act, 1894, the material provisions of which are as follows: Section 134 (*c*): "In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman or to any reasonable dispute as to liability or to any other cause, not being the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof." 186 (2): "The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either —(*a*) provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman; or (*b*) furnish the means of sending him back to some such port; or (*c*) provide him with a passage home; or (*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home."

Robson, Q.C. (*J. D. A. Johnson* with him), for the plaintiff.—The words "provide him with a passage home" in section 186, sub-section 2 (*c*) means providing him with sufficient means to get to the actual place where he was engaged from and originally shipped. "Home" does not mean any port in the United Kingdom. It is not sufficient to put a seaman on board and make no provision for his maintenance. The master must provide maintenance for him whilst on the voyage home. The expenses the plaintiff was put to are recoverable as wages under section 186, sub-section 4 *a*. He had therefore not received his full wages on his discharge, and these continue to run under section 134 until such time as he does receive them.

Joseph Walton, Q.C. (*Lewis Noad* with him), for the defendants.—"Home" means any port in the United Kingdom. The master here did all that was necessary under section 186, sub-section 2. He placed the matter in the hands of the consul, who made what order he thought was right and proper under the circumstances, and the plaintiff and the other seamen accepted the vouchers for the passage to Grimsby and made no objection. As regards the claim for wages under section 134, that cannot be maintained. That section only applies to wages proper of seamen and not to expenses incurred by seamen after they have been paid their regular wages and discharged the ship.

COLLINS, J.—This is an application by a seaman to be reimbursed the expense of maintenance before he started from Antwerp on his journey to England, and for his maintenance during the passage home, and also for the railway fare between Grimsby, the port at which he arrived from Antwerp in England, and the port of West Hartlepool, from which he was originally shipped. He also claims a sum *per diem* from the date of his return to England up to the settlement on the ground that under the particular provisions of the Merchant Shipping Act the unpaid sum which he claims for maintenance and railway fare are wages, and as such come under the provisions of that section, and that he is entitled to be paid so much per day until he is actually paid.

Now, the seaman in question was shipped at West Hartlepool under articles which provided that he was shipped "on a voyage from West Hartlepool *via* British Channel to any port or ports, place or places, not exceeding 75 degrees north and 20 degrees south latitude, trading as may be required within such limits for any period not exceeding one year and back to a final port of discharge in the United Kingdom or on the Continent of Europe between the Elbe and Brest, inclusive, at master's option." Therefore the ship was entitled to discharge itself within the limits named or in the United Kingdom. If the plaintiff had been ultimately conveyed to the port at which he ultimately arrived and if he had been conveyed on the voyage and discharged there—viz., at Grimsby he would have had nothing to complain of because Grimsby, being a port in the United Kingdom, was one of the ports at which he agreed the voyage might terminate and that he should be discharged.

What happened was this. The ship was discharged at Antwerp. The work that was required on the ship was completed on the night of Thursday, the 26th inst. The seamen were allowed to remain on board until Friday, the account for their wages in the meantime having been given them, and an appointment made to pay them off the next day at the consul's office. Accordingly, on the next day the master attended before the consul for the purpose of paying off the crew, and his evidence is that before paying off the crew, there was a conversation between him and the consul in which the consul said that he would pay the crew off on the day named if the master would pay for the passage home or give a guarantee.

The master gave a guarantee, that is to say, he undertook that whatever sum of money the con

required would be paid, and according to his evidence from and after that time he left the matter wholly in the hands of the consul.

The consul, according to the master's evidence, arranged with the men not only to pay off their wages, but to provide for their arrival at home, and accordingly, in the end he gave to all of them a passage to Grimsby. The consul accordingly made out vouchers that entitled all the crew to be taken to Grimsby, and he sent in a bill for the whole account which was at once paid by the master.

The vessel for Grimsby did not start till the next day, which involved one day's maintenance of the plaintiff prior to getting on board the ship. We are told that the passage provided did not embrace food on that passage, and, further, when the ship arrived at Grimsby the plaintiff had to pay his railway fare from Grimsby to Hartlepool.

Now, the question is whether the captain or the owners have done everything that the section of the Merchant Shipping Act, which applies to the case, enacts they must do. That section is the 186th. Clause (*b*) is the first one that applies to the case. "Where the service of any seaman or apprentice belonging to any British ship terminates at any port of her Majesty's dominions"—that is not the case here, because it was at Antwerp—"the master shall give to that seaman or apprentice a certificate of discharge in a form approved by the Board of Trade." That has nothing to do with this. Now comes sub-section 2, "The master shall also, besides paying the wages to which the seaman or apprentice is entitled, either (*a*) provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman; or (*b*) furnish the means of sending him back to some such port; or (*c*) provide him with a passage home; or (*d*) deposit with the consular officer or merchants as aforesaid such a sum of money as is by the officer or merchants deemed sufficient to defray the expenses of his maintenance and passage home." Now, the plaintiff says that none of those provisions have been complied with—that all that was done was to give him a passage, or to give authority to the shipowner to carry him from Antwerp to Grimsby, and that no provision was made for his maintenance either before or during the voyage, nor for his carriage to his ultimate destination. Mr. Walton contends that the obligations are satisfied in taking each of the three out of the four sub-divisions. He says that under three of them he has an answer. He says first of all, in reference to (*a*) that the alternative of providing him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped became impossible, because there was no ship on which they could find him employment, "or to any port in the United Kingdom agreed to by the seaman." That was not possible, because there was not any ship available for the purpose. The alternative there then is an alternative between a ship going to the port from which the seaman was originally shipped and a ship going to a port in the United Kingdom agreed to by the seaman. Then we come to clause (*b*) which is an alternative, "or furnish the means of sending him back to some such port." He could not be sent back as a person employed, therefore he has to be sent back by the master "furnishing the means of sending him back to some such port." That, it is intended, is either the port from which he was originally shipped, or a port in the United Kingdom agreed to by the seaman; that is to say "some such port" covers the ports named in the preceding sub-division. Mr. Walton says, if that be the construction, he has complied with it, because Grimsby is a port in the United Kingdom, and, in fact, it was a port agreed to by the seaman, inasmuch as by the articles, if you look at the substance of the matter, the man is not entitled to be put in a better position than he would have been if the voyage which he originally contracted to perform had been performed. One of the alternative methods he might have performed would have resulted in his being landed at Grimsby, and if the master puts him in the same position as if he were discharged at Grimsby, or finds means for his getting to Grimsby, that is within the meaning of the section which says "furnish him with the means of going back to such port"—that is, to an agreed port. That argument so far is addressed only to the place to which he is entitled to be sent. Mr. Walton also contends that he has complied with sub-section *c* and with sub-section *d*. By sub-section *c* the owner is to provide him with a passage, and Mr. Walton says on the true construction of this section a passage home embraces a passage to a port in the United Kingdom, and *a fortiori* to a port agreed upon in the United Kingdom, but whether agreed upon or not he says the passage home would be, on the true construction of this section, a passage to Grimsby, which, of course, is a port in the United Kingdom, apart from the fact that it is a port agreed to by the seaman. Then, further, he relies on sub-section *d*. He says that in effect the master here did deposit or give what was equivalent to a deposit with the consul's officer or the merchant such a sum of money as was by the consul deemed to be sufficent to pay the expenses of maintenance and passage. That section throws on the consul the burthen of assessing the sum which in his judgment is necessary to fulfil both those provisions, namely, maintenance and passage home, and by giving the consul a free hand in the matter he was absolutely relieved from any further responsibility.

It is contended by the plaintiff that in point of fact there was no deposit, and there was no deposit; inasmuch as one has to look at the object of these provisions, the real point appears to be, Was the consul furnished with the means of doing that which he had to do? If he was perfectly satisfied with the solvency of the person he was dealing with, I cannot suppose that the section would be deemed not to be applicable because he did not insist on payment of the deposit. I think if he waived the deposit he took upon himself the responsibility of dealing with the matter under that section, as the captain clearly invited him to do.

Now, in the view that I take of this case, I do not think it really necessary for me to decide all the points that have been raised in the course of the discussion, but as they have been a great deal argued I propose to give an opinion upon some of them.

I think myself that the case falls within sub-section *d*. I think that in effect the undertaking made by the captain at the instance of the consul to do all that the consul required in the way of repaying the consul all that he demanded for sending the crew home is a compliance with the provisions of sub-section *d*, and I think the evidence of the master, which I accept in preference to the evidence of the two sailors, satisfies me that the real negotiations as to where the crew should go and what should be done were conducted, not by the master himself, but by the consul with the seamen. If that be so, it is quite clear that the consul gave the men all he conceived necessary to defray the expenses of maintenance and the passage home, and whatever amount he demanded the captain was prepared to pay, and did pay. Therefore it appears to me that the case does

fall under sub-section *d*, and that the master is protected by what the consul did.

But even if I should be wrong on that point, and if I should hold that there must be a prepayment in order to bring the case within that section, nevertheless I have come to the conclusion that the passage back to Grimsby was, in the circumstances of the case, a passage home.

Now, the view put forward by the plaintiffs must go thus far, or it does not go far enough—viz., that the "passage home" in the two sub-sections in which it is used must mean a passage to the port to which he was originally shipped. If they cannot carry it that far, they cannot carry it far enough. Now, I do not think that it is meant to bear that interpretation if you read the sub-sections through, although I quite admit that it is absolutely impossible to put an interpretation which would give equal effect to the words in all the sub-sections. But I think I am justified in saying that "passage home" does not, according to the section, necessarily mean a passage to the port at which the seaman was originally shipped.

Then comes sub-section *b*, which deals with the case of the master not finding employment for him, then he must furnish the means of sending him back to some such port. That leaves us where we were. It is either of two things. The master must either find employment for him to the port where he was shipped or to an agreed port in the United Kingdom, and if the master does not do that he must furnish him with the means of sending him back to one of those places or provide him with a passage home. If home meant the port where he was originally shipped, I must suppose the Legislature would have said so. I cannot conceive any reason if that was the limited meaning they intended to put on the word, why they should not have said so. Then in sub-section *d* the words are "passage home," and not "passage to port where originally shipped."

Now, some light is also thrown on the meaning of "passage home" by section 191, which deals with a different set of circumstances, but which also shows what the Legislature had in its mind when dealing with "passage home," because to this extent at all events it seems clear that it does not mean "passage to the port where the seaman was shipped." This section deals with the case of shipwrecked seaman and so on, and then in clause (*b*) the section says: "Seamen and apprentices to the sea-service being subjects of her Majesty who have been engaged by any person acting either as principal or agent to serve in a ship belonging to the Government or to a subject or citizen of a foreign country, and are in distress in any place abroad." Then sub-section 2 says: "For the purpose of providing a distressed seaman with a passage home the authority shall put him on board a British ship bound either to the United Kingdom or to the British possession to which the seaman belongs (as the case requires) which is in want of men to make up its complement." That means that he is to work his passage to the destination. That is all for the purpose of providing a seaman with a passage home, and a passage home is provided by giving him the means of getting to the United Kingdom or to the British possession—not to a particular port in the United Kingdom or to a particular port in the British possession to which the seaman belongs—in a British ship that is in want of men to make up its complement. Then comes the other alternative—"or if there is no such ship then the authority shall provide the seaman with a passage home as soon as possible in any ship British or foreign bound as aforesaid." It is not bound to any particular port, but "booked to either the United Kingdom or to the British possession to which the seaman belongs."

Therefore, I cannot find in this Act of Parliament that by the word "home" the Legislature means the port from which the seaman was originally shipped. Then short of that what does it mean? I do not think I am called upon to give a general definition on the matter; it is enough for me to say that clearly in this case, Grimsby being one of the ports in the United Kingdom within the ambit of the original contract is a port to which they were entitled to send him. I think, apart from the Consul's discretion, which I have dealt with under sub-section *d*, the passage to Grimsby was a "passage home."

With respect to the question of maintenance on the way and before, I think that that must stand on sub-section *d*, because I think, apart from sub-section *d*, the passage home would embrace such a reasonable sum as was necessary to keep the man alive on the passage. I don't think it would be satisfied by delivering him as a dead carcase at the port of origin; and furthermore, I think also that the owners would be obliged to keep him alive until he started on the passage, and therefore it would embrace the maintenance until he was put on board before his passage home. So that if it were not for sub-section *d* I should be obliged to hold here that there was a small sum to be paid for the maintenance until he started for Grimsby, and also for the maintenance during the passage to Grimsby. But holding as I do that the case come under *d*, I think the consul has fixed the sum which measures the obligation of defendants. Of course that would be an answer in itself.

As to the other point made by Mr. Robson as to wages, I will deal with that also. It seems to me the provision which makes these expenses recoverable as wages does not in the slightest degree constitute them wages or make them anything more than they are; therefore it does not give the right which it conferred with regard to wages properly so called by the 134th section—viz., of their running on until they are actually settled. Section 186, sub-section (4) (*a*), merely provides that these particular expenses are to be recovered in the same way as wages. There are summary procedures and other legal incidents attached to them, but they are not constituted wages, and they cannot be considered as going on *de die in diem* in a case where it is clear they are not wages, and where such wages as were due were satisfied.

My judgment, therefore, must be for the defendants.

Solicitors for the plaintiff, *Pattinson & Brewer*.

Solicitors for the defendants, *W. A. Crump & Son*.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) March 1, 2, 15, 30.

In re GALLARD.

Ex parte HARRIET GALLARD *v.* STRETTON'S EXECUTORS. (*a*.)

Bankruptcy—Purchase by a partner of a member of the committee of inspection of part of the bankrupt's estate—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), r. 316.

A sale by the trustee in bankruptcy of part of the estate to a partner of one of the members of the committee of inspection cannot be set aside as being either directly or indirectly a sale to a member of the committee of inspection within rule 316; *nor can it be set aside as being contrary to the earlier practice in bankruptcy law.*

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

down in Ex parte Moore, 30 *W. R.* 123, *which did not allow a trustee to sell any part of the estate to his own partner.*

Motion by Miss Harriet Gallard, a creditor in the bankruptcy, for a declaration that the sale by the trustee, to J. H. Stretton of certain property of the bankrupt for £225 was contrary to the provisions of rule 316. "Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the court on the application of the Board of Trade or of any creditor."

The bankruptcy in this case took place in 1887.

The bankrupt had been engaged in building and land speculations at Brighton in conjunction with Stretton, Williams, and Vaughan.

Vaughan became bankrupt in 1885, when Stretton acquired his interest in the speculations.

As soon as Gallard became bankrupt one Harris communicated with Stretton, and with the trustee in Vaughan's bankruptcy, and it was arranged that Harris should be trustee in Gallard's bankruptcy, that Mr. Hunt, of the firm of Ashurst, Morris, & Crisp, a son of Williams, and Mr. Hilliard, a partner of Stretton, should form the committee of inspection, and that Ashurst, Morris, & Co., should act as solicitors in the bankruptcy. Stretton, being a creditor for £5,000, had sufficient voting power to obtain the carrying out of this arrangement.

During the course of the bankruptcy Miss Gallard made a bid of £200 for a certain property forming part of the bankrupt's estates; whereupon Stretton offered £225 for a portion of the same property. Hilliard, Stretton's partner, without informing Miss Gallard of the advance on her bid, induced his colleagues on the committee of inspection to accept Stretton's offer, and the property was sold to him by the trustee.

Miss Gallard now moved against Stretton's executors to have the sale set aside as contrary to rule 316.

The case was argued on the 1st, 2nd, and 15th of March, and during the course of the argument counsel for the applicant were allowed to amend their notice of motion and to allege that the sale was contrary to the practice existing before the date of rule 316, and further, that on the facts of the case it was fraudulent.

E. Cooper Willis, Q.C., and *Mackintosh*, for the applicant.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the respondents.

The following considered judgment was delivered on the 30th of March.

VAUGHAN WILLIAMS, J.—In my judgment this sale by the trustee was not contrary to the provisions of rule 316 of the Bankruptcy Rules, 1886. I am of opinion upon the evidence before me that Hilliard, the partner of Stretton, who was the purchaser, had no interest directly or indirectly in the purchase of this property. It seems to me to have been a purchase by Stretton on his own account, and I do not think that the partnership firm had, as between themselves and Stretton, any interest in the purchase. It was a purchase by Stretton on his own account, and not for the benefit of the firm.

In my judgment such a purchase does not fall within the words of rule 316, which, I think, only covers cases where a purchase is made directly or indirectly by a trustee or member of the committee of inspection.

It has been urged, however, that so to construe the rule would be inconsistent with an established rule in bankruptcy that there cannot be a sale to a partner of the trustee. This seems to be the rule laid down in *Ex parte Moore*, 30 W. R. 123. But I do not think that this entitles me to amplify a rule, the words of which are clear. It is said that the words "by his partner, servant, clerk, or agent" are unnecessary if they are only instances of indirect purchase, and that the meaning is that a purchase by a partner, clerk, agent, or servant, or a person standing in such a relation to a trustee or member of a committee of inspection should be deemed to be an indirect purchase by such trustee or member of a committee even though there is no proof that the purchase was in any way for his benefit. I cannot come to this conclusion, even though the rule so construed might be, as I think it would be, a salutary rule and in accordance with previous bankruptcy practice. [His lordship then went on to find on the facts that the sale had been fraudulent as against Miss Gallard, and granted her an inquiry as to the damage she had sustained thereby.]

Application allowed.

Solicitor for the applicant, *B. H. Buckwell*, Brighton.

Solicitors for the respondents, *Ashurst, Morris, & Crisp.*

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 26; March 2, 4, 5, 19.

In re WRAGG (LIMITED). (*a.*)

Company—Winding up—Contract with vendors—Payment in fully paid-up shares—Property sold of less than nominal value of shares—Stamp duty—Apportionment of value of items of property sold—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Where a limited company purchased property, and paid the agreed price in fully paid-up shares, the contract of sale being duly registered before the issue of the shares pursuant to section 25 *of the Companies Act*, 1867, *the vendors cannot be made liable as contributories in the winding up of the company, merely on the ground that the value of the property sold was less than the full nominal value of these shares.*

The above-named company, which was formed for the purpose of taking over the business of coach proprietors and livery stable keepers belonging to E. J. Wragg and J. B. Martin, was registered under the Companies Act on the 9th of January, 1894, with a capital of £20,000 divided into 2,000 shares of £10 each. By a contract dated the 10th of January, 1894, and duly registered pursuant to section 25 of the Companies Act, 1867, it was agreed that Wragg and Martin should sell to the company the goodwill of the business, premises, plant, &c., for £46,300, which was to be paid as to £7,000 in cash, as to £3,000 in first debentures, as to £6,300 in second debentures, as to £10,000 by the transfer to the company of two mortgages for that amount on the property con-

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

veyed, and as to the balance of £20,000 in fully paid-up shares in the company.

By clause 3 of the contract the said sum of £46,300 was allocated thus: to goodwill, £6,000; to freeholds (including mortgages for £10,000), £12,000; to leaseholds, £500; to stock-in-trade, £27,300; to contract rights, £250; to other property, £250.

The said sum of £46,300 was duly paid to the vendors in the manner provided by the contract.

Subsequently the company was ordered to be wound up.

One of the books of the company contained an account headed "Purchase of Business," in which the value of the stock at the time of the company's formation was set down at only £15,375. On the other hand, this account showed an item which did not appear in the contract—viz., balance to goodwill account, £11,647.

This was a summons by the official receiver and liquidator of the company, asking that it might be declared that the nominal amount of the shares standing in the names of Martin and Wragg was unpaid, and that Martin and Wragg were liable to pay the nominal amounts thereof, and that they might be ordered to pay within four days of the service of the order.

The summons having been dismissed by Vaughan Williams, J., the liquidator appealed.

Sir R. B. Finlay, S.G., Buckley, Q.C., and *Ingle Joyce*, for the appellant.—Though this precise question may not have arisen before, the principles on which it is to be decided are well established. The value of the stock-in-trade, which is put in the agreement at £27,300, appears from the company's books to have been only £15,375. The item "balance to goodwill account" there introduced really represents nothing, and was merely put in to bring up the total to £46,300. There is thus a deficiency in the value of the property sold to the company of about £11,000, and the shares should be treated as not paid up by that amount. The Companies Act, 1862, does not alter the liability of a shareholder to pay for his shares, but only limits it: *Oakes* v. *Turquand*, 15 W. R. 1,201, L. R. 2 H. L. 325. A company cannot issue shares at a discount, even though there is a contract registered under the Act of 1867: *In re Almada and Tirito Co., Allen's case*, 36 W. R. 593, 38 Ch. D. 415; *Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125. A mere improvident bargain entered into by a company would not necessarily be invalid; but a company cannot knowingly issue shares as fully paid-up in exchange for property of less than their full value: *In re Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9; *Elkington's case*, 15 W. R. 665, L. R. 2 Ch. App. 511. The appellant does not impeach the contract of sale.

Herbert Reed, Q.C., and *Ward Colridge*, for the respondent Martin.—There is no ground for saying that the alleged deficiency of £11,000 should be set against the shares rather than against the cash and debentures. The company agreed to accept property capable of valuation as of a certain value, and to pay for it in part by the issue of these fully paid-up shares, and the agreement is not impeached. The shares cannot therefore be treated as not fully paid up, and the respondent made liable as a contributory: *In re Heyford Co., Pell's case*, 18 W. R. 31, L. R. 5 Ch. App. 11; *In re Heyford Ironworks Co., Forbes & Judd's case*, 18 W. R. 302, L. R. 5 Ch. App. 270; *In re Baglan Hall Colliery Co.*, 18 W. R. 499, L. R. 5 Ch. App. 346. This is not affected by the later decisions in *In re Almada and Tirito Co.* and *Ooregum Gold Mining Co.* v. *Roper*. [LINDLEY, L.J., referred to *Chapman's case*, 43 W. R. 553, [1895] 1 Ch. 771, and *In re Empire Assurance Co., Leeke's case*, 19 W. R. 300, L. R. 11 Eq. 100.] It is for the appellant to show that the transaction is illegal: *Hire Purchase Furnishing Co.* v. *Richens*, 36 W. R. 365, 20 Q. B. D. 387. This they have not done, and it must therefore be presumed to be legal.

Eve, Q.C., and *Carrington*, for the respondent Wragg.—There is no reason why the vendors should not make a profit on their dealing with the company. The apportionment in clause 3 of the contract was made solely with a view to reducing the amount of duty payable under section 59 of the Stamp Act, 1891, duty being payable thereunder in respect of goodwill, but not in respect of stock-in-trade.

Finlay, S.G., in reply.—The suggestion last made is tantamount to saying that the parties to the contract have committed a fraud upon the revenue. The value of the goodwill was truly stated in the contract to be £6,000, but the evidence shows that the value of the stock-in-trade was there overstated by £11,000. As regards the law the pith of the whole matter is contained in *Ooregum Gold Mining Co.* v. *Roper*, where it is laid down that the transaction will not be impeachable if the company honestly regarded the consideration given as representing the nominal value of the shares in cash. In face of the evidence it cannot be said that they did so here. The cases cited on the other side do not touch the point.

LINDLEY, L.J.—The liquidator contends that the shares issued to Martin and Wragg were improperly issued as fully paid up, and cannot be properly so treated. No attempt has been made to impeach or set aside the agreement. Nor, having regard to the decision of the House of the Lords in *Salomon* v. *Salomon & Co.*, *ante*, p. 193, [1897] A. C. 22, is it possible to hold that agreement invalid, on the materials before us. The company, although a small one, promoted by the vendors and managed by them, must be treated as competent to buy the property which it was formed to acquire, and to take it at the price named by the vendors. The only question is whether the shares issued as fully paid up in part payment of the price can be treated as fully paid up. Before examining the law upon this point I will state the grounds on which the appellant contends that they cannot. It appears from the books of the company that the stock-in-trade, which by clause 3 of the agreement is taken to be worth £27,300, was entered as of the value of £15,375 only, and it is contended that the paid-up shares given to the vendors must be attributed in part at least to this difference of £11,000 odd. In other words, it is contended that the company ought to be treated as having issued shares to the nominal amount of £20,000 (the rest of the £27,300 being cash or debentures) in payment of goods of much less value—viz., of the value of £15,000 odd only—as both vendors and buyers well knew. I am quite unable to take this view of the contract. I will assume that the stock-in-trade was worth only £15,000—*i.e.*, that it would not have fetched more in the market. There was no agreement to buy the stock-in-trade at that price, and to pay for it in shares of a larger nominal amount. The third clause in the agreement was merely inserted for stamp purposes. It was absolutely useless and meaningless for any other purpose. No evidence is required to prove it. No lawyer accustomed to the preparation of deeds can fail to see why it was inserted or its legal effect. Stamp duty had to be paid on so much of the £46,300 as was liable to duty, and duty was payable in

respect of so much of this sum as was attributable to the goodwill, and in respect of the freeholds and leaseholds and of nothing else. These were valued at the respective sums mentioned in clause 3; £27,300 remained and the stock-in-trade remained, and the £27,300 was attributed to that. I do not say that this was right, but whether right or wrong the third clause does not in any way alter the real agreement between the vendors and the company. The real agreement was that the vendors should sell and that the company should buy the various properties mentioned in the schedule to the agreement for one sum of £46,300, which apparently was £11,000 more than could have been obtained from any other purchaser. But the parties did not appropriate any part of the purchase-money to any definite part of the property purchased nor is the court at liberty to do so. It would be wholly wrong to treat the agreement as one to pay £27,300 for stock-in-trade, valued as between the vendors and the company at £15,375, and to attribute the whole of the share capital to the purchase of that particular item. To do this is to fasten on the parties a contract which they never made and one, moreover, which would entirely defeat their intentions if the appellant is right in his contention.

In *Leifchild's case*, 14 W. R. 22, L. R. 1 Eq. 231, a limited company bought a patent and paid for it in paid-up shares; the holder was held not to be a contributory. The agreement was not sought to be set aside and no question as to the actual value of the patent was raised. No one apparently thought that question material. This case was decided in 1865 by Kindersley, V.C., and is valuable as showing that as early as that year it was taken for granted that shares in a limited company issued as paid up in consideration of property transferred to the company must be treated as paid up unless the whole transaction was set aside on the ground of fraud. In 1869 *Drummond's case*, 18 W. R. 2, L. R. 4 Ch. App. 772, came before Giffard, L.J., sitting as the Court of Appeal, and it was then distinctly decided that even a subscriber of the memorandum of association could satisfy his liability in respect of the shares for which he subscribed by paying for them in money or money's worth or, as Giffard, L.J., put it, in "meal or in malt." This general proposition has never been doubted, but there was a difficulty in applying it to a subscriber of the memorandum of association. The difficulty was to identify the shares which he was to receive as vendor with those which he had bound himself to take and pay for by subscribing the memorandum of association. This difficulty always arises in similar cases. It has never been doubted, so far as I know, that the obligation of every shareholder in a limited company to pay to the company the nominal amount of his shares could be satisfied by a transaction which amounted to accord and satisfaction or set-off as distinguished from payment in cash. In 1867 the legislature rendered all such transactions invalid unless they were made pursuant to a duly registered contract, but if there is such a contract the law is now what it always was.

As regards the value of the property which a company can take from a shareholder in satisfaction of his liability to pay the amount of his shares there has been some difference of opinion. But it was ultimately decided by the Court of Appeal that, unless the agreement pursuant to which shares are to be paid for in property or services could be impeached for fraud, the value of the property or services could not be inquired into. In other words, the value at which the company is content to accept the property must be treated as its value as between itself and the shareholder whose liability is discharged by its means. The following are the decisions which established this doctrine. The point was first raised in 1869 in *Pell's case*, 18 W. R. 31, 5 L. R. Ch. App. 11. Pell had agreed to sell his business to a limited company for a certain number of fully paid-up shares which were allotted to him and were registered in his name. On the winding up of the company Lord Romilly held him to be a contributory in respect of these shares, but to be entitled to an inquiry as to the value of the property given for them and to be allowed such value but no more towards payment of them. This decision, however, was reversed on appeal by Giffard, L.J., on the ground that the agreement for the sale of the business for paid-up shares not being impeached, the shares ought to be treated as paid for in money's worth. In *Forbes and Judd's case*, 18 W. R. 302, L. R. 5 Ch. App. 270 (1870), Lord Hatherley clearly intimated his concurrence with the view that, unless the agreement was impeached, the value of the property given for the shares could not be gone into. In *In re Baglan Hall Colliery Co.*, 18 W. R. 499, L. R. 5 Ch. App. 346 (1870), Giffard, L.J., again acted on the same principle, and there being, as he said, "some confusion in the views entertained of cases of this nature," he went fully into the grounds of his decision, referring to the various sections of the Companies Act, 1862, which were material. He fully recognised the obligation of a shareholder to pay for his shares, but he again held that this obligation could be satisfied otherwise than by payment in money. In that case the company had agreed to buy a colliery and to pay for it in shares, and the handing over of the colliery as the consideration for the shares was held to be payment in full (see p. 357). No question was raised as to the value of the colliery. In *Leeke's case*, (1870), 19 W. R. 300, L. R. 11 Eq. 100, Stuart, V.C., criticised *Pell's case*, and evidently disapproved the decision of Giffard, L.J.; but, although *Leeke's case* was affirmed on appeal, the Vice-Chancellor's strictures on *Pell's case* were not approved. (See L. R. 6 Ch. App. 469.) In *Jones's case*, (1870) L. R. 6 Ch. 48, 19 W. R. Ch. Dig. 53, the Court of Appeal again adhered to the principle laid down in *Pell's case*, *Forbes and Judd's case*, and *In re Baglan Hall Colliery Co.* James, L.J. seems to have had some doubt whether he should have come to the conclusion he did if it had not been for the decisions, but I understand his doubt was as to the identification of the shares subscribed for with those given for the property taken by the company. Mellish, L.J., had no misgivings, and expressly approved the decision of Giffard, L.J., in *Pell's case*. In *Maynard's case*, (1873) 22 W. R. 119, L. R. 9 Ch. App. 60, fully paid-up shares were allotted to a subscriber of the memorandum of association in payment of property sold by him to the company. He was held to have satisfied his liability, the company "being free to accept payment in any honest way" (see p. 65). It was proved to the satisfaction of the court that the shares for which he subscribed were to be paid for in property to be bought by the company at a sum equal to the amount of the shares subscribed for. It was not suggested that the agreement was *ultra vires* or depended for its validity on the value of the property. All these cases arose before the Companies Act, 1867, came into operation, although some of them were decided at a later date. In *Fothergill's case*, (1873) 21 W. R. 301, L. R. 8 Ch. App. 270, which arose after that Act was in force, the above decisions were again considered and were held inapplicable to cases to which that Act applied unless, a proper agreement were duly registered. In *Fothergill's case* there was a registered agreement, but it was held not to apply to the shares for which he had

subscribed the memorandum of association, and he was held to be a contributory in respect of them. But I can find nothing to throw doubt on the application of the law as settled in *Pell's case* and the others referred to above, to similar cases arising since 1867, and in which the shares in question have been issued pursuant to a duly registered agreement as required by the Act. In *Anderson's case*, (1877) 26 W. R. 442, 7 Ch. D. 75, a colliery was sold to a limited company for paid-up shares. A proper agreement was registered. The price of the colliery to the company was £150,000, to be paid in shares. The vendors had shortly before agreed to buy it for £66,000, and to pay £42,000 in shares. They therefore made a huge profit. It was nevertheless held by the Court of Appeal that, so long as the agreement for sale to the company was unimpeached, all the £150,000 shares must be treated as fully paid up. This case is the last to which it is necessary to refer, bearing directly on the question I am examining.

I understand the law to be as follows. The liability of a shareholder to pay the company the amount of his shares is a statutory liability and is declared to be a specialty debt (Companies Act, 1862, s. 16), and a short form of action is given for its recovery (section 70). But specialty debts, like other debts, can be discharged in more ways than one—*e.g.*, by payment, set-off, accord and satisfaction, and release—and, subject to the qualifications introduced by the doctrine of *ultra vires*, or, in other words, the limited capacity of statutory corporations, any mode of discharging a specialty debt is as available to a shareholder as to any other specialty debtor. It is, however, obviously beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid-up shares for nothing and preclude itself from requiring payment of them in money or money's worth (*In re Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9), nor can a company deprive itself of its right to future payment in cash by agreeing to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement, for its statutory action for non-payment of calls (see *Pellatt's case*, 15 W. R. 726, L. R. 2 Ch. App. 527). From this it follows that shares in limited companies cannot be issued at a discount. By our law the payment by a debtor to a creditor of a less sum than is due does not discharge the debt; and this technical doctrine has also been invoked in aid of the law which prevents the shares of a limited company from being issued at a discount. But this technical doctrine, though often sufficient to decide a particular case, will not suffice as a basis for the wider rule or principle that a company cannot effectually release a shareholder from his statutory obligation to pay in money or money's worth the amount of the shares. That shares cannot be issued at a discount was finally settled in the *Ooregum Gold Co.'s case*, the judgments in which are strongly relied upon by the appellant in this case. It has, however, never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper, and pay for them in fully paid-up shares. Provided a limited company does so honestly, and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, it appears to be settled by *Pell's case* and the others to which I have referred, of which *Anderson's case* is the most striking, that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the companies and their creditors. The Legislature in 1867 appears to me to have distinctly recognized such to be the law, but to have required, in order to make such agreements binding, that they shall be registered before the shares are issued. There is certainly no decision yet which is opposed to the above statement of the law. The observations in *In re Addleston Linoleum Co.*, 37 Ch. D. 191, *In re Almada and Tirito Co.*, 38 Ch. D. 415, and *In re Ooregum Gold Co.*, [1892] A. C. 125, relied upon by the appellant in this case, fall far short of deciding that the value of the property or services paid for in shares can be inquired into or is material in any case in which the sale is not impeached.

These and other cases decided upon the Act of 1867 show (1) that since that Act, as before, shares must be paid for in money or money's worth; (2) that since that Act, as before, they may be paid for in money's worth; (3) that since the Act payment in money's worth can only be effectually made pursuant to a properly registered contract; (4) that, even if there is such a contract, shares cannot be issued at a discount; (5) that if a company owes a person £100, the company cannot by paying him £200 in shares of that nominal amount discharge him, even by a registered contract, from his obligation as a shareholder to pay up the other £100 in respect of those shares. That would be issuing shares at a discount. The difference between such a transaction and paying for property or services in shares at a price put upon them by a vendor and agreed to by the company may not always be very apparent in practice. But the two transactions are essentially different, and whilst the one is *ultra vires* the other is *intra vires*. It is not law that persons cannot sell property to a limited company for fully paid-up shares and make a profit by such transaction. We must not allow ourselves to be misled by talking of value. The value paid to the company is measured by the price at which the company agrees to buy what it thinks it worth its while to acquire. Whilst the transaction is not impeached, this is the only value to be considered. This appears to me to be in complete accordance with the judgments of Cotton, L.J., in *In re Almada and Tirito Co.*, 38 Ch. D. 423, and Lords Watson and Macnaghten, in the *Ooregum Gold Co.'s case*, [1892] A. C. 136-7, 147-8. Lord Herschell's judgment, as I understand it, is distinctly favourable to the respondents.

In my judgment the law is settled, and cannot be declared wrongly settled by this court, at any rate. If it is to be altered, the decisions which settled it must be declared wrong by the House of Lords, or the law must be altered by Act of Parliament. Vaughan Williams, J., has had to consider this matter on more than one occasion—viz., in *Chapman's case*, 43 W. R. 553, [1895] 1 Ch. 771, and again in the present case—and on both occasions the principle on which he based his decision is, in my judgment, correct. The summons which has raised the question of Martin and Wragg's liability is of an unusual kind, being a misfeasance summons and an alternative application to enforce payment up of the shares. It was dismissed with costs, and no question was raised on appeal except the important question of principle which I have considered. The appeal must be dismissed with costs.

SMITH, L.J., after referring generally to the formation of the company and to the contract of sale, continued: The Solicitor-General, who appeared for the liquidator, did not seek upon any ground to impeach the sale by Messrs. Wragg & Martin to E. J. Wragg (Limited); but he asserted that he could show by evidence that the shares in E. J. Wragg (Limited) which were taken by Wragg & Martin as fully paid up in part payment of the agreed price of £46,[illegible]

were not so, in other words that he could show that there was a deficiency in the value of the property sold by Messrs. Wragg & Martin to the company for the agreed price of £46,300, and that as regards that deficiency which he alleged to be £11,647, the shares held by them were not fully paid-up. It is admitted that the present proceeding of the liquidator is without precedent, and apart from the authorities some of which I will deal with hereafter, I will first ascertain the facts upon which the liquidator relies in proof of his case, assuming that he is entitled to go into them. [His lordship here referred in detail to the provisions of the contract of sale.] It is argued for the liquidator that here he proves that the "stock" sold to the company was valued at £27,300. I agree that upon the face of clause 3 it is so, but before I say that it is proved that £27,300 was the value of the stock I must consider for what purpose this apportionment of the £46,300 into its different component parts was made and inserted in the agreement. The Solicitor-General was unable to make any suggestion as to this. He simply said that it is stated upon the face of the clause that the value of the stock was £27,300, and that establishes the fact. *Primâ facie* this would be so; but as, except upon one hypothesis, the clause is obviously useless, and there is no possible reason for its insertion, I do not think what would otherwise be its *primâ facie* meaning is necessarily its real meaning. The hypothesis is this: that the distribution of the items in this clause was made solely to arrive at the stamp duty payable upon the instrument of agreement, for otherwise it is inconceivable why it should have been inserted, and that this is the only reason for its existence I have no doubt.

It was said that the court could not come to such a conclusion without hearing the defendants' evidence thereon. But with evidence or no evidence, for what other purpose was the clause inserted? To this there has been no answer. In my judgment this supposed valuation of the stock at £27,300 is not a real valuation of such stock at all. [His lordship here referred in detail to the "Purchase of Business account."] What is the meaning of this last item, "Balance to Goodwill Account" in this account? Does it mean profit upon the sale of Messrs. Wragg & Martin's business to the company over and above the estimated items therein appearing; or, if not, what does it mean? The liquidator suggests that it was put in as representing nothing. The accountant he called to give evidence as to this, gave no intelligible account of why he made this entry as he did. He said that he found that there was a sum of £11,647 to be accounted for, and so he entered it in this way. The liquidator ignores the fact of a possible profit being made upon the sale of the business to the company, and says that he has proved that the sum of £11,647 represents nothing. I do not think that he has.

It was vigorously insisted upon that as the defendants had not been called the court was bound not to infer that the component parts of the £46,300 were allocated as they were in clause 3, for stamp purposes, for that would be to infer that it was done for the purpose of defrauding the revenue, which no court could, without evidence, infer. Assuming for a moment the probability that the agreed price of £46,300 for the business as a going concern embraced a profit to Mr. Wragg and Mr. Martin upon the sale thereof to the company over and above the estimated items, the whole thing is at once explained. Whether the revenue can complain is another matter; and, indeed, it would seem that the £11,647 should have been distributed over the different items sold, and not placed exclusively upon the stock, and if this were the point I should decide against Messrs. Wragg & Martin. In my judgment, however, the liquidator fails to establish that the £11,647 is a fictitious entry and represents nothing; and, indeed, the true inference from the facts adduced by the liquidator is that it represents the agreed profit passing to the vendors upon the sale of their business to the company. The liquidator has failed to prove that the £27,300 was the real price of the stock, and thereby, as he contends, the £11,647 represents nothing.

But even if this were otherwise, another point arises. If there were in fact the shortage, as it has been called, of the £11,647, what right has the liquidator to say that this shortage was the consideration for the shares, so that by that amount they were not fully paid up? There was ample property conveyed by the vendors to the company to satisfy 1,993 fully paid-up shares of £10 each—*i.e.*, £19,930; for, leaving out the £10,000 of mortgages transferred to the company, the agreed price was £36,300. Deduct £11,647, the alleged shortage, it leaves £24,653 as consideration for £19,930 of shares. Why is the liquidator to allocate the shares against what he alleges to be shortage, even if it existed, and not against the whole consideration of £24,653? Mr. Buckley ingeniously argued that if he did not do this the result would follow that the consideration for the £7,000 cash and for the £9,300 of first and second debentures would be short, that is assuming there was no agreed profit upon the transaction. He got at it thus: £36,300 agreed contract price (leaving out the two mortgages for £10,000); £11,647 shortage, leaves £24,653; shares, £19,930; leaving £4,723 as consideration for the £7,000 cash and the £9,300 in first and second debentures. And therefore he said the shares and not the cash and debentures must be taken to have had insufficient consideration given for them, a purely speculative conclusion and which also omits the consideration of profit. So much for the facts, and upon these alone apart from the cases I agree with my brother Williams that the liquidator has failed in his case. But when I come to the authorities the same result follows.

It is now well settled law that for a shareholder in a company limited by shares to have fully paid-up shares and therefore not to be liable for calls in a winding-up of the company, he must show that he has fully paid up to the face value of the shares either in cash or in value received by the company in some form, or partly in cash and partly in value received by the company in some form; and if payment other than in cash be relied on this can only be done if there be a "contract duly made in writing and filed with the registrar of joint-stock companies at or before the issue of such shares" pursuant to section 25 of the Companies Act, 1867. The House of Lords has definitely settled this point in the case of *The Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125. Partial payment is not sufficient, but shares may be lawfully issued as fully paid up for considerations which the company have agreed to accept as representing in money's worth the nominal value of the shares (per Lord Watson at p. 36 of [1892] A. C. in *The Ooregum case*) It is not suggested that the contract of the 10th of January, 1894, is not an honest bargain, or that its consideration is colourable or illusory. Now, is a liquidator entitled to go into the adequacy of the consideration and to show if he can that the consideration for the contract was inadequate, unless it appears so upon the transaction itself; or if not, if he desires to do so must he not impeach the contract itself? If there be no consideration at all for the shares, and it be shown as in the case of *In re The Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9, that the words inserted in the registered contract "in consideration of services" were placed

there as a mere blind, that will suffice. Again, if in a registered contract a money value be placed upon the consideration which the company had agreed to accept as representing in money's worth the nominal value of the share less than the face value of the share, that share would, I should think, not be fully paid up. For instance, as was put in argument, a contract to supply to a limited company 100 tons of coal valued at 10s. per ton as a consideration for 100 £1 shares in the company—*i.e.*, a valued £50 worth of coal for 100 £1 shares, these shares would not be, I think, fully paid up. There would be no necessity in such a case for impeaching the agreement, for that the shares were not fully paid up in money or money's worth would be apparent upon its face. Cotton, L.J., in *In re The Almada and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415, at p. 421, points to such a case as this, though he did not decide it. If, however, the consideration which the company has agreed to accept as representing in money's worth the nominal value of the shares be a consideration not clearly colourable nor illusory, then in my judgment the adequacy of the consideration cannot be impeached by a liquidator unless the contract can also be impeached. And I take it to be the law that it is not open to a liquidator, unless he is able to impeach the agreement, to go into the adequacy of the consideration to show that the company have agreed to give an excessive value for what they have purchased. I will content myself with citing three of the earlier cases, and I will begin with *Pell's case*, 18 W. R. 31, L. R. 5 Ch. App. 11 (1869). Pell in this case had agreed to sell to a company the goodwill and stock-in-trade of his business in consideration of 1,500 £20 shares of the company fully paid up. The company was wound up, and no payment for these shares could be found in the books of the company. Lord Romilly, M.R., directed an inquiry as to the value handed over by Pell to the company under his agreement with them and declared that Pell was entitled to be allowed only the amount of that value. This decision was reversed upon appeal, Giffard, L.J., holding that as the agreement was not impeached the court had no ground for going behind the agreement. In the next year (1870) in *Forbes's case*, 18 W. R. 302, L. Rep. 5 Ch. App. 270, at p. 273, Hatherley, L.C. deals with *Pell's case*, and expressly states that if the consideration is to be impeached the contract must also be impeached—he says: "The only difference between Giffard, L.J., and the Master of the Rolls in that case was this—the Master of the Rolls thought that Pell, being bound to pay the full amount of £20 per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy Pell's business; and Giffard, L.J., thought that the contract not being impeached, must be treated as a good contract, and one that ought to be acted upon, so that no question could be raised as to the actual value of the business made over." The Lord Chancellor clearly approves and in no way disapproves of the decision of Giffard, L.J., in *Pell's case*. In *In re The Baglan Hall Colliery Co.*, 18 W. R. 499, L. R. 5 Ch. App. 346, at p. 357, Giffard, L.J., again lays down what he had stated in *Pell's case*. It is true that in *Leeke's case*, 19 W. R. 300, L. R. 11 Eq. 100 at p. 107, Stuart, V.C., did not like the decisions in *Pell's* and *Forbes's cases* by Lord Hatherley and Giffard, L.J. But many cases have been decided since then all in accord with *Pell's case*, which cases Lindley, L.J., has referred to, and I do not repeat them, and not a single case has been cited to the contrary. It appears to me that in the House of Lords in the *Ooregum case* the principle of *Pell's case* and *Forbes's case* was distinctly approved. Lord Watson, at p. 136 of [1892] A. C., says: "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice." Lord Herschell at p. 140 is very distinct upon this point. He says: "But the contrary has been determined. And not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the share." And Lord Macnaghten at p. 148 says: "It seems to me that all that has been determined so far is that the court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price for the property."

In my judgment, whether the facts of this case are looked to, or whether the law applicable thereto is looked at the liquidator is in the wrong, and my brother Vaughan Williams's judgment was quite right in dismissing his application.

RIGBY, L.J.—In this case the respondents Wragg and Martin were two of the first three directors of the company now in course of being wound up. They had for a considerable time before the incorporation of the company carried on the business of omnibus and cab proprietors at Whitechapel and elsewhere in London. What their respective interests as between themselves were in the assets of the business we cannot infer from the evidence, nor is it necessary that we should know. Wragg & Martin were minded to turn their business, as the phrase goes, into a private limited company—that is to say, a limited company in which the vendors were to take, at any rate in the first instance, all the shares in the company which were to be allotted to the vendors as part of the consideration for the purchase of the goodwill and assets of the partnership, and as such, allotted to the vendors or their nominees, including, as I understand, the subscribers of the memorandum of association. The property to be sold to the new company consisted of freehold estate of sufficient value to have been accepted as security for a first mortgage debt of £8,000 with interest at 6 per cent., and a second mortgage debt of £2,000 with interest at 5 per cent. These mortgages were apparently treated by the mortgagees as fair security. There were leaseholds

of small value, a considerable stock-in-trade consisting among other things of omnibuses, cabs, and horses, worth, at any rate, not less, according to the evidence, than £15,000. The business was therefore a very substantial one. The assets (notably the goodwill of the business) could not from the nature of them be said to have any market value; and what they would be worth to a company incorporated to carry on the business would depend upon considerations as to which there would be room for considerable honest difference of opinion. The vendors were, of course, able to settle the constitution of the company according to their own wishes, and they determined that it should be brought out with a capital of £20,000, in 2,000 shares of £10 each, and that there should be an issue of first debentures for £10,000. Neither the amount of capital, nor the amount proposed to be raised on first debentures, can be said to have been on the face of the matter extravagantly large, regard being had to the nature of the business to be transferred. The only effect, beyond the appearance of greater importance to be given to the company, of putting down £20,000, instead of, say, £10,000, as the capital of the company would be to make the value of each share proportionately smaller. The vendors or their nominees might be able to dispose of their shares on better terms if the capital were larger, but it is only fair to observe that the vendors in fact retained by far the largest part of the share capital until the winding up of the company. The vendors determined to fix the price for the property to be sold at £46,300. How this sum was arrived at we do not know. No doubt it included a large amount of what would be profit to the vendors if they disposed of their shares favourably, but so long as they continued to hold them this would be nominal profit only. The vendors did not require to be paid a large amount in cash, and arranged that the £46,300 should be paid as follows: £10,000 by the company taking over the existing mortgages on the freeholds, £7,000 in cash which was expected to be raised by means of first debentures for that amount, £3,000 the residue of the first debentures, £20,000 in shares to be treated as fully paid up. This left £6,300 to be raised somehow or other, and I think the suggestion a probable one, that the balance so remaining determines the amount £6,300 of the second debentures. This arrangement was carried out by an agreement dated the 10th of January, 1894 (the company having been incorporated just before). The memorandum of association provided for the execution of this agreement. The agreement was executed by the authority of the board of directors consisting of Wragg and Martin and one Harrison, and its execution by the company was attested by Wragg and Harrison. A supplementary agreement was executed the same day whereby the solicitor of the company undertook to raise £7,000 by first debentures, of which £4,600 was to be paid to Martin, £1,000 to the credit of the company, and out of the residue Wragg and Martin covenanted to pay the debts of the partnership. The last terms of this agreement were plainly insisted upon for the satisfaction of debenture-holders, and were very fair. So far nothing could be more straightforward or more reasonable, subject always to the question whether the intended ultimate profit to be realized was not fixed too high. As, however, it is not suggested that there is ground for setting aside the contract, I do not see, subject to the point which I reserve as to appropriation of the purchase-money, how, consistently at any rate with *Anderson's case*, the shares could possibly be treated as not fully paid up. In the present, as in *Anderson's case*, the shares allotted were allotted to vendors, or persons representing vendors, and in *Anderson's case* the £150,000 worth of shares allotted consisted, to an extent of far more than 50 per cent. of profit reserved to the members of the syndicate selling. That case is undoubtedly binding upon us. It was cited and relied upon in the *Ooregum case*, and was not, I think, in any way disapproved of. Certainly there is nothing in the opinions of the noble and learned lords to shake the authority of the case. By saying that *Anderson's case* is an authority binding on us I do not mean to intimate an opinion that there are not other authorities to the same effect. I think that the series of authorities cited by Lindley, L.J., beginning with *Pell's case*, have made it impossible in such a case as above indicated to inquire effectually into the value of the property taken in exchange for shares where the contract itself is not impeached. If these authorities are to be overruled that must be done by the House of Lords. But it is said that a clause in the main agreement of the 10th of January, 1894—viz., clause 3 makes the present case an exception to the general rule. Before examining that clause I will consider what the actual agreement between the parties was independently of that clause. Clearly it was a purchase of the whole freehold property dealt with at an entire price. Neither the vendors nor purchasers would have sold or bought any one of the items independently of the others. It is not in accordance with the facts that there were a number of independent purchasers of separate items, and no one could say that, independently of the clause, it would have been possible to make any appropriation of portions of the purchase-money. As the vendors would have the full control over the consideration given, and could divide it in accordance with their rights *inter se*, there could be no object connected with any difference in those rights in making any appropriation. In addition to this it is manifest that the figures in the clause are not founded on any exact estimate of the rights of the different partners, the figures being throughout round numbers which could hardly by possibility conform to pre-existing rights. It is obvious that it could not in any way make the slightest difference to the company, except for the stamp duty payable, that part of the consideration should be given for one part of the assets rather than for another. My conclusion is that the clause was intended to be operative only as regards stamp duty. The apportionment may have been a wrong apportionment, but that cannot alter the nature of the contract or entitle the company to deal exceptionally with it. I am not prepared to say that in no cases can the consideration in kind given for paid-up shares be inquired into, even though there may be nothing on the face of the contract to show the insufficiency of the consideration; but I abstain from attempting to define what the cases are. I think it sufficient to say that in my judgment the opinions of the noble and learned lords in *The Ooregum case* sufficiently indicate that such cases may arise. They must be dealt with when they do arise.

Appeal dismissed.

Solicitors, *Walter Murton; Colyer & Colyer; A. E. Greville.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) May 31.

MEXBOROUGH (EARL OF) v. WHITWOOD URBAN DISTRICT COUNCIL. (a.)

Practice—Discovery of documents—Interrogatories—Action for forfeiture of land.

The defendant in an action to recover possession of land on a forfeiture for breach of a covenant contained in a lease, cannot be ordered to make an affidavit of discovery of documents or to answer interrogatories.

Seaward v. Dennington, 44 *W. R.* 696, *disapproved.*

Appeal from an order of Bruce, J., at chambers.

The action was brought to recover possession of land on the ground of forfeiture incurred by reason of a breach of a covenant contained in a lease.

The plaintiff applied for an order on the defendant to make discovery of documents and to answer interrogatories.

The defendant opposed the application on the ground that an order for discovery could not properly be made on a defendant in an action for a forfeiture of land.

Bruce, J., refused to make an order.

The plaintiff appealed.

Scott Fox, for the plaintiff.—The defendant is not entitled to resist an order for discovery. The case of *Seaward* v. *Dennington*, 44 W. R. 696, is a distinct authority that an order for discovery of documents may be made against a defendant in an action for a forfeiture of land. Such an action is not an action for a penalty in the sense of punishment on the defendant for doing something wrong. It is merely an action to enforce a covenant. The case of *Martin* v. *Treacher*, 34 W. R. 315, 16 Q. B. D. 507, on which the defendants will rely, was an action for a penalty. In the case of *Spokes* v. *Grosvenor and West-end Railway Terminus Hotel Co.* (*No.* 1), decided in this court a few days ago, *ante*, p. 545, it was held that in an action for fraudulent conspiracy a defendant could not resist the making of an order for discovery of documents, and that the proper time for him to take the objection that giving discovery would tend to criminate him was when he made his affidavit in answer. There ought to be no difference in this respect between an objection that discovery may tend to criminate the party and an objection that discovery may expose him to a forfeiture.

He also cited *Ind, Coope, & Co.* v. *Emmerson*, 36 W. R. 243, 12 App. Cas. 300.

Tindal Atkinson, Q.C., and *Montague Lush*, for the defendants.—No order for discovery can rightly be made in this case. This is an action directed to obtaining a forfeiture of the defendants' interest, and discovery is only sought with that object. It is not like the case where it may incidentally happen that an answer may criminate a man. The case of *Martin* v. *Treacher* shows that there is a distinction between the objection that giving discovery may criminate and the objection that discovery is sought to establish a forfeiture. *Pye* v. *Butterfield*, 13 W. R. 178, 5 B. & S. 829, is a clear authority to show that interrogatories cannot be allowed in an action brought, like the present, to enforce a forfeiture of land. And if interrogatories cannot be administered, an order for discovery of documents ought not to be made: see *Hunnings* v. *Williamson*, 31 W. R. 924, 10 Q. B. D. 459; *Hobbs & Co.* v. *Hudson & Co.*, 38 W. R. 682, 25 Q. B. D. 232.

They also cited *Lord Uxbridge* v. *Staveland*, 1 Ves. sen. 56.

Lord ESHER, M.R.—This is an action in which the plaintiff seeks to obtain a judgment that the defendants' lease has become forfeited. The plaintiff therefore admits that the defendants have an estate in land, but he says that they have forfeited the estate by a breach of covenant. The plaintiff insists that he has a right to an order on the defendants to make discovery of documents, and also a right to an order on the defendants to answer interrogatories. The learned judge has refused both orders.

There are two rules which have always existed in the common law of England, and have never been taken away by any statute. One is that, if any person brings an action against another for penalties, the court will not assist the person claiming penalties by any order in the way of procedure. The other is that, where a person has an estate in land and another seeks to obtain a forfeiture of that estate, the court will not give any assistance to the person claiming the forfeiture. These are rules of procedure, but they are also something more; they are rules in favour of particular classes of defendants, they are intended to protect defendants against claims for forfeiture of land, and against informations for penalties brought by common informers. There is also another rule which is often spoken of together with these rules—viz., that a witness is not bound to criminate himself. But this rule really has nothing in common with the other rules.

In *Martin* v. *Treacher*, which was a *qui tam* action for penalties brought by a common informer, it was laid down that in such an action the court would not assist the plaintiff by any of its procedure with regard to discovery. The reasoning of the judgments applies as well to discovery of documents as to interrogatories. In *Pye* v. *Butterfield*, which was an action for forfeiture, the decision was that interrogatories could not be delivered at the instance of the plaintiff. Then unfortunately there is the case of *Seaward* v. *Dennington*, which was an action like the present to recover possession of demised premises on a forfeiture for breach of covenant, and there this court held that an order for discovery of documents might be made against the defendant. After hearing the law on the subject fully discussed I venture to think that that case was not rightly decided. With regard to the case of *Ind, Coope, & Co.* v. *Emmerson*, I do not think that the House of Lords there intended to decide that the two rules which I have mentioned were done away with by the Judicature Act. I think that an action for forfeiture of land is on the same footing as an action for penalties, and that where the only issue in an action is whether there shall be a forfeiture of land, as is the case here, the court must refuse to make an order either for interrogatories or for discovery of documents. The appeal must be dismissed.

A. L. SMITH, L.J.—This is an action of ejectment brought by a lessor against a lessee; it is what is called an action for forfeiture. The plaintiff seeks to put the defendant under discovery, both discovery of documents and by way of interrogatories. The learned judge disallowed both applications. In *Martin* v. *Treacher*, which was an action for penalties for forfeiture, this court held that interrogatories could not be allowed; and before that, in the case of *Hunnings* v. *Williamson*, which was also an action for penalties, the Divisional Court held that no order could be made either for discovery of documents or interrogatories. Then we come to the case where the action is for forfeiture other than penalties. *Pye* v. *Butterfield* was a case of an action for forfeiture of

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

land exactly similiar to this case; and there it was held that no interrogatories could be administered. In the recent case of *Seaward* v. *Dennington*, which was heard before my brother Rigby and myself, we held that in such a case an order for discovery of documents might be made. But on further consideration I think that our decision in that case was not right. I therefore agree that the appeal must be dismissed.

CHITTY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Vincent & Vincent*, for *North & Sons*, Leeds.

Solicitor for the defendants, *T. A. Jones*, for *C. A. Phillips*, Castleford.

From Q. B. Div. (Lopes and Rigby, L.JJ.) May 18.

MACHADO *v.* FONTES. (*a.*)

Practice—Pleading—Striking out allegation—Libel—Publication abroad—No civil remedy in foreign country, but only criminal remedy at instance of the State—Plea of the foreign law.

Where an act has been committed abroad which if done here would by English law give rise to a right of action, an action may be brought in this country unless by the law of the place where it was done the act complained of is either justified or excused. It is therefore no defence to show that the law of the place where a libel was published provides for no civil action, but only for criminal proceedings at the instance of the State, in respect of such publication.

Appeal from Kennedy, J., at chambers. The plaintiff had brought an action in this country against the defendant for a libel alleged to be contained in a pamphlet published by the defendant in Brazil, and the defendant had put in a defence denying the allegations of the statement of claim. Afterwards the defendant applied in the Manchester district registry for leave to amend his defence by adding an allegation that if the pamphlet had in fact been published by him in Brazil (which he denied) such publication could not, by Brazilian law, be a ground of legal proceedings against the defendant in which damages could be recovered, or alternatively that such publication could not be a ground of legal proceedings against the defendant in which the plaintiff could recover general damages for any injury to his credit, character, or feelings. It was alleged on behalf of the defendant that in cases of libel the law of Brazil provided only for criminal proceedings being taken by the State for the punishment of the libeller, and gave no remedy of any kind to or at the suit of the person libelled; or, in the alternative, that the person libelled could recover only "special damage" occasioned to him by the libel.

The registrar at Manchester allowed the amendment, and on appeal Kennedy, J., at chambers affirmed his decision, but gave leave to appeal. The plaintiff appealed accordingly.

C. Montague Lush, for the appeal, cited *Scott* v. *Lord Seymour*, 10 W. R. 739, 1 H. & C. 219; *The M. Moxham*, 24 W. R. 597, 650, 1 P. D. 107, 113; *The Halley*, 16 W. R. 998, L. R. 2 P. C. 193; and *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602.

Joseph Walton, Q.C., and *A. J. Ashton*, for the respondent.—A tort, to be sued upon here, must be actionable both here and where it is committed. By the law of Brazil the only remedy for a libel is a criminal one, and therefore this action cannot be maintained.

They cited *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, 18 W. R. C. L. Dig. 2; and 1 Sm. L. C. (9th ed.), pp. 664-65.

Montague Lush, in reply.—Unless by the law of Brazil the act complained of is justified or excused the plaintiff can sue in England.

LOPES, L.J.—I am of opinion that this appeal must be allowed. An action has been brought by the plaintiff against the defendant for a libel alleged to have been published by the defendant in Brazil, and as to this publication in Brazil the defendant has pleaded the plea that such a publication cannot be the ground of legal proceedings against the defendant in Brazil, or, at any rate, it cannot be the ground of any legal proceedings in Brazil in which general as distinguished from special damages can be recovered. It appears to me that that is the meaning of the language used; that only special damages can be recovered. Mr. Walton says that that is not the meaning of the plea, but that it is intended to raise a larger question than that—that it is intended to say that in Brazil libel cannot be made the subject-matter of civil proceedings at all, but only of criminal proceedings. I will assume, for the purpose of my judgment, that that is the true meaning.

Now, where the words complained of have been published outside the jurisdiction, the general principle applicable is that the publication alleged to be an injury must be wrongful both by the law of England and also by the law of the country where the publication took place. The first thing for us to do, then, is to see whether the conditions have been satisfied.

In *Phillips* v. *Eyre* Willes, J., lays down very distinctly what the requisites are in such a case. He says: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Then we find in *The M. Moxham* these words: "It is settled that if by the law of a foreign country the act is lawful, or is excusable, or even if it has been legitimized by a subsequent act of the Legislature, then this court will take into consideration that state of the law; that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused, for the thing done, he will not be answerable here."

Both of those cases seem to me to go to the length of establishing that if the act complained of is one which in the foreign country where it was done would be an innocent act, that will be a good defence. There is no doubt that the present action complies with the requirements laid down by Willes, J., for the act of publication was not justifiable or excusable in Brazil. If the publication in Brazil is actionable, then the right of action in this country is established, and a remedy in this country, and according to the law of this country, follows from that. Therefore in this case damages would flow from the libel, just as in any action brought in respect of the publication of a libel in this country. It was said that it would be much better this question should not be decided at the present time, but that a commission should go for the examination of the witnesses in Brazil. But

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

if our view is correct, that would be a mere waste of time and money. I think, therefore, that the plea put in by the defendant ought to be struck out.

RIGBY, L.J.—I am of the same opinion. I do not propose to decide this case upon any technical construction as to what may be the precise allegation which the defendant desires to insert in his defence. The construction contended for by the defendant is one which it will reasonably bear, and I will assume it to involve that no action for damages or other civil action can be maintained in Brazil in respect of a libel. But, even if that is shown to be so, does it follow that a libel published in Brazil is not actionable in this country? Other circumstances concurring—as that the plaintiff and the defendant are here within the jurisdiction of the English court—I think it does not follow. In *Phillips* v. *Eyre* Willes, J., laid down the rule, which he expressed without the slightest doubt or hesitation. I cannot doubt that the change in that statement from "actionable" to "justifiable" was deliberate. The first requisite is that the act alleged to be a wrong must be actionable in England. It was long ago settled that an action for anything of a "transitory" nature—according to the old phrase—may be brought in this country. But when an act is committed in a foreign country it may turn out to be, by the law of that country, an innocent act, and we in England pay such respect to the law of that country that we do not allow an action to be brought upon it here. But I conceive that that means exactly what it says; the act must be justified or excused by the foreign law. It is not of importance what may be the remedy provided by that law. The remedy, of course, must be according to the law of the country where the action is tried.

In *The M. Moxham* all the judges of the Court of Appeal laid down the law, so that there is a uniform decision of the court binding upon us, if it were necessary to consider that. One judge after another treats the rule laid down by Willes, J., as correct; not quoting Willes, J.'s words, but stating the principle to exactly the same purport and effect. I think there is no doubt at all that this action for a libel is maintainable unless it can be shown that the alleged libel is justified or excused by some law of Brazil, either existing at the time of publication or subsequent.

In fact you start from this: Here is an act which is *primâ facie* actionable, the only defence to an action in respect of that act is that the act was lawful according to the law of the place where it was done. All we have to do is to see whether there is a peremptory bar to our jurisdiction, because we are dealing with an act which ought to be considered an innocent or excusable act.

Appeal allowed.

Solicitors, *Grant, Bolcraig, & Co.*, for *Parker, Ayre, & Moorhouse*, Manchester; *Chester & Co.*, for *Crofton, Craven, & Worthington*, Manchester.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 12.

In re LONDON HEALTH ELECTRICAL INSTITUTE (LIMITED). (*a*.)

Company—Winding up—Private company—Debentures issued to vendors—Debentures covering all assets—Right of unsecured creditors to winding-up order.

Where the available assets of a private company are insufficient to satisfy debentures which have been issued to the vendors of property to the company, in payment of the agreed price thereof, and which cover all the assets, the unsecured creditors of the company are not entitled to a winding-up order, as they could not get anything thereby.

Appeal by unsecured creditors of the company from Vaughan Williams, J.

The above company was formed for the purpose of acquiring certain businesses which were the property of G. & M. Spalding, and was duly registered under the Companies Act in 1892.

The company was what is known as a "private" company, and on its formation £3,000 debentures were issued to the above-named gentlemen as consideration for the sale of the businesses.

The company having become insolvent, a winding-up petition was presented by certain trade creditors.

The petition was opposed on the ground that the assets were insufficient to satisfy the debentures, and that there would therefore be nothing for the unsecured creditors in the event of a winding-up.

Vaughan Williams, J., dismissed the petition. The petitioners appealed.

Waghorn and *Nepean*, for the appellants.—The appellants are entitled to a winding-up order. This case is distinguishable from *Salomon* v. *Salomon & Co.*, *ante*, p. 193, [1897] A. C. 22. There the debentures were issued in consideration of book debts; but here, although they purport to have been issued in part payment of the price of the business, they were in reality issued without consideration, as will appear if a winding-up order is made. They are therefore void as against the other creditors of the company under 13 Eliz. c. 5, and should be set aside. They are void under the statute on the further ground that they were not issued *bonâ fide* but with a view to defeat the future creditors: See *Twyne's case*, 3 Co. 212; *Cadogan* v. *Kennet*, Cowp. 432; *Ex parte Mercer, In re Wise*, 17 Q. B. D. 290, 34 W. R. Dig. 169. [LINDLEY, L.J.—The House of Lords in *Salomon* v. *Salomon* were of opinion that debentures duly registered were good against all creditors. I cannot see that 13 Eliz. c. 5 applies in the case of registered securities.] A mere plea of no assets does not afford a conclusive answer to a winding-up petition: *In re Krasnapolsky Restaurant and Winter Garden Co.*, 40 W. R. 639, [1892] 3 Ch. 178; *In re Uruguay Central and Hygueritas Railway of Monte Video*, 27 W. R. 571, 11 Ch. D. 372. In *In re Chapel House Colliery Co.*, 31 W. R. 933, 24 Ch. D. 259, which may be cited against us, it was not disputed that there were no assets. The same observation applies to *In re St. Thomas Dock Co.*, 24 W. R. 544, 2 Ch. D. 116; and *In re Free Fishermen of Faversham*, 36 Ch. D. 329, 35 W. R. Dig. 107. [LINDLEY, L.J., referred to *In re International Commercial Co.*, 75 L. T. N. S. 639.] At all events the petition should be allowed to stand over and an inquiry be directed at chambers as to whether the debentures should be set aside: *In re Olathe Silver Mining Co.*, 33 W. R. 12, 27 Ch. D. 278, as coming within the statute of Elizabeth. The petitioners ought not to be required to pay costs.

Butcher, for the company, and *Austen Cartmell*, for opposing creditors, were not called upon.

LINDLEY, L.J.—In my opinion we are bound by the decision of the House of Lords in *Salomon* v. *Salomon*, which is very far-reaching in its effects. It is impossible to draw any distinction between that case and the present. The material facts are the same in both.

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

There, as here, the business was sold to the company in consideration of the issue of debentures to the vendors. Lord Watson, referring to the agreement for sale, says that it was "in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were, or were likely to be, members of the company," and the court came to the conclusion that it could not be set aside. We must accept that decision and treat the agreement for sale in the present case as valid also. That being so the debentures cannot be got rid of, and it is conceded that unless they can be got rid of the unsecured creditors can get nothing. How, then, can it be said that there is any possibility of there being a farthing for the unsecured creditors in the event of a winding up? This is a very unfortunate state of things, and since the decision above referred to apparently without a remedy. The only course for tradesmen to adopt is to refuse to deal with such companies except for cash. The only way in which we could come to a different conclusion from Vaughan Williams, J., would be by deciding to order an examination as to whether there would be any assets in a winding up, but in face of the authority referred to we cannot do that. It has been suggested that the petition should be allowed to stand over, and that an inquiry like that which was directed in *In re Olathe Silver Mining Co.* should take place as to the validity of the debentures. But as the petitioners have not exercised their right of cross-examining Messrs. Spalding upon their affidavits, I do not think we ought now to put in force the powers conferred upon the court by section 115 of the Companies Act, 1862, and section 8 of the Companies Act, 1890. We cannot differ from the decision of Vaughan Williams, J. The appeal must be dismissed with costs.

A. L. SMITH, L.J.—I am of the same opinion. The question is, Can this winding-up order be made? Vaughan Williams, J., held that it could not because there were no assets. It is conceded by the appellants that the only asset that could be realized would be by getting rid of the debentures. On their behalf an able argument has been addressed to us based upon 13 Eliz. c. 5, but it appears to me that it cannot prevail in view of the decision of the House of Lords in *Salomon* v. *Salomon*. That decision appears to me to imply that if a trader wishes to convert himself into a limited company all that is required of him is a literal compliance with the provisions of the Companies Acts. He may go on trading as a company with limited liability although he is the only member of the company who is worth anything at all. If he is entitled to form himself into a company he is entitled to issue debentures. That is what has been done in the present case. The debentures cannot be impeached, and it is therefore useless to ask for a winding-up order. I am of opinion that the decision of Vaughan Williams, J., should be affirmed.

RIGBY, L.J.—I agree with my learned brethren in thinking that nothing can be done to assist the unsecured creditors. It is admitted that if the debentures stand they can get nothing. In my opinion there is no possibility of setting aside the debentures.

Appeal dismissed.

Solicitor for the appellants, *A. Arnold Hannay.*

Solicitors for the respondents, *Mann & Taylor.*

From Prob. Div. & Adm. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — March 10, 11; April 7, 14.

BISHOP *v.* BISHOP.
JUDKINS *v.* JUDKINS. (*a.*)

Divorce—Judicial separation—Husband and wife—Separation deed—Covenant not to sue for greater allowance—Permanent alimony—Matrimonial Causes Acts, 1857, 1859, 1866 (20 & 21 *Vict.* c. 85, *ss.* 32, 35; 22 & 23 *Vict.* c. 61, *s.* 4; 29 & 30 *Vict.* c. 32, *s.* 1).

Although under a separation deed a wife may have agreed to accept a certain sum as maintenance from her husband, and may have covenanted not to sue for any further allowance, yet if the circumstances be altered to divorce or judicial separation by reason of subsequent adultery or otherwise the court has power to order a larger sum to be paid to the wife by the husband by way of permanent alimony and for the maintenance of her children.

Gandy *v.* Gandy, 30 *W. R.* 673, 7 *P. D.* 168, 33 *W. R.* 803, 30 *Ch. D.* 57, *explained.*

Appeal of the respondent in *Bishop* v. *Bishop* from the President of the Probate Division, and in *Judkins* v. *Judkins* from Barnes, J.

The facts are sufficiently stated in the judgment of Lindley, L.J.

Willis, Q.C., and *Barnard*, for the husband in the first case.—There are three points to be considered—(1) Were the husband and wife legally capable of entering into this agreement? (2) Is this a settlement within the meaning of 22 & 23 Vict. c. 61, s. 5? (3) Even if it is such a settlement, will the court vary it? As to (1) *Gandy* v. *Gandy*, 33 W. R. 803, 30 Ch. D. 57, decided that the parties could enter into such an agreement: see also *Rose* v. *Rose*, 31 W. R. 573, 8 P. D. 98. There being cruelty before the deed of separation and adultery afterwards, husbands and wives must have a right to compromise all suits in the Divorce Court; and if they can compromise after the suit is commenced they can compromise before suit. (2) *Gandy* v. *Gandy* does not affect this question. We cannot argue that a covenant is not property; a covenant is a settlement. But this document must be looked at as a whole; it is headed "In the suit." If it is simply an agreement for an order it cannot be said to be a settlement. But no order was actually drawn up, though one was contemplated. On the true construction it is simply an agreement to agree to an order, and therefore is not a settlement within section 5. Further, nothing is settled on Mrs. Bishop in her capacity of wife, and therefore it is not a settlement. As to the definition of "property," see *Worsley* v. *Worsley*, 17 W. R. 743, L. R. 1 P. & D. 648; *Maudsley* v. *Maudsley*, 2 P. D. 256, 26 W. R. Dig. 80. [RIGBY, L.J.—I think *Maudsley* v. *Maudsley* entirely overrules the conclusion you have arrived at from *Worsley* v. *Worsley*.] We submit that the reasoning of *Morrall* v. *Morrall*, 29 W. R. 897, 6 P. D. 98, is binding in this case, and the President has wrongly applied it.

Deane, Q.C., and *Dudley Grazebrook*, for the wife.—Whatever happens, this is an allowance to the wife, even if they lived together again. The wife can at any time come and ask for additional maintenance for her children under Act of Parliament; and unless there is a definite covenant against such increased allowance which this court can enforce, the wife is entitled to come here for an increase of

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

maintenance. This case differs from *Williams* v. *Baily*, L. R. 2 Eq. 731, 15 W. R. Ch. Dig. 45, because in that case there was a specific covenant by the wife not to do certain things; the Vice-Chancellor held that she had not assented to those terms, because she did not understand or approve of them. There are no decided cases to show whether this agreement which makes provision for future adultery is legal or illegal.

They referred to *Rowley* v. *Rowley*, L. R. 1 Sc. & Div. App. 63, 15 W. R. H. L. Dig. 6; *Brunton* v. *Dixon*, W. N., [1892] 105; *Smyth* v. *Smyth*, 4 Hagg. Ecc. Cas. 509; *Matthews* v. *Matthews*, 8 W. R. 591, 3 Sw. & Tr. 161; *Powell* v. *Powell*, 22 W. R. 62, L. R. 3 P. & D. 186.

Willis, Q.C., replied.

Cozens-Hardy, Q.C., and *Priestley*, for the husband in the second case.—Barnes, J., relied upon *Bishop* v. *Bishop*, and thought the second decision in *Gandy* v. *Gandy* was set aside. There is no jurisdiction to give increased alimony. Express power is given by statute allowing a petition for an increase of maintenance for children, but not a word is said about alimony. The principle of *Gandy* v. *Gandy* is that when a bargain made between husband and wife is still in force, the court has no power to relieve the husband from his obligations under the deed; this can only be done after decree of divorce. Here there is an express covenant that the wife will maintain herself out of her allowance of £150 per annum, and that covenant is still in force. The order made by Barnes, J., was wrong and is inconsistent with *Gandy* v. *Gandy*. The husband cannot under any circumstances repudiate his covenant to pay £150 a year.

Rawlins, Q.C., and *Barnard*, for the wife.

Cozens-Hardy, Q.C., replied.

Cur. adv. vult.

April 14.—Judgment in the two cases was delivered by LINDLEY, L.J., as follows:

These are two appeals from two orders of the Divorce Court, and in both of them the appellants rely on the decision of this court in *Gandy* v. *Gandy*, which is said to be inconsistent with the orders appealed from. It will be convenient, therefore, in the first place, to examine the case referred to and to ascertain what exactly was there decided. *Gandy* v. *Gandy* came twice before the Court of Appeal—first, on one state of facts; and, secondly, on another and quite different state of facts.

The first decision of *Gandy* v. *Gandy*, 30 W. R. 673, 7 P. D. 168, appears to have been greatly misunderstood. Lord Hannen had held that a deed of separation between husband and wife ought to be treated as based on the implied condition that both parties should live apart in chastity; and he held that the subsequent adultery of the husband enabled the wife not only to sue for and obtain a decree for judicial separation, but also to sue for and, if the husband's means permitted, to obtain a larger allowance by way of alimony than she had agreed to accept when she separated from him. The wife had expressly covenanted not to sue for more than the agreed allowance; but this covenant was held by Lord Hannen not to be binding on her, the implied condition of chastity having been broken by the husband (7 P. D. 77). On appeal this decision was reversed (7 P. D. 168), and the condition held by Lord Hannen to be implied in all deeds of separation was decided by this court not to be implied, and, no other ground for relieving the wife from her covenant being suggested except that the husband's means had improved, this court held the wife to be bound by her covenant, and her petition for increased alimony was dismissed. This was all that the Court of Appeal then decided, and the court has never gone back from that decision.

When the case came before the Court of Appeal on the second occasion (33 W. R. 803, 30 Ch. D. 57) other circumstances were brought to the attention of the court—viz., that the Divorce Court had given the custody of the two youngest daughters to the wife, and that the husband refused to support them, which he had covenanted to do by the separation deed. Under these circumstances this court held that the wife was no longer bound by her covenant not to sue for further alimony, and that it was competent for the Divorce Court to grant her more than she had agreed to accept in the deed of separation. This court accordingly made an order giving her leave to present a fresh petition to the Divorce Court for increased alimony (see 30 Ch. D. 83). This she did, and she ultimately obtained a considerable allowance beyond what her husband had covenanted to pay her by the deed of separation. This decision was perfectly consistent with the first decision, which was based on a different state of facts. The decision in *Gandy* v. *Gandy* that continued chastity is not a condition underlying separation deeds, and to be implied in them accordingly, is obviously a decision of general application, and has no reference to the nature of the proceeding in which such a question arises. But, in considering the power of the Divorce Court to disregard agreements between husband and wife, it is very important to consider whether that court has decreed a judicial separation or a dissolution of marriage. The Court of Appeal in the first case of *Gandy* v. *Gandy* drew attention to this, and laid great stress upon it, and expressed no opinion on what the Divorce Court could or could not do in cases of dissolution of marriage. But the Court of Appeal on the first occasion, whilst negativing the implied condition of chastity, distinctly recognized that there might be circumstances which would entitle the Divorce Court, even in suits for judicial separation, to disregard bargains between husband and wife. Such bargains cannot prevent the court from doing what is right as regards infant children; and on the second occasion the Court of Appeal acted on this view, as already pointed out.

The short result of *Gandy* v. *Gandy* may be summed up thus—(1) Lord Hannen's decision that continued chastity was an implied condition in separation deeds was overruled; (2) in the first case of *Gandy* v. *Gandy* the court held the wife bound by her agreement, there being no circumstances to relieve her from it, and no power in the Divorce Court to disregard her covenant; (3) in the second case of *Gandy* v. *Gandy*, the wife having the custody of the children, and the husband refusing to support them, she was held no longer bound by the covenants in the separation deed, and the Divorce Court, being free to disregard it, had power to do what it thought just in making her an allowance in the shape of alimony, and to take into account whatever circumstances it considered material in arriving at a conclusion as to what was just under the altered position of the parties; (4) nothing was decided respecting any of the statutory powers of the Divorce Court in suits for dissolution of marriage; (5) nothing was decided in the first suit of *Gandy* v. *Gandy* as to the power of the Divorce Court to make orders respecting the custody, maintenance, and education of children.

We pass now to the appeals before us. First, as to *Bishop* v. *Bishop*. There is one child of the marriage—a daughter. In 1894 Mrs. Bishop presented a petition for a divorce, on the ground of her husband's adultery and cruelty. When the petition came on for

hearing it was withdrawn, and the petitioner and her husband made and signed an agreement, dated the 20th of March, 1894, and in the words following: "The petitioner agrees to accept £130 per annum by way of permanent maintenance; this sum to include the maintenance of the child. The said allowance to be paid by Mr. Walter Harry Bishop, the respondent, by monthly payments during their joint lives. This allowance to be paid in any event, whether they remain married or whether the marriage should hereafter be dissolved. Mrs. Edith Bishop, the petitioner, is to have the custody of the child." The agreement contained no covenant by either party not to sue the other at some future time for restitution of conjugal rights, or for a judicial separation, or for a divorce, and, indeed, the possibility of proceedings in future for a divorce was evidently contemplated, for the parties agreed that the allowance should be paid whether they remained married or whether the marriage should thereafter be dissolved. Further than this, the agreement contained no covenant by the wife not to sue for more than the £130.

Counsel for the wife contend that the £130 a year was the minimum she would accept, but not the maximum she would endeavour to obtain if circumstances should occur enabling her to do so. After this Mrs. Bishop sued for and obtained a decree for restitution of conjugal rights. This decree was disobeyed, and she then sued her husband for a divorce on the ground of fresh adultery and desertion, and on the 8th of June, 1896, she obtained a decree dissolving the marriage, and the custody of the child was given to her. In August, 1896, she presented a petition praying for an order that her husband should pay, or secure to her, such gross sum, or such annual or monthly or weekly sum for her permanent maintenance as to the court might seem meet, and, further, for an order that her husband should make such provision for the maintenance of the child as the court should think reasonable. The petition was referred to the registrar, and he in effect reported that the agreement above set out was binding on the petitioner, and that she was not entitled to more than £130 a year. On the 8th of February, 1897, an order was made by the President setting aside this report and directing the inquiry as to the means of the petitioner to proceed. From this order Mr. Bishop appealed to this court, leave to do so having been granted by the President. It is to be observed that the agreement provided that the wife should have the child and maintain her out of the agreed allowance. The decree giving the wife the custody of the child has therefore not imposed any additional burden on the wife in this respect. It is further to be observed that the agreement provided for a possible dissolution of the marriage, and it cannot therefore be said that the circumstances which have arisen were not foreseen and provided for by the parties. On the other hand, the agreement did not provide for the education of the child, but only for her custody and maintenance. Nor can the agreement in any way preclude any application on behalf of the child for a proper allowance for her maintenance and education, if any such can be made under the Divorce Acts. The case being one of dissolution of marriage and not of judicial separation, *Gandy* v. *Gandy* is not in point, except in so far as it negatives any implied condition of continued chastity.

The present case must turn on the power of the Divorce Court on a dissolution of marriage to compel a husband to provide for his divorced wife, and to make orders for the maintenance and education of the children. It is necessary, therefore, to examine the provisions of the Divorce Acts relating to these matters. The statutory powers of the court as to a divorced wife's maintenance are 20 & 21 Vict. c. 85, s. 32, and 29 & 30 Vict. c. 32, s. 1. The statutory powers of the court as to children are contained in 20 & 21 Vict. c. 85, s. 35, and 22 & 23 Vict. c. 61, s. 4. As regards permanent maintenance section 32 of the Act of 1857 is very wide indeed, and it would not be right for this or any court to put a narrow construction upon it or to fetter in any way the court or judge intrusted with its application in cases of divorce. The section says that regard is to be had to the wife's fortune, to the ability of the husband, and to the conduct of the parties. The appellant contends that all these matters are to be disregarded, and attention is only to be paid to the terms of the separation deed. This cannot be right. The later Act, 29 & 30 Vict. c. 32, s. 1, which extends the power of the court and enables it to order monthly or weekly payments, must be read with the former section, and the same circumstances which the court is told to regard when ordering a gross or annual sum to be secured must be regarded when a monthly or weekly sum is ordered to be paid. The agreement no doubt contemplates the continuance of the agreed allowance, even in the event of a future dissolution of marriage. The validity of the agreement in this respect is very questionable. Wood, V.C., said in *H.* v. *W.*, 3 K. & J. 382 at p. 387, 6 W. R. Ch. Dig. 29, "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolable." This was before the Divorce Act had been passed, and before Lord Westbury's celebrated decision in *Hunt* v. *Hunt*, 10 W. R. 215, 4 De G. F. & J. 221. But we are not aware of any authority since the Divorce Act which shows that a covenant by a husband or wife not to sue the other for a divorce grounded on future misconduct is valid, and we doubt whether an express covenant not to sue for increased alimony in the event of such a divorce could be recognized. There is no express covenant to that effect in the present case; and a covenant of such very questionable validity certainly cannot be implied. In other words, the wife cannot be held to have precluded herself by her agreement from invoking the aid of the court to obtain further maintenance in the events which have happened. The foregoing statutory powers amply justify the order under appeal. But the statutory powers relating to the custody, maintenance, and education of children are also very wide, and no agreement between the parents can deprive the court of the jurisdiction thus conferred upon it. These powers are exercisable not only in suits for dissolution of marriage but also in suits for judicial separation. They amply warranted what was done in *Gandy* v. *Gandy* on the second occasion. On the first occasion nothing turned upon them, and they were not alluded to. The power of the Divorce Court to vary settlements does not assist the wife on the present occasion. Section 45 of 20 & 21 Vict. c. 85 only enables the court to deal with property settled on the wife; section 5 of 22 & 23 Vict. c. 61 extends this power to property settled on either husband or wife. The other statutes do not extend the power to other property. Even if the agreement for separation in this case is a post-nuptial settlement, no variation of that agreement dealing with the property settled by it can be made which will in any way benefit the wife, and there is no other settled property that we are aware of which can be made available for her benefit. But on the ground that the other statutory powers to which we have referred are ample to justify the order appealed from, and there being no grounds for discharging that order if there is jurisdiction to make it, this appeal must be dismissed with costs.

We turn now to *Judkins* v. *Judkins*. On the 30th of July, 1892, Mr. and Mrs. Judkins, who had been married some years and had two daughters, executed a separation deed, by which the husband and wife agreed to live apart, not to molest each other, not to sue each other for restitution of conjugal rights, nor for divorce or judicial separation in respect of any past misconduct. The two girls were to remain at the school where they then were, and the husband was to pay for their school bills. The wife was to have the custody and control of them during part of their holidays, and the husband was to have them for the rest of the holidays. The husband agreed to pay his wife an allowance of £150 a year, and she agreed to keep herself and to indemnify her husband from all debts and liabilities which she might contract. The husband further agreed to pay his wife £15 a year for the clothing of each girl until she should attain the age of fifteen, and such further sum afterwards as the husband and wife should agree upon until each girl should attain twenty-one. The agreement was to become void if the parties became reconciled or if their marriage should be dissolved for any future misconduct. On the 5th of August, 1896, the wife obtained a decree for judicial separation on the ground of adultery on the part of the husband since the date of the separation deed, and she obtained an order giving her the custody of both daughters, one of whom is now over seventeen, and she is to pass part of her holidays with her father. The wife afterwards applied for permanent alimony and maintenance for the daughters. The registrar dismissed her application, on the authority of the first decision of *Gandy* v. *Gandy*, 30 W. R. 673, 7 P. D. 168, but on appeal Barnes, J., reversed this decision, on the authority of the second decision in that case, and gave the wife liberty to proceed with her application. From this decision the husband has appealed to this court. It will be observed that this is a case of judicial separation, and not of divorce, and that, whilst the separation deed left the custody of the children with the husband, the decree of the Divorce Court has given that custody to the wife. Further, the husband's covenant to pay the school bills of the girls only extends to the bills at the school at which they were at the date of the deed, and one of the girls being over fifteen, no sum for her clothing is payable under the separation deed, the husband and wife not having agreed upon any allowance. The husband in this case has by his counsel expressed his willingness to do whatever the court may think right as regards the girls, but this offer does not affect the jurisdiction of the court, nor the right of the wife to invoke its aid. The separation deed contains no express covenant not to sue for a greater allowance than £150 a year, and is in this respect less explicit than the deed in *Gandy* v. *Gandy*. The covenant not to molest is shown by the next clause not to apply to proceedings in the Divorce Court based on subsequent misconduct, even if it could so apply apart from such context; and the covenant by the wife to pay her own debts and indemnify her husband against them does not prevent her from applying for maintenance for the children.

Under these circumstances Barnes, J., was right in holding the second decision in *Gandy* v. *Gandy*, rather than the first decision, applicable to the present case. No doubt there are observations in the judgments on the first occasion which favour the contention of the husband, but, as already pointed out, nothing then turned on the custody or maintenance of the children.

It was contended by counsel for the husband that even if an order were made for the maintenance of the children it ought to be confined to that, and ought not to extend to alimony for the wife. But it is obvious that in considering what ought to be done as to either allowance, the court must consider the other. Barnes, J., made the order in the exercise of the jurisdiction conferred upon the court by 20 & 21 Vict. c. 85, s. 17 (alimony), and section 35, amended by 22 & 23 Vict. c. 61, s. 4 (maintenance). We see no reason to alter the form of the order, especially having regard to the form adopted in *Gandy* v. *Gandy*, and the observations of Cotton, L.J., in 30 Ch. D. 79, 80, and the orders ultimately made by the Divorce Court for alimony after the second decision of this court in that case. The whole case as to alimony and maintenance is properly open as soon as the position of the parties provided for by the deed is altered by the order of the court changing the custody of the children.

The appeal in this case must also be dismissed with costs.

Appeals dismissed.

Solicitors in *Bishop* v. *Bishop*, *Edward J. H. Carter; Edwin Smith & Ellis.*

Solicitors in *Judkins* v. *Judkins*, *Arnold Williams & Co.; H. B. Wade.*

High Court of Justice.

Chan. Div. }
Stirling, J. } May 12, 13.

CROSHAW v. LYNDHURST SHIP CO. (LIMITED). (a.)

Company—Winding up—Judgment creditor—Receivership order, effect of—Companies Act, 1862 (25 & 26 *Vict. c.* 88), *ss.* 87, 163.

A judgment creditor of a company who, at the commencement of the winding up of the company, has obtained a receivership order against the company but taken no steps under that order, has not acquired anything in the nature of a charge, but is in a position analogous to that of an execution creditor where the execution is incomplete, and accordingly will not be allowed to proceed further by the court in the absence of special circumstances, and gains no priority over the other creditors by virtue of the order.

In re Potts, [1893] 1 *Q. B.* 648, *applied.*

This was an action by a mortgagee of a ship's freight against the mortgagors who were a company and various incumbrancers and persons claiming to have incumbrances, amongst whom were the London and North-Western Bank (Limited). The bank were creditors of the company, and on the 5th of February, 1896, after prior mortgages and charges had been executed, they recovered judgment against the ship company.

On the 1st of April of the same year they obtained, after notice to the company, though the company did not appear, from a judge of the Queen's Bench Division this order, that the "manager of the plaintiff company (the bank) be appointed receiver upon first giving security by bond to the satisfaction of one of the masters of the Supreme Court of Judicature to receive the rents and profits and moneys receivable in respect of the defendants' (Lyndhurst Co.) interest in the following property—that is to say the ship *Lyndhurst* and her freight, but that the appointment be without prejudice to the rights of any prior incumbrancers upon the said ship and

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

freight who may think proper to take possession of or receive the same by virtue of their respective securities, or if any prior incumbrancer is in possession then without prejudice to such possession, and that such receiver have liberty . . . out of the rents, profits, moneys to be received by him to keep down the interest upon the prior incumbrances according to their priorities and be allowed such payments (if any) on passing his accounts, and that such receiver shall, on the 1st day of July, 1896, and at such further and other times as may be ordered by the master leave and pass such accounts, and shall on the 1st day of August, 1896, and at such further and other times as may be hereafter ordered by the master pay the balance or balances appearing due on the accounts or left or such part thereof as shall be certified as proper to be so paid, such sums to be paid in or towards satisfaction of what shall for the time being be due in respect of the judgment signed on the 5th day of February, 1896, for the sum of £2,032 14s. 7d., and £4 14s. costs, . . . and that the balance (if any) remaining in the hands of the receiver after making the several payments aforesaid shall, unless otherwise directed by the master, be forthwith paid by the receiver into court to the credit of the action subject to further order."

At the time that order was made the present action had been commenced, and a receiver had been appointed in it, which, of course, could not be interfered with by the order made in the Queen's Bench Division. The bank having obtained the order, proceeded in a regular way before the master to give an appointment to fix the security, and notice was served on the 19th of April on the company. The company did not appear, and it stood over from time to time, and on the 18th of June this modification of the order was introduced by indorsement to the effect that "the plaintiff (the bank) undertaking to be answerable for the receiver's receipts, any money received by him to be paid into court to abide further order, and security to be dispensed with."

In the meantime on the 21st of May, 1896, an order was made to wind up the company, and on the hearing of this action the company appeared by the liquidator, and he on behalf of the general body of the creditors resisted the contention of the bank that they were entitled to any balance out of the proceeds of the ship which had been sold, paid after satisfaction of the prior charges to the receiver or to the credit of the funds in court in priority to the general body of the creditors.

Hastings, Q.C., and *Stokes*, for plaintiffs.—Their claim was admitted by all parties.

Scrutton, C. Macnaghten, and *Lightwood*, for various creditors, took no part in the argument as to marshalling.

Methold, for Balfour, Williams, & Co.—We have a charge under the document of the 27th of June on the freight only, and we claim to marshal so that the freight may be available.

Grosvenor Woods, Q.C., and *Jenkins*, for the North-Western Bank.—[STIRLING, J.—Your charge being merely under the execution, only gives you what the mortgagor could give you.] The bank have a higher right. The order entitles the bank to stand in the position of an incumbrancer on the property, and to say that there shall be no marshalling to their prejudice. [STIRLING, J.—The question is, What is the construction of the document of the 27th of June?] *Liverpool Marine Co.* v. *Wilson*, 20 W. R. 665, L. R. 7 Ch. App. 507, at 512; *The Dowthorpe*, 2 W. Robinson 73. There must be a rateable distribution of the disbursements between the freight and the ship.

Methold, in reply, cited 2 W. & T. L. C. Eq. 113, as to marshalling by the Court of Admiralty; *The Mary Ann*, 9 Jur. 94, and *The Constancia*, 15 W. R. 183, as to the rights of the North-Western Bank under the receivership.

STIRLING, J., held that Balfour, Williams, & Co. were entitled to marshal.

Grosvenor Woods, Q.C., and *Jenkins*, on the claim to priority.—The bank are persons entitled to redeem: *Rowe* v. *Bant*, 1 Dickens, 150, and *Beckett* v. *Buckley*, 22 W. R. 294, L. R. 17 Eq. 435. A judgment creditor's rights against land depend on the statute, and if he has taken all such steps as lie in his power, he has such an interest as entitles him to redeem; and the same principle applies to other cases of execution, that, if the creditor has done all he can, he will obtain priority. Before the fund can be taken out of the hands of the bank's receiver, the bank's debt must be paid. Nothing in the Companies Act, 1862, affects the bank's title, and the court will not interfere with the bank's rights. Section 163 of the Companies Act, 1862, is the only section which applies. The order obtained by the bank does not come within the terms of that section. Even if the word "execution" be held to include such a receivership as this, the section is controlled by sections 85 and 87 of the Companies Act, 1862. A creditor who has issued execution obtains a preference, although the execution has not been completed; and the receivership order is equivalent to the sheriff taking possession: *In re Great Ship Co.*, 12 W. R. 139, 4 De G. J. & S. 63; *In re Milwood Colliery Co.*, 24 W. R. 398; *In re Richards*, 27 W. R. 530, 11 Ch. D. 676; *Hatton* v. *Haywood*, referred to in *Cadogan* v. *Lyric Theatre (Limited)*, [1894] 3 Ch. 338, 43 W. R. Dig. 145; *In re Roundwood Colliery Co., ante*, pp. 217, 327, [1897] 1 Ch. 373. The appointment of a receiver gives a legal right (*Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 25 W. R. Dig. 185; *Salt* v. *Cooper*, 29 W. R. 553, 16 Ch. D. 554; *In re West Cumberland Iron Co.*, 41 W. R. 265, [1893] 1 Ch. 713), and, although not itself equitable execution, it is equivalent to equitable relief (*In re Shepherd*, 38 W. R. 133, 43 Ch. D. 138); and the court has to consider who is entitled to the property: *Levasseur* v. *Mason & Barry (Limited)*, 39 W. R. 596, [1891] 2 Q. B. 73. The Judicature Act, 1875, s. 10, does not introduce the bankruptcy definition of secured creditor into winding up, and was not intended to enlarge the assets to be distributed: *In re Withernsea Brickworks*, 29 W. R. 178, 16 Ch. D. 337; *In re Maggi*, 30 W. R. 729, Ch. D. 545; *In re Oriental Bank Corporation*, 28 Ch. D. 643; *Gorringe* v. *Irwell India Rubber Works*, 35 W. R. 86, 34 Ch. D. 128; *In re Williams*, 36 W. R. 34, 36 Ch. D. 573; *Pratt* v. *Inman*, 38 W. R. 200, 43 Ch. D. 175; *In re Leng*, 43 W. R. 406, [1895] 1 Ch. 652. The Irish case of *Ex parte Thompson*, [1896] 1 L. R. Ir. 29, is wrong on this point. *In re Potts*, 41 W. R. 337, [1893] 1 Q. B. 648, and *In re Dickenson*, 37 W. R. 170, 22 Q. B. D. 187, were decided on the definition of secured creditor in the Bankruptcy Act, 1883.

McSwinney, for the mortgagors, the first defendants.—The defendants case is that the bank is not a secured creditor: *Taunton* v. *Sheiff of Warwickshire*, 43 W. R. 579, [1895] 1 Ch. 734. The appointment of a receiver does not create a charge, but is only a step towards putting in execution: *Lloyd* v. *Lloyd & Co.*, 25 W. R. 872, 6 Ch. D. 339; *Tyrrell* v. *Painton*, 43 W. R. 163, [1895] 1 Q. B. 202; *In re Pound, Son, & Hutchins*, 38 W. R. 18, 42 Ch. D. 402; *In re Wanzer (Limited)*, 39 W. R. 343, [1891] 1 Ch. 305. There is no analogy between cases of this kind and where you are dealing with a mortgagee; and the cases show that a creditor whose execution is not complete does not obtain priority;

London and Devon Biscuit Co., 19 W. R. 963, L. R. 12 Eq. 190. This case is covered by the decision of the Master of the Rolls in Ireland in *Ex parte Thompson*. By section 10 of the Judicature Act the rules in bankruptcy should be read into the administration of estates, whether of individuals or of companies. The terms of section 10 of the Judicature Act are sufficiently wide, and though the Act does not furnish any definition of secured creditor, it cannot have any other meaning than it has in the Bankruptcy Act; and, if so, *In re Dickenson, Ex parte Charrington*, and *In re Potts* must govern this case.

Grosvenor Woods, Q.C., in reply.—The cases as to the effect of section 87 cited on the other side must be treated as overruled by the cases cited which are of later date.

He also referred to *Ex parte Evans, In re Watkins*, 28 W. R. 127, 13 Ch. D. 352; *In re Jones and Judgments Act*, 1864, 39 SOLICITORS' JOURNAL 671, [1895] W. N. 123, as showing that the order was equivalent to actual execution.

STIRLING, J., after stating the facts, continued: Now, the question is one of law which for its ultimate solution if all the formalities were strictly complied with might require the decision of a judge of the Queen's Bench Division, and, perhaps, ultimately of the judge to whose court the winding up is attached. But it has been very reasonably agreed that I shall dispose of this case as if I had jurisdiction over the case in the Queen's Bench Division and the winding up, and as if the application was made either by the bank as judgment creditors for leave to pursue their further remedies under the order—because as the matter now stands they have no right to pay themselves—or as if the liquidator were here applying to stay further proceedings under the order.

The first question is, What is the effect of this order? That was considered by the Court of Appeal in *In re Potts*. The question there did not arise under precisely similar circumstances, because in that case there had been a bankruptcy. The question there was whether an order almost exactly similar in terms to the order of the 1st of April before it was varied on the 18th of June, made judgment creditors secured creditors within the meaning of the Bankruptcy Act, 1883. In order to determine that question the nature and effect of a receivership order had to be considered. I do not propose to go through the judgments, but the court decided that that order did not create "a mortgage charge or lien" on the property in question. The ground of the decision may be stated in the few words of the judgment of Lindley, L.J., on p. 660 of the report ([1893] 1 Q. B.). In that case the bankrupt was entitled under the will of his mother to a share of residuary estate which consisted of realty and personalty. The order was in the form I have stated, and was served on the executors. The Lord Justice, after stating that, said: [His lordship read the judgment of Lindley, L.J., at p. 660: "The short question which we have to consider is . . . they had not acquired an equitable interest in the property as distinguished from a right to get by a process which was not yet completed," and continued:] Therefore it seems to me that it is quite clear, having regard to that judgment, that judgment creditors have not in these circumstances required anything in the nature of a charge. Then what is their position? They are in the position of judgment creditors who have recovered judgment and are attempting to obtain payment or satisfaction out of the assets of the debtor. In that state of things I have to consider what effect the winding up of the mortgagor company has upon their rights. Now, as is well known, this is governed by two sections of the Companies Act, 1862—namely, sections 87 and 163. [His lordship read these sections and continued:] Now, it has been held that these two sections are to be read together, and notwithstanding the strong language of section 163 there are cases in which a judgment creditor who, after the commencement of the winding up, had not actually realized his execution by sale may nevertheless be allowed to proceed by leave under section 87. There is a discretion in the court as to whether it will allow proceedings which have reached a certain point to go further, or no. That was laid down in the *Great Ship Co.*, which has been commented on in many subsequent decisions. The general rule which has been laid down amounts to this, that where as regards execution creditors the sheriff has at the date of the commencement of the winding up actually seized goods belonging to the company but has not sold them, the court will, in the absence of special circumstances, allow the execution to be proceeded with and the goods to be sold and realized. On the other hand, if the writ has only reached the hands of the sheriff, and he has not seized, the court has said that it will not allow the proceedings to go further, again in the absence of special circumstances. An illustration of this is to be found in the *London and Devon Biscuit Co.*, 19 W. R. 943, L. R. 12 Eq. 190, before Malins, V.C. Another illustration of the same rule is to be found in the case of *In re Stanhope Silkstone Collieries Co.*, 27 W. R. 561, 11 Ch. D. 160, which relates to the effect of a garnishee order. There a judgment creditor had obtained a garnishee order *nisi* to attach the debts of the debtor but had not at the commencement of the winding up served the order on the garnishee. It was held that the creditor had not become a secured creditor at the commencement of the winding up, and that leave could not be given to proceed further. The case which was in the Court of Appeal was before the late Master of the Rolls and James and Bramwell, L.JJ. The judgment of James, L.J., is very short. [His lordship read the judgment and continued:]

These being the principles on which the court acts, the question is how they are to be applied in the present case? At the commencement of the winding up all that had been obtained by the judgment creditor was an order appointing a receiver who could not act until he had given security. Steps had been taken to fix the security but it had not been actually given. Therefore the order was to a certain extent ineffective. I should be sorry to decide the case on any such point as that, although no doubt it is a difficulty in the way of the judgment creditor. I will refer again on the effect of that order supposing it had been perfected, to what was said by Lindley, L.J., in *In re Potts*, "an order appointing a receiver is not the same thing as taking out execution. Such an order is not a *fi. fa.*, it is something far short of that. . . . It is simply an uncompleted process to obtain payment of money. It is not a charge because there is no order upon their executors to pay the money." Therefore the view of the lord justice appears to me to be that it is an incomplete process and not complete or effectual until an order is got on the persons liable to pay over the money referred to in the order, and there is no charge or anything of the kind. Now, it is obvious from that, that if there is an order appointing a receiver it does not amount to putting in force the execution, but is short of that. Something more has got to be done to make it effective. That being so, no further steps after the winding up proceedings can be taken without the leave of the court to make that order effectual. Ought that leave to be given? The rule of the court is that where the execution is incomplete and there has been no seizure or any-

thing equivalent to it the court does not give leave to proceed further except under special circumstances. There is an analogy in the cases of the delivery of the writ to the sheriff not followed by seizure, and there is an analogy in the case of a garnishee order not followed by service of the order. There are here no special circumstances which justify granting leave, and therefore it follows that the claim of the liquidator must prevail and the fund must be dealt with accordingly. I ought to add that is in accordance with the decision of the Master of the Rolls in Ireland (*Ex parte Thompson*) although there are some expressions in that judgment which may be open to question.

Solicitors, *Parker, Garrett, & Holman; Harwood & Stephenson; T. B. Robinson; Thomas Cooper & Co.*, for *Hill, Dickenson, & Hill*, Liverpool; *Pritchard, Englefield, & Co.*, for *Simpson, North, Harley, & Birkett*, Liverpool; *Travers, Smith, Braithwaite, & Robinson.*

Chan. Div.
Kekewich, J. } April 29, 30.

In re ERRINGTON.
ERRINGTON *v.* ERRINGTON. (a.)

Settlement—Trust for accumulation—Policies of assurance on the lives of the settlor and others—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98), *s.* 1.

Where an indenture of settlement contains a direction for the accumulation of the moneys payable in respect of five policies of assurance, one on the life of the settlor and four on the respective lives of other persons, until the last of such four policies shall have fallen in, the first period for accumulation allowed by the Thellusson Act (39 & 40 *Geo.* 3, *c.* 98), *s.* 1—*viz., the settlor's life—is the only period which, upon the proper construction of such a settlement, is applicable to the accumulation of the proceeds of the four policies.*

By a marriage settlement dated the 13th of December, 1852, and made between George Henry Errington (the father) of the first part, the defendant George Henry Errington of the second part, Isabel Lannette Forbes of the third part, the plaintiff John Lancelot Errington-Turbutt (then John Lancelot Errington), Daniel Boys, and Alexander Forbes Tweedie of the fourth part, the Rev. John Richard Errington and the Rev. James Watham Hitch of the fifth part, and the Rev. George Wrenford Southouse and Frederick Lewis Austen of the sixth part, certain leasehold property, called "The Derbyshire Leaseholds" (which had been held for many years under renewable leases, and were then held under a lease from the Dean of Lincoln dated the 29th of April, 1843, for the lives and life of William Addesley Francis, Charles Bennet Calley, and the plaintiff J. L. Errington-Turbutt, and which lease had ceased to be renewable by reason of the reversion of the same lease having become vested in the Ecclesiastical Commissioners), and certain policies of assurance—namely: (1) Two policies in the University Life Assurance Society, one for £3,400 and the other for £1,600 on the life of the said W. A. Francis; (2) a policy for £5,000 in the same office on the life of the said C. B. Calley; (3) a policy for £5,000 in the same office on the life of the plaintiff J. L. Errington-Turbutt; and (4) a policy in the Equitable Assurance Society for £5,000 on the life of the said G. H. Errington, the father, were settled, to the use of the trustees for a term of 500 years and subject thereto to the use of the said G. H. Errington, the father, during his life with remainder to the use of the said J. R. Errington and J. W. Hitch during the life of the defendant G. H. Errington, upon trust to pay him the income during his life or until bankruptcy, and from and after his decease to the use that the said Isabel L. Forbes should receive a jointure of £600, and subject thereto to the use of the first and every other son of the defendant G. H. Errington successively in tail male with remainders over. And it was thereby declared that the trustees of the 500 years' term should (among other trusts) raise such annual or other sums of money as should be necessary for keeping on foot or reviving the said policy on the life of the said G. H. Errington (the father), and further to raise a certain annual sum therein referred to, and keep on foot thereout such of the remaining policies as should not have fallen in. And it was thereby further declared that the said J. L. Errington-Turbutt, Daniel Boys, and A. F. Tweedie should stand possessed of the said several policies of assurance upon trust to lay out and invest the moneys to be received therefrom respectively in manner therein declared, and to accumulate the annual income to arise from the investments of the said policy moneys, and all the resulting income thereof from time to time until all the said four policies in the said University Life Assurance Society should have fallen due by the deaths of the several persons on whose lives the same respectively had been effected, and thenceforth to stand possessed of the accumulated fund and the annual income thereof upon the trusts therein declared and contained concerning the moneys to arise from the sale or exchange of any freeholds thereby settled, provided always that if the said trust for accumulation as to any part of the said fund should exceed the period allowed by law for accumulation of income then the trust for accumulation should at the expiration of such period cease as to such part of the fund.

In the year 1873 C. B. Calley died, and the money received under the policy on his life were applied in paying off incumbrances on the settled lands.

G. H. Errington, the father, died on the 8th of March, 1883, and the sum of £10,100 was received under the policy on his life.

W. Addesley Francis died on the 14th of February, 1889, and the sum of £9,838 10s. was received under the policies on his life.

George Henry Forbes Errington, the eldest son of the defendant G. H. Errington, attained twenty-one on the 29th of September, 1874.

By a disentailing assurance dated the 18th of September, 1883, G. H. F. Errington barred his estate tail in the settled lands and in the policy moneys and accumulation fund, and resettled the said lands (subject to the uses and limitations thereof prior to his estate tail) to the use of himself for life with remainder to his first and other sons successively in tail male, and under the same indenture the said moneys were to be held (subject as aforesaid) upon trusts similar to those declared of capital moneys arising from the sale of the settled lands.

The infant defendant G. H. Errington was the eldest son of G. H. F. Errington.

The defendant G. H. Errington now claimed to be entitled to all income and accumulations of income arising from the said sum of £10,100 received in respect of the policy on the life of G. H. Errington, the father, and from the sum of £9,838 10s. received in respect of the policies on the life of W. A. Francis, on the ground that the trust for accumulation of the policy moneys was valid only during the life of the settlor, G. H. Errington, the father.

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

The plaintiffs, who were the trustees of the said policy moneys and term of years and also of the said resettlement, took out the present summons for the determination of the following questions—namely (1) whether the trust for accumulation in the above-mentioned settlement of the 13th of December, 1852, contained, extended to the moneys received in respect of the policy on the life of G. H. Errington, deceased, and if it did so extend whether the same trust was or was not valid for any and what period? (2) the like as to the moneys received in respect of the two policies on the life of the said W. A. Francis, deceased.

A. W. Rowden, for the trustees.

Warrington, Q.C., and *Dibdin*, for the defendant, G. H. Errington.—The "Francis" policy moneys ought never to have been accumulated, for the only period during which they could lawfully have been accumulated was the life of the settlor, and he predeceased Francis. The period cannot be 21 years after the settlor's death, for then, if Francis had predeceased the settlor there would be a gap in the trusts for which no provision is made. We must admit that the moneys due under the policy on the settlor's life can be accumulated for 21 years after his death: *Jagger* v. *Jagger*, 32 W. R. 284, 25 Ch. D. 729; *In re Lady Rosslyn's Trust*, 16 Sim. 391.

J. G. Wood, for the infant defendant.—The trust for the accumulation of the proceeds of the "Francis" policy are still running and will run for 21 years from the death of the settlor; this is a reversionary interest, and the accumulation runs on for 21 years from the settlor's death (*Webb* v. *Webb*, 2 Beav. 493). At the date of the settlement the period for accumulation was uncertain, and so the longest period allowed by law can be taken.

KEKEWICH, J.—It is not contended on either side that these cases which have been cited—and there are very few of them—really decide the point before me in the sense of presenting a state of facts, I will not say on all fours with, but reasonably like that with which I have to deal. It is conceded that the point is new as regards facts, and the value of the cases, as often happens, is only to assist one in arriving at a principle of application of the provisions of the Legislature. I apprehend that the first thing one has to do is to construe the instrument which in this case is a deed. One must find out what was the intention of the testator or settlor and you must do that as if the Thellusson Act had never been passed. Having arrived at the intention as a question of construction, you must then bring in the paramount authority of the Legislature to see how far that intention can be supported, and how far it cannot be supported, and, as regards the latter, how it is to be controlled. There is no difficulty at all in ascertaining the construction of this instrument. It is perfectly clear. I am now dealing only, of course, with what has been called Francis' policy, because it is conceded on both sides that each policy must be treated as if it were a separate trust, and as if there were a separate witnessing part assigning that policy to trustees on separately declared trusts. This is what is to happen. The trustees are to receive the policy moneys, then they are to invest these moneys and to accumulate the annual income to arise from the investment until all the policies in the University Life Assurance Society have fallen due by the deaths of the several persons. This might have been the last of those policies, in which case there would have been no accumulation with regard to this policy at all; or it might have been the first, second, or third, but until the time arrives, which is a simple though contingent event, that is to say, when the last of the University policies fall in, until that time there was to be accumulation, and not until then was the *corpus*, with the accumulations, to be applicable according to the terms of the deed. So there is no difficulty in the construction.

Now let us consider the facts. We are dealing with the policy on the life of Francis, who was of course living at the date of the deed, and might or might not have survived the settlor; you must construe it with reference to that. The deed cannot possibly have meant, and the settlor cannot possibly have intended, that an accumulation was to take place from his death, because as Francis might have died in his lifetime you would have had a possible vacuum or interval between the death of Francis and the death of the settlor during which there would have been no destination of the income at all. It even does not stop there, for there would have been no direction for investment applicable to the case. The trustees would not have known what to do with the fund in hand; they could have invested it, but they would not have known what to do with the income. That confirms the construction which is otherwise clear that the intention was that the trustees should receive the policy-moneys when they fell in and invest and accumulate them until the last policy dropped. Having got the intention, I have to apply the Act of Parliament. Fortunately for the court, of the several contingencies or periods contemplated by the Act only two need be considered at all, and they are, the period during the life of the settlor, and the term of twenty-one years from the death of the settlor. It must be one or other of those two, because the other two are wholly inapplicable in language with reference to the particular deed. The Legislature has left one at large to apply one or other of those periods, whichever will fit the case. What it has said, according to the cases about which there is no doubt, is that you cannot apply more than one and you must choose that one which fits the case. You are not to choose the one which will give the longest period of accumulation, you are not to choose the one which you may suppose would best effectuate the intention, but you are to take the one which actually fits the intention as declared. It seems to me you cannot make to fit this direction a limitation of the accumulation for twenty-one years from the death of the settlor, because that, as I have already pointed out and as was forcibly urged in argument, leaves a gap for which no provision is made at all. You have to fit it as well as you can. The only thing you can do is to say that as the accumulation is to commence from the death of the assured it is to be limited to one of the periods commencing from that time, it cannot commence from the death of the settlor, who might not be dead, and therefore you must take it during his life.

The result is that it is really limited to so much of the period of his life as continued after the receipt of the policy-money; as a matter of fact there was none at all. The result is that, upon the proper construction of the instrument and upon the proper application of the Act of Parliament there was no accumulation of this particular fund. Of course that defeats the intention of the testator and defeats it grossly—that is to say, it is a destruction altogether of the intention. The Thellusson Act was, however, passed to destroy intention, the object of the Legislature was to prevent settlors and testators from giving effect to their full intention, and therefore that argument, though an extremely powerful one when applied to the construction of a will or deed, has no force whatever when you remember that you are considering the paramount authority of the Legislature superimposed on the otherwise free power of a settlor or

testator. It seems to me, therefore, that I am bound to say that in the events which have happened the proceeds of this policy ought never to have been accumulated. The result must be that as the other can be accumulated, for Mr. Warrington felt himself incapable of arguing against that, that must be accumulated for twenty-one years from the death of the settlor.

Solicitors, *A. F. & R. W. Tweedie.*

Q. B. Div.
(Hawkins and Wright, JJ.) May 11.

FIRTH *v.* STAINES. (*a.*)

Metropolis—Management—Vestry—Committee—Approval of acts of committee—Ratification—Metropolis Local Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *s.* 58.

A committee appointed by a vestry under section 58 *of the Metropolis Local Management Act,* 1855, *resolved that a notice be served under section* 85 *of the Act upon the owner of premises requiring him to abate a nuisance thereon arising from defective drainage. The notice not having been complied with, the committee resolved that proceedings should be taken for the recovery of penalties, and a summons was issued against the owner. Section* 58 *provides that the acts of the committee shall be submitted to the vestry for their approval.*

Held, that the fact that the vestry had not approved of the service of the notice until after the issue of the summons did not render the service of the notice invalid.

Case stated by a metropolitan magistrate.

The appellant was a sanitary inspector in the employment of the vestry of the parish of St. Leonard, Shoreditch. The vestry was the sanitary authority for the parish, which was a parish included in Schedule A of the Metropolis Local Management Act, 1855.

The vestry had, under the powers conferred by section 58 of that Act, appointed a committee, known as the Public Health Committee, for the purposes specified in the following bye-law: "The committee now known as the General Purposes and Sanitary Committee shall be called the Public Health Committee, and shall be empowered and authorized: (1) To execute and carry out the powers and duties of the vestry under the Public Health (London) Act, 1891, the Sale of Food and Drugs Acts, the Margarine Act, 1887, the Sale of Horseflesh Act, the Metropolis Management Acts, and other Acts amending the same from time to time, so far as they relate to the public health of the parish."

On the 19th of September, 1896, the appellant served upon the respondent a written intimation as provided for by section 3 of the Public Health (London) Act, 1891, of the existence of a nuisance from a defective drain upon premises of which the respondent was the owner.

On the 15th of October the appellant attended before the committee and made a report upon the condition of the premises, and the committee passed a resolution that notice be served upon the respondent to abate the nuisance, failing compliance with which the appellant was to take proceedings.

On the 19th of October the appellant served the notice on the respondent, and on the 3rd of November, the notice not having been complied with, the appellant laid an information against the respondent for penalties, and a summons was issued. On the same day after the issue of the summons the proceedings and the resolution of the committee were reported to the vestry and were approved by resolution entered in the minutes of the vestry.

On the hearing of the summons it was submitted on behalf of the respondent that under section 58 of Metropolis Local Management Act, 1855, the resolution of the committee authorizing the service of the notice ought to have been approved of by the vestry before the notice could properly be served.

The magistrate was of opinion that as the resolution of the committee had not been submitted to the vestry for their approval before the service of the notice the notice was invalid, and he therefore dismissed the summons.

The question for the consideration of the court was whether on the facts this decision was right in point of law.

The Metropolis Local Management Act, 1855, s. 58: "It shall be lawful for the Metropolitan Board of Works, and the board of works for any district, and any such vestry respectively, to appoint a committee or committees for any purposes which, in the discretion of the board or vestry, would be better regulated and managed by means of such committee, and at any meeting to continue, alter, or discontinue such committee. Provided always that the acts of every such committee shall be submitted to the general body of the board or vestry appointing such committee for their approval."

Cripps, Q.C., and *R. C. Glen*, for the appellant.—The decision of the magistrate was wrong. The contention put forward by the respondent amounts to this, that each step in proceedings by the committee under sections 82 to 85 of the Metropolis Local Management Act, 1855, for the abatement of a nuisance caused by defective drainage must be separately and formally approved of by the vestry before the committee can take the step in question. There is nothing in the language of section 58 to warrant such a construction, which would, moreover, have the effect of rendering the appointment of a committee absolutely nugatory.

R. D. Muir, for the respondent.—The approval required by section 58 must be something more than a mere formal subsequent approval. If the vestry are not bound to approve the acts of the committee until all the important steps in the proceedings have been taken, the provision as to approval in section 58 is practically useless. No vestry would ever withhold its approval if the consequences of so doing were to render the acts of the committee unlawful.

He referred to *Barnsley Local Board* v. *Sedgwick*, 15 W. R. 514, L. R. 2 Q. B. 185; *St. Leonard's Vestry* v. *Holmes*, 50 J. P. 132.

Cripps, Q.C., replied.

HAWKINS, J.—In this case I think that the decision of the magistrate was wrong, and that the appeal ought to be allowed. The case turns on several sections of the Metropolis Local Management Act, 1855, and the question is whether the committee had power to do the acts complained of under the powers conferred by section 58 of that Act. That section gives to the vestry a statutory authority to appoint a committee for any purposes which, in the opinion of the vestry, would be better regulated and managed by means of such committee. Therefore, in order to make the appointment of the committee complete, it is necessary that there should be a formal document pointing out for what purposes the committee is appointed. [His lordship read the terms of the appointment of the committee.] There is no question that the matters which are the subject of the order

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

which is sought to be obtained in this case are matters relating to the public health of the parish. By section 82 power is given to the vestry or their surveyor to inspect drains and to enter premises and to cause the ground to be opened. I hardly think that it could be contended that the committee would have no power to enter premises for the purpose of inspection, but if the contention of the respondent is valid, I do not see how we could avoid saying that the committee would have no power to enter without the previous approval of the vestry. However, that point has not been taken in this case, and I cannot doubt that the committee have power to enter premises.

In this case complaint was made of a nuisance followed by a written intimation of the nuisance served upon the respondent by the appellant. Turning now to section 85 we find that that section provides that if upon inspection, as aforesaid, any drain appears to be in bad condition the vestry shall cause notice in writing to be given to the owner or occupier of the premises requiring him to do the necessary work, and if the notice be not complied with the vestry may either do the work and receive the expenses, or proceed for penalties under section 64 of the Act of 1862. It is quite clear when one looks at sections 58 and 82, that when it is said that the vestry may take the steps mentioned, it means either the vestry or those lawfully deputed by the vestry under section 58 to act for the vestry. The committee have the same power as the vestry subject to the approval of their acts by the vestry. Here there was a nuisance of the character contemplated by section 85, and a notice was served on the owner requiring him to execute certain works, and on non-compliance with the notice a summons was issued against him. It is said that all the proceedings of the committee are absolutely null and void because, although the vestry subsequently gave their sanction to the order of the committee on which the summons was issued, the notice was served upon the respondent before the approval of the vestry was obtained, and it is further said that the vestry must judicially consider the matter before the notice is served. I cannot help thinking that if a committee is appointed to do acts which, in the judgment of the vestry, can be better done by a committee than by the vestry, the word "approval" in section 58 is used advisedly as meaning that, although the committee can do the acts in question they cannot justify themselves, unless at some time or other the approval of the vestry is obtained. If the notice referred to in section 85 to do the necessary works cannot be given without the approval of the vestry being previously given, I do not see why the twenty-four hours' notice of inspection under section 82 should not also require the previous sanction of the vestry; and if that is requisite there might just as well be no committee at all. I cannot see of what use the committee would be. A further point is that if the committee can do no act without first obtaining the approval of the vestry, then there can be no act done by the committee which, in the words of section 58, "shall be submitted to the . . . vestry appointing such committee for their approval." I have no difficulty in coming to the conclusion that the magistrate was wrong in holding that the approval of the vestry ought to have been given before the notice was served on the respondent. The committee, in my opinion, have power under the statute to first serve the notice and then afterwards to obtain the approval of the vestry.

WRIGHT, J.—This question is one of great and general importance, for it affects not only the metropolitan vestries but also all municipal corporations, and I apprehend that it may affect county councils and district councils. It is also a question of undoubted difficulty, as is shown by the fact that Blackburn, J., refrained from giving an opinion on the point in *Barnsley Local Board* v. *Sedgwick*.

The principle applicable both to the service of the notice and to the issue of the summons is, I think, the ordinary principle on which ratification obtains. Ratification requires, first, that the agent should purport to act on behalf of a principal; secondly, that at the time of the act the agent must have had a competent principal; and thirdly, the principal must be legally capable of ratifying the act. It seems to me that all these requisites of ratification were present in this case. I think that is sufficient to decide the case, and I prefer to go no further. On the approval of the vestry being given, the acts of the committee become valid from the time when they were first done. In this case the ratification was expressed on the day of the issue of the summons, but I think it would have been equally good if it had been given on the day the summons was served.

Appeal allowed.

Solicitor for the appellant, *H. M. Robinson.*

Solicitor for the respondent, *Jutsum.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Wright, JJ.) — May 24, 27.

In re BROSTER.
Ex parte PRUDDAH. (*a.*)

County court—Execution—Distress for rent—Poundage of high bailiff—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 154, 160—*County Court Rules,* 1889, *Schedule A.*

Where a high bailiff seizes goods on any premises under a warrant of execution, and then seizes further goods on the same premises under a claim made by the landlord for rent, he is entitled to a separate set of fees in respect of each seizure.

Appeal from a judgment of his Honour Judge Foulkes in the county court at Birkenhead.

Upon the 22nd of December, 1896, the high bailiff of the Birkenhead County Court entered upon the premises of one Broster and seized goods thereon sufficient to satisfy a warrant of execution for £20 11s. 3d., and proceeded to hold them for five days, as required by section 154 of the County Courts Act, 1888. While the high bailiff was thus on Broster's premises—namely, upon the 23rd of December, the landlord, acting as directed by section 160 of the same Act, delivered to the bailiff or his officer a notice in writing stating that the rent was in arrear to the extent of £55, and the high bailiff thereupon seized and held possession of further goods on Broster's premises to satisfy the claim for rent in addition to the amount claimed under the execution. The high bailiff claimed to be entitled to poundage at rate of sixpence in the pound on the value of the goods seized under the execution up to the value of £20, and to poundage to a similar amount on the value of the goods seized to satisfy the landlord's claim.

The county court judge treated the seizure under

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

the execution, and the seizure under the landlord's claim as one proceeding, and allowed poundage upon £20 only.

The high bailiff appealed.

Buckmaster and *L. Sanderson*, for the appellant.—The county court judge was wrong here because he based his judgment on the case of *In re Wells, Ex parte The Sheriff of Kent*, 68 L. T. 231, 41 W. R. Dig. 221, which is not applicable to this case.

Muir Mackenzie, for the respondent.—The statute puts distress on a par with execution, and the high bailiff is only entitled to fees for one execution.

Buckmaster replied.

Cur. adv. vult.

May 27.—VAUGHAN WILLIAMS, J.—This case raises a question as to the meaning of section 160 of the County Courts Act, 1888. The material facts seem to be that there was an execution and a subsequent claim by the landlord and the raising under section 160 of a sufficient sum, in addition to the execution, to satisfy the claim for rent. The high bailiff carried in a bill claiming to treat these two transactions as separate and entitling him to a double set of fees. The court below refused to allow two sets of fees, and taxed on the basis of there having been one execution.

The question for us is, What is the proper mode of taxation in circumstances of the kind I have described? To judge of this we must look at section 160 and section 154. It is best just to look at section 160: "Section one of the Act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of the court, but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made, the bailiff or officer making the levy shall, in addition thereto, distrain for the rent so claimed and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy—first, the costs of and incident to the sale; next, the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case; and lastly, the amount for which the warrant was issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incidental to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods shall be returned to the defendant, and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress shall be the same as would have been payable if the distress had been an execution of the court, and no other fees shall be demanded or taken in respect thereof."

Then one has to turn to section 154 to see what the poundage is. Section 154, after providing for methods of execution and for the employment of persons to keep possession and of sworn brokers and appraisers, says: "And no goods taken in execution under this Act shall be sold for the purpose of satisfying the warrant of execution except by one of the brokers or appraisers so appointed, and the brokers or appraisers so appointed shall be entitled to have, out of the produce of the goods so distrained or sold, sixpence in the pound on the value of the goods for the appraisement thereof, whether by one broker or more, over and above the stamp duty, and for advertisements, catalogues, sale and commission, and delivery of goods, one shilling in the pound on the net produce of the sale."

It will be observed that in section 154 the words are "out of the produce of the goods so distrained or sold." "Distrained" does not seem to me strictly applicable to an execution but only to a distress.

The question for us to answer is this: Is the high bailiff entitled to a double set of fees, to treat the proceedings as separate, and have one set of fees for the execution, and one set for the distress? I do think that he is so entitled, and I think so because section 154 seems by its plain words to treat execution and distress as different, and to give fees by way of remuneration to the bailiff in respect of each transaction. I should point out that if this were not so the effect of the rule in Schedule A as to fees would be to deprive the high bailiff in many cases of any remuneration for distress at all, for it is provided in that rule: "All poundage, except where otherwise herein specified, shall be estimated upon the amount of the value of the subject-matter of the proceeding upon which it is payable, except where the said amount or value exceeds twenty pounds, where the poundage shall be estimated upon twenty pounds only." The result of that would be that if there were an execution for £20 and a distress, and the proceedings were not treated as separate, there would be no remuneration for the distress. I think that the words of the section and the provision with regard to the fees lead one to the conclusion that the transactions were intended to be dealt with as separate for the purpose of poundage.

WRIGHT, J., concurred.

Appeal allowed.

Solicitor for the appellant, *E. H. Scott.*

Solicitor for the respondent, *Solicitor to the Board of Trade.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) — May 13

NEW'S TRUSTEE *v.* HUNTING. (*a.*)

Bankruptcy — Voluntary conveyance — Making good breaches of trust—Revocable deed—Fraudulent preference—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

A bankrupt, a few days before his bankruptcy, executed a deed conveying certain real estate to a trustee upon trust to raise thereout a certain sum and to apply the same in making good divers breaches of trust which he had committed as trustee of certain specified estates. The deed, which contained recitals that the bankrupt was desirous of executing the deed to rectify the breaches

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

of trust and thereby to shield and exonerate himself from liability to proceedings to which he might be exposed, charged the real estate with the payment of the said sum, and conferred upon the trustee, his executors and administrators, power to appoint new trustees for the purpose of carrying into effect the trusts of the deed. The deed was not communicated to any of the beneficiaries or creditors.

Held, first, that the intention of the bankrupt was to execute a deed, which should be binding upon him, in favour of his cestuis que trustent, *and that therefore the deed was irrevocable; and, secondly, that the deed was not a fraudulent preference within section* 48 *of the Bankruptcy Act,* 1883.

The bankrupt, before his bankruptcy, deposited certain share certificates in the boxes in his office in which the documents relating to the trust estates were usually kept, along with a memorandum that the certificates were deposited as security for the moneys owing to the trust estates. The trustee in bankruptcy claimed the certificates.

Held, that there was a valid appropriation of the certificates to the particular trusts, and that the trustee was not entitled to them.

Middleton *v.* Pollock, 2 *Ch. D.* 104, 24 *W. R. Dig.* 88, *approved.*

Appeal from the judgment of Vaughan Williams, J., reported [1897] 1 Q. B. 607.

The action was brought by the trustee in bankruptcy of New, Prance, & Garrard, against the defendant Hunting and others, claiming a declaration that a deed executed by the bankrupt Prance, two days before the bankruptcy, was void against the plaintiff either as a fraudulent preference within section 48 of the Bankruptcy Act, 1883, or as a voluntary conveyance for the benefit of certain creditors which was revocable by Prance, and was, in fact, revoked by the bankruptcy.

There was also a claim to recover certain share certificates.

Messrs. New, Prance, & Garrard had for many years practised in co-partnership as solicitors at Evesham, in the county of Worcester.

In 1893 New died insolvent, and the business was carried on by the two surviving partners.

On the 31st of March, 1894, a receiving order was made against them on their own petition, and they were adjudicated bankrupt.

Their trustee in bankruptcy became trustee under an administration order made in bankruptcy of the estate of New.

On the 29th of March, 1894, Prance executed a conveyance of certain real estate, of which he was sole owner in fee, to the defendant Hunting (since dead) upon trust to raise thereout £4,200, and to apply the same in making good divers breaches of trust which he, Prance, had committed either as sole trustee or as joint trustee of certain trust estates specified in the schedule to the deed.

By the same deed Prance charged the estate with the payment of the said sum of £4,200, and gave Hunting, his executors and administrators, power to appoint new trustees for the purpose of carrying into effect the trusts of the deed.

The deed contained recitals in general terms of the breaches of trust that had been committed, and also a recital that Prance was desirous of executing the deed to rectify such breaches of trust as far as might be, and thereby to shield and exonerate himself as far as possible from liability to the proceedings he was then, or might at any time hereafter, be exposed to by reason of such breaches.

The deed was executed without any pressure being put upon Prance, nor was it communicated to any of the beneficiaries or creditors.

As regards the claim for the share certificates, it appeared that these had been deposited by Prance in the several boxes in his office in which the documents relating to the above trust estates were usually kept, along with a memorandum in each case that the certificates were deposited as security for the moneys owing to the trust estates.

These certificates were subsequently collected and placed in one box with the above memoranda.

Vaughan Williams, J., gave judgment for the defendants.

The plaintiff appealed.

Muir Mackenzie and *R. Harington*, for the plaintiff.—This deed was revocable, and was revoked by the bankruptcy. The principle is stated in *Synnot* v. *Simpson*, 5 H. L. Cas. 121, following the decisions in *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; *Walwyn* v. *Coutts*, 3 Sim. 14; *Gibbs* v. *Glamis*, 11 Sim. 584; and *Acton* v. *Woodgate*, 2 My. & K. 492, to be that where a person who is indebted makes provision for payment of debts by vesting property in trustees for the purpose of discharging them, but does so behind the backs of the creditors, and without communicating with them, the trustees do not become trustees for the creditors. The arrangement is for the debtor's convenience only, and is the same as if he had put money into the hands of an agent with directions to apply it in paying certain specified debts. The debtor may at any time revoke the authority given to his agent. That principle was followed in *Johns* v. *James*, 26 W. R. 821, 8 Ch. D. 744; *In re Ashby, Ex parte Wreford*, 40 W. R. 430, [1892] 1 Q. B. 872. *Simmonds* v. *Palles*, 2 Jo. & Lat. 489; and *Smith* v. *Hurst*, 10 Hare 30, were also referred to. Secondly, this deed constituted a fraudulent preference within section 48 of the Bankruptcy Act, 1883. The relation between a trustee who has misappropriated trust funds and his *cestui que trust* is that of debtor and creditor: *In re Smith, Fleming, & Co., Ex parte Kelly & Co.*, 27 W. R. 830, 11 Ch. D. 306; *In re Paine, Ex parte Read, ante*, p. 190, [1897] 1 Q. B. 122. If a person executes a deed when his bankruptcy is imminent, which he knows must have the effect of preferring a creditor, it is a fraudulent preference. The dominant motive of the bankrupt was to benefit his *cestuis que trustent* at the expense of his other creditors. They referred upon this point to *Ex parte Stubbins*, 29 W. R. 653, 17 Ch. D. 58; *Ex parte Taylor*, 35 W. R. 148, 18 Q. B. D. 295; *Ex parte Ball*, 35 W. R. 264. Thirdly, the deposit of the share certificates was not a sufficient appropriation of the shares to the *cestuis que trustent*, and Prance could at any time have disposed of the shares as he pleased. It is admitted that the facts of this case cannot be distinguished from those in *Middleton* v. *Pollock*, 2 Ch. D. 104, 24 W. R. Dig. 88, but it is submitted that the decision in that case is inconsistent with *Wilson* v. *Balfour*, 2 Camp. 579, and is wrong.

Upjohn, Clayton, and *Van Neck*, for the various defendants, were not called upon.

Lord ESHER, M.R.—The first question we have to decide is whether this is a revocable deed. To enable us to come to a decision upon that point we have the great assistance of a most careful and most able judge—Lord Justice (then Vice-Chancellor) Turner, and his guidance enables me to come to a conclusion upon the question. In *Smith* v. *Hurst*, 10 Hare 30, at p. 47, he said: "Many of the cases upon voluntary deeds were cited and commented upon in the argument of this case, and I have thought it right, therefore, to examine the authorities upon the subject.

They appear to me to result in this, that in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered, or modified by the party who has created the trust; but that in cases of deeds purporting to be executed for the benefit of creditors, the question whether the trusts can be revoked, altered, or modified depends upon the circumstances of each particular case. It is difficult, at first sight, to see the distinction between the two classes of cases; for in each of the classes a trust is purported to be created, and the property is vested in trustees; but I think the distinction lies in this: In cases of trust for the benefit of particular persons, the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created, and, the trust being well created, the property in equity belongs to the *cestuis que trust* but as much as it would belong to them at law, if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the court there has to examine into the circumstances for the purpose of ascertaining what was the true purpose of the deed." We must therefore look at all the circumstances of this case. Prance had committed a fraud upon his *cestuis que trustent* in reference to the trust estates. He had also various creditors. He accordingly executed this deed in favour of certain persons only. The persons intended to be benefited by it are, in my opinion, sufficiently identified. They were the persons with regard to whom he had committed breaches of trust. That brings the deed within the description above given of irrevocable deeds, as the trustee of the deed became, not his trustee, but trustee for the particular persons in whose favour he executed the deed. There is, however, another reason why this deed is irrevocable. Prance had committed frauds against his *cestuis que trustent* for which he would have been liable to various penalties. He might have been struck off the rolls, and, as far as I can see, might have been indicted. Now, what was in his mind when he executed this deed? What he was proposing to do would have, or he thought it would have, a material effect upon the punishment he would receive. He thought that he would mitigate, at all events, his punishment, if he put the persons whom he had wronged into the same position as if he had acted rightly. Now, they could not be in the same position as if he had done right, unless he meant by what he did to give them the absolute right to the property he was conveying, and unless he made the trustee under the deed their trustee and not his trustee. Therefore his intention, when all the circumstances of the case are looked at, was—first, to do something for certain persons, who could be easily identified; and, secondly, not to reserve to himself any right of undoing what he had done. The deed is therefore an irrevocable deed.

It was next said that the deed amounted to a fraudulent preference. The doctrine of fraudulent preference is a well-known doctrine. The question to be determined is one of fact in each case, and depends upon the state of mind of the person who brings about that preference. There must not only be a creditor preferred, but the preference must be with the fraudulent intention of preferring the creditor. It is said that a man must be taken to intend the necessary consequences of his acts. To my mind that is entirely fallacious. It may, in many cases, be wholly untrue. One must find out whether he did or did not intend that his act should have that necessary consequence. What did Prance intend here? Did he intend to give these persons a preference? We have the recitals in the deed which shew what his intention was. Having considered the deed and all the circumstances of the case, can it be said that he intended to make these persons the object of his bounty? In my opinion he had no care for anybody except to benefit himself. He thought to benefit himself by taking from these persons the inclination to press him to the extreme end. He thought that, by putting these particular persons in the same position as if no fraud had been committed, it would greatly mitigate the consequences to himself. What he had done would, he knew, come out in a few days, and he did this to protect himself. That is not a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

The last point has reference to the deposit of the share certificates. When the case was before Vaughan Williams, J., it was admitted that the case was governed by the decision of Sir George Jessel in *Middleton* v. *Pollock*, as the facts were not distinguishable, but it is now contended that that decision is wrong. That is the sole point taken. It is not sought to distinguish that case from the present. It is said that it is in conflict with a decision of Lord Ellenborough in *Wilson* v. *Balfour*. In my opinion, however, the cases are totally different. I cannot see that the decision in *Middleton* v. *Pollock* is wrong. I am not in the least prepared to overrule it. That point therefore fails, and the appeal must be dismissed.

A. L. SMITH, L.J.—The first question is, Was this deed irrevocable? It seems that Prance was a solicitor who had misappropriated certain trust funds, and he executed this deed. Whether or not the deed was revocable depends upon whether it was, as has been said, an agency deed—that is to say, whether the property was conveyed to Hunting as the agent of Prance, or whether the deed was executed so as to create a trust between Hunting and the persons who were described in the schedule to the deed. I have no doubt that there was a valid trust created for the benefit of those persons as *cestuis que trustent*. The recitals in the deed show that Prance executed the deed for the purpose of shielding and exonerating himself as far as he could from proceedings to which he might be exposed by conveying the property to a trustee, not for himself, but for his *cestuis que trustent*. Further, the clause giving Hunting, his executors and administrators, power to appoint new trustees to carry out the trusts of the deed goes to show that it was not a deed merely for the convenience of Prance, but a binding deed entered into for the benefit of his *cestuis que trustent*.

The next question is whether this amounted to a fraudulent preference. The tribunal which has to determine whether a transaction is or is not a fraudulent preference must ascertain what was the dominant motive in the mind of the bankrupt. Was his dominant motive to prefer some of his creditors? It seems to me clear that his dominant motive was to avert the punishment to which he had exposed himself. His motive was to save himself. The case of *Ex parte Taylor* seems to me to be absolutely conclusive that this cannot be a fraudulent preference. There was, therefore, no fraudulent preference.

As regards the third point I entirely agree with what has been said by the Master of the Rolls.

CHITTY, J.—I concur. As regards the first question, *primâ facie* every deed of conveyance made upon trusts declared is binding upon him who created the trusts, unless he has reserved to himself an express power of revocation. But there is a class of cases, of which *Garrard* v.

Lord Lauderdale is one, where the deed is for the benefit of creditors, in which the courts of equity have held that the deed is a mere agency deed, and that the trustee under the deed is a mere agent for the grantor and is not a trustee for the creditors. Turner, L.J., has shown in *Smith* v. *Hurst* why such a distinction has been allowed, and in *Johns* v. *James* James, L.J., stated what seemed to him to be the reasons for the decision in *Garrard* v. *Lord Lauderdale* —namely, that the intention of the grantor in such a case would necessarily be defeated if the deed were held to be irrevocable, for if it were he would have no opportunity of paying a creditor who was pressing, or of settling an action, or of getting any food for himself or his family. In the present case it seems to me to have been the clear intention of Prance that the deed should be irrevocable. It would have defeated the very object he had in view if he had power to revoke it. The recitals, which are admittedly true, show that that must have been his intention. It would be a strange thing indeed were we to hold that he could revoke the deed which he intended to be a shield to protect himself from the consequences of his fraudulent acts. It seems to me that the charge upon the estate and the power conferred upon the trustee, his executors and administrators, to appoint new trustees are circumstances which support the view that this deed is irrevocable.

As regards the question of fraudulent preference, I agree with what has been already said. As regards the last question, in my opinion *Middleton* v. *Pollock* was rightly decided. There was in that case a valid appropriation of the securities to the particular trust. I agree that that case was well decided.

Appeal dismissed.

Solicitors for the plaintiff, *Burton, Yeates, & Hart*, for *Johnson, Barclay, & Rogers*, Birmingham.

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.; M. H. Prance; R. White.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) May 7.

REMMINGTON v. SCOLES. (a.)

Practice—Pleadings—Striking out pleading—Frivolous and vexatious—Abuse of process of court—Affidavit evidence.

Though the court will not in general, on an application to strike out a pleading, inquire into the truth or falsehood of the allegations pleaded, yet an affidavit will be admitted to show that the allegations which a party denies by his pleading have previously been so admitted by him as to make his pleading a mere abuse of the process of the court; and in that case the pleading may be struck out.

Hildige *v.* O'Farrell, 8 *L. R. Ir.* 158, 30 *W. R. Dig.* 169, *distinguished.*

Appeal from Romer, J.

The defendant had by his defence in general terms denied or refused to admit all the material allegations of the statement of claim, but had given no explanation or other version of the transactions alleged by the plaintiffs. The plaintiffs then applied to strike out the defence as frivolous and vexatious and an abuse of the process of the court, and as having been put in solely for the purpose of delaying the plaintiffs. In support of this application one of the plaintiffs made an affidavit (which was not contradicted by the defendant), showing that in previous interlocutory proceedings in the same action the principal allegations in the statement of claim (now denied or not admitted by the defendant) had, with the exception of certain specific allegations that the defendant had acted fraudulently, been sworn to on behalf of the plaintiff, and that none of them had been denied, while several of them had been distinctly admitted, by the defendant.

Romer, J., held that the affidavit evidence was admissible, and after considering the evidence made an order striking out the defence, and allowing the defendant within a fortnight to put in a fresh defence.

The defendant appealed.

Frank Russell, for the appeal.—The question is not *res judicata*, and the court will not strike out a pleading because its statements are shown by affidavit to be untrue. *Boswell* v. *Coaks*, 31 W. R. 540, 23 Ch. D. 302, which Romer, J., relied upon, was as to striking out a statement of claim; it is a stronger thing to strike out a defence, and make the defendant liable to judgment in default. *Hildige* v. *O'Farrell*, 8 L. R. Ir. 158, 30 W. R. Dig. 169, is a very strong case in favour of the defendant here.

He also cited *O'Donnell* v. *Reilly*, 11 Ir. C. L. R. 329; and *Marquis of Drogheda* v. *Hanlon*, Ir. R. 1 C. L. 319. [RIGBY, L.J., referred to *Lawrance* v. *Lord Norreys*, 38 W. R. 753, 15 App. Cas. 210.]

G. P. C. Lawrence, for the plaintiffs, was not called upon.

LINDLEY, L.J.—Now that we understand the case, there is no doubt that what Romer, J., has done is a very unusual thing to do. It is a very strong thing to say, and it cannot be said as a general proposition, that the defendant is not at liberty to put in a defence merely denying the statements in the statement of claim. Of course he is entitled to do so, as a general rule; that is obvious enough. The learned judge is quite right; he recognises the rule which is referred to and illustrated by the case of *Hildige* v. *O'Farrell*. In a case of that kind the court will not try whether the statement of defence states what is true or false. But the ground on which the learned judge has proceeded is that this defence is a mere sham. The character of the defence can be seen through, and is stamped by, the first three paragraphs, which are mere shams. That gives a character to the whole thing, and, bearing in mind what has occurred in this very case, I think the learned judge has not gone wrong when he says, as he does, that it is a defence which never ought to have been put in, and that the whole proceeding is with a view to gain time. It is a mere sham defence, and not an honest defence at all. If the defendant has an honest defence, which probably he has not, he is at liberty to put it in. The learned judge has guarded himself. He says it will not do, after what has passed, simply to deny everything. The defendant may deny the plaintiff's allegations if he chooses, but if he does he must give some explanation to show that he is acting honestly. This defence is a mere trick to gain time. I think the learned judge is right, and that the appeal must be dismissed, and dismissed with costs.

LOPES, L.J.—I am of the same opinion. The learned judge observes that this is an exceptional case, and I think it is an exceptional case. Such a case can only be dealt with in the way in which he has dealt with it, and in which we propose to deal with it, where the circumstances are exceptional.

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

We are entitled to deal with it, and to strike out the defence on account of the inherent jurisdiction in every court of justice to prevent an abuse of its procedure. I think that this defence, if it was permitted to remain on the file, would be an abuse of the procedure. But I desire to say this, that it is not enough to invoke this kind of jurisdiction of the court if the court thinks the facts alleged in the statement of defence, or the statement of claim, as the case may be, improbable or false. But what the learned judge thought here, and I think he was right in so thinking, was that—having regard to the character of this defence, bearing in mind what is known about the case beforehand, what is known about the previous proceedings in the case—this is a sham defence, and that it has been set up, not honestly and *bonâ fide* as a substantial defence, but for the purpose of delay. I think, therefore, we ought to support his decision.

RIGBY, L.J.—I do not wish in any way to infringe upon the salutary rule that a defendant has a right to put in issue any fact that he pleases, and to have that tried in the regular manner. Therefore the court will not, as *O'Donnell* v. *Reilly* and the other cases cited show, although it may be reasonably satisfied, or quite satisfied, as far as the affidavit goes, that the defence is untrue, strike it out for that reason. But if the court can, on the facts that are not in dispute, ascertain that the actual defence put in is really a defence which has no relation to the merits of the case at all, in other words that it is a sham defence, why then, of course, the court has jurisdiction, and in this very exceptional case ought to act upon the jurisdiction, and to have that sham defence taken off the file. I think this is a case clearly of that kind, and on that ground the decision of Romer, J., ought to be upheld.

Appeal dismissed.

Solicitors, *George F. Clark; Darley & Cumberland.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) March 17, 18; April 2.

HORNSEY DISTRICT COUNCIL *v.* SMITH. (*a.*)

Local government—Street—Paving expenses—National school—Charge upon the premises—Enforcement of charge by sale or mortgage—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.

The trustees of a National school, the site of which had been conveyed to them under section 6 *of the School Sites Act,* 1841, *are liable as "owners" under section* 4 *of the Public Health Act,* 1875, *to be charged with the expenses of making up roads adjoining their land; and until payment such expenses are a charge upon the premises under section* 257 *of the same Act.*

So held, affirming the decision of Kekewich, J., ante, *p.* 231.

But such charge cannot be enforced by sale or mortgage of the premises.

So held, reversing the decision of Kekewich, J.

Appeal of the defendants from Kekewich, J., reported *ante*, p. 231.

The plaintiffs had a charge upon some school premises in their district in respect of paving and other expenses which had been incurred and apportioned against the trustees of the school under section 150 of the Public Health Act, 1875. The plaintiffs asked for the enforcement of the charge by sale or mortgage of the premises.

Kekewich, J., made an order for sale or mortgage. The trustees of the school appealed.

Dibdin, for the appellants.—The first question here is, Is there an owner? The trustees are not the owners of premises which can be let at a rack-rent, and do not come within the definition of section 4.

He referred to *In re Randell, Randell* v. *Dixon*, 36 W. R. 543, 38 Ch. D. 213; *Walsh* v. *Secretary of State for India*, 11 W. R. 823, 10 H. L. Cas. 367; *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782, 30 W. R. Dig. 121; *Guardians of Tendring Union* v. *Dowton*, 40 W. R. 145, [1891] 3 Ch. 265; *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379.

My second point is that the order for sale must be wrong because there is a statutory fetter, and the court will not make an idle order. A purchaser could make nothing out of these schools, because they must be carried on in a particular way without profit under section 14 of the School Sites Act, 1841. [LINDLEY, L.J.—If the charge is valid, and there is no sale, what is the remedy?] There is none. If I am wrong on the first point, the charge is a barren charge, and cannot be enforced by sale.

Macmorran, Q.C., and *E. Beaumont*, for the respondents.—The trustees must hold for school purposes only. They could sell under the Elementary Education Act, 1870, by transferring the premises to the School Board, and they could actually let the school at a rent: *In re Burnham National Schools*, 22 W. R. 198, L. R. 17 Eq. 241. The principle of *Bowditch* v. *Wakefield Local Board of Health*, L. R. 6 Q. B. 567, 19 W. R. C. L. Dig. 66, has never been overruled. The contention on the other side is that where land is by the common law or by statute incapable of being let at a rack-rent there cannot be an owner. The answer is that the incapacity must be stamped upon the property itself, and must not be merely on a casual owner. The charge given by the statute is a charge on the premises, and not on any particular person. The trust deed only affects the use in the hands of the trustees. So long as they hold it under the School Sites Act the use is limited, but if they part with it the use is gone. If the property were subject to a private trust it could be sold under a charge freed from that trust, and the case is precisely the same if the trust is statutory. The incapacity does not affect the land, it only affects the trustees dealing with the land.

Dibdin replied.

Cur. adv. vult.

April 2.—The judgment of the court was delivered by

A. L. SMITH, L.J., as follows: By an indenture dated the 29th of April, 1847, the rector of Hornsey, pursuant to the provisions contained in section 6 of the School Sites Act of 1841 (4 & 5 Vict. c. 38), conveyed to the Archdeacon of Middlesex a piece of the glebe land belonging to the rectory to hold unto the use of the archdeacon and his successors for ever, to be applied as a site for a school for poor persons of the parish and for no other purpose whatever, such school to be always in union with the Incorporated National Society for Promoting the Education of the Poor; and it was provided that the management, direction, control, and government of the school and premises should be vested in and exercised by a committee consisting of the rector for the time being and of five other persons. The piece of land so conveyed was bounded by and abutted upon a high road upon its

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

eastern side, which road of late having become a new street, the urban district council of Hornsey, under the powers conferred upon them by section 150 of the Public Health Act of 1875, have executed paving and other works thereon; and the district council now seek under section 257 of the Act to recover the expenses they have so incurred by means of a charge upon the school premises, and an order for sale of these premises to satisfy such charge. There is in this case no question as to the school premises not being bounded by and abutting upon the new street, nor whether the appellants were trustees of the school when the works were executed.

The first question is whether the appellants are "owners" of the land within the meaning of the Public Health Act, 1875, in which case a charge by virtue of section 257 of the Act would be created upon the premises; and the second is, if there be such a charge, whether the court can enforce it by ordering a sale of the school premises.

As regards the first point, this depends upon whether the appellants are "owners" of the school premises within the meaning of section 257 of the Act of 1875. This section enacts "Where any local authority have incurred expenses for the repayment whereof the owner of the premises . . . is made liable under this Act . . . such expenses may be recovered . . . from any person who is the owner of such premises when the works are completed, . . . and until recovery of such expenses and interest, the same shall be a charge on the premises in respect of which they were incurred." By section 4 of the same Act "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." In the case of *Bowditch* v. *Wakefield Local Board of Health* in the year 1871 the court of Queen's Bench held that the trustees to whom premises had been conveyed for the purposes of a school under the provisions of section 2 of the School Sites Act of 1841 were "owners" within the meaning of section 2 of the Public Health Act of 1848 (11 & 12 Vict. c. 63), which is identical so far as "owner" is concerned with section 4 of the Public Health Act, 1875, and if this case is good law and has not been overruled, there can be no doubt that the appellants are "owners" within the meaning of section 257 of the Public Health Act of 1875. Blackburn, J., in delivering his judgment in this case, said: "The definition 'owner,' however, in section 2 does not say 'owner shall include,' but 'shall mean.' Now, though these premises are and must be held as schools and cannot be let for any purpose, yet if they were let the rent would come to the appellant. I think, therefore, he is 'owner' within the meaning of the definition. There is no apparent reason why a trustee of these schools should not be within the Act; and as to the difficulty of the appellant getting recouped, those who undertake trusts do often incur liability, and must have recourse to such measures as are open to them." Mellor and Lush, JJ., based their judgments upon the ground that as there was no special exemption in the statutes as regards schools as there was with regard to churches, schools were liable to the expenses. It cannot be said that this *Wakefield case* has ever been in terms overruled, nor do we find that it has ever been doubted; but, on the contrary, as will be seen hereafter, it was treated as good law as late as in the year 1885 by this court in the case of *Wright* v. *Ingle*, and by Stirling, J., in *In re Christchurch Inclosure Act*, 42 W. R. 614, [1894] 3 Ch., 209, and by Mathew, J., in 1895, in the case of *Vestry of St. Mary, Islington* v. *Cobbett*, 43 W. R. 44, [1895] 1 Q. B. 369. It is, however, argued on behalf of the appellants, the trustees of the school, that two cases—the one in the Exchequer Chamber, *Plumstead Board of Works* v. *The British Land Co.*, 23 W. R. 634, L. R. 10 Q. B. 203, and the other in the House of Lords, *The Great Eastern Railway Co.* v. *The Hackney District Board of Works*, 31 W. R. 769, 8 App. Cas. 687—show that the ground of Blackburn, J.'s decision in the *Wakefield case* was erroneous, and consequently that the case is no longer law. It was said that the ground of his decision was that "owner" in the Act included, amongst others, the case of the owner of premises which were never capable of being let at a rack-rent, and that the two cases above mentioned showed that this was not so. Blackburn, J., in the same year as he decided the *Wakefield case*—1871—in the case of *Lord Northbrook* v. *Plumstead Board of Works*, 20 W. R. 177, L. R. 7 Q. B. 183, and again, in 1874, in *Plumstead Board of Works* v. *British Land Co.*, reaffirmed what he had said in the *Wakefield case*, but this later case was taken upon appeal to the Exchequer Chamber and reversed, and it is said that this reversal overruled the *Wakefield case*, and that the House of Lords, in the year 1883, in *The Great Eastern Railway* v. *Hackney Board of Works*, had done the same thing. The appellants' point is this—that it is not now correct to say that a person is an "owner" within the meaning of section 257 of the Public Health Act, 1875, if the property which he possesses is by law for ever incapable of being let at a rack-rent. They point out that, in the year 1868, prior to the *Wakefield case*, Blackburn, J., in the case of *Angell* v. *Vestry of Paddington*, 16 W. R. 1167, L. R. 3 Q. B. 714, had stated that he could not see how commissioners for building additional churches could be said to be owners within section 250 of the Metropolis Management Act, 1855, which, as regards "owner," is identical with section 4 of the Public Health Act of 1875. In the case of *Plumstead Board of Works* v. *British Land Co.*, in the Exchequer Chamber, it was held that, assuming the Land Co. to be owners of the soil of the roads, they were not "owners" thereof within section 250 of 18 & 19 Vict. c. 120 (the Metropolis Management Act of 1855), because the roads had been irrevocably dedicated to the public—in other words, because the roads had for ever become incapable of being let at a rack-rent, and therefore the Land Co. were not "owners" within the meaning of the section. We must point out that that judgment, which was delivered by Lord Coleridge, in which Bramwell, Cleasby, Pollock, and Amphlett, BB., and Grove, J., concurred, leaves out of consideration that the minerals under the roads were still the property of the defendants; but that case is nevertheless an authority binding upon us, that, if the land of an owner be irrevocably dedicated to the public, he is not an "owner" within the meaning of the Act. The *Wakefield case* was not cited in the *Plumstead case* in the Exchequer Chamber. Again, in the House of Lords in 1883, in the case of *Great Eastern Railway Co.* v. *The Hackney Board of Works*, the same thing was held. One point which arose in that case was whether the Great Eastern Railway Co. were "owners" of land within the meaning of the Act. Lord Watson, at p. 693, sums up the previous authorities, though the *Wakefield case* was again not referred to. He says: "The authorities cited in the course of the argument appear to me to establish this proposition—that the person vested with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burthen of a public right which deprives him of their lawful use, is not an owner within section 77 of the Act of 1862 (the Metro-

polis Local Management Act of 1862). The fences are mere accessories of the public highway, and are not, in my opinion, land capable of yielding a rack-rent to the appellants within the meaning of the statutes." Lord Blackburn agreed in this opinion. These two cases, in our judgment, show that if land be by statute for ever incapable of yielding a rack-rent, the owner thereof is not "owner" within the meaning of the Acts. In the year 1855, in *Wright* v. *Ingle*, this court had to consider the meaning of the word "owner" in the 250th section of the Metropolis Local Management Act of 1885, which, as before stated, is identical with section 4 of the Act of 1875. The court by no means overruled the *Wakefield case*, but on the contrary Lord Esher expressly says that he thought he was not overruling any previous case and that the *Wakefield case* remained untouched. He says: "If by statute a house or building . . . is put into such a category that it cannot, so long as the statute lasts, be let at all at a rack-rent, there never can be the 'owner' described in the 250th section." Bowen, L.J., says: "But section 250 does not confine the term 'owner' to those persons who could receive a rack-rent from the particular premises or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at such a rent, and I think *Bowditch* v. *Wakefield Local Board* is a conclusive authority, if authority were wanted, to show that a man is not the less the 'owner' of premises because by the provisions of the deed under which he holds them they cannot so long as he holds them be let at a rack-rent. Whether in the case of premises which were prevented by Act of Parliament from being let at a rack-rent there ever could be an owner within the meaning of section 250 I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an owner within the meaning of section 250." As before stated, Stirling, J., in *In re Christchurch Inclosure Act*, treated the case of *Bowditch* v. *Wakefield Local Board* as still standing, and in 1895, in the case of *The Vestry of St. Mary, Islington* v. *Cobbett*, Mathew, J., treated it as a binding authority. It is true that there is no provision for reverter in section 6 of the Act of 1841, under which the land was conveyed to the predecessors of the appellants, as there is in the prior sections—why this was omitted we do not know—but it will be seen that under section 14 of the Act of 1841 the present school premises and buildings may in certain events be sold or exchanged by the trustees for other land or buildings suitable to the purposes of their trust, in which case the school premises would become unfettered from the obligation "of being applied for the site for a school for poor persons of the parish and for no other purpose whatever"; and it would also seem that under section 23 of the Elementary Schools Act, 1870 (33 & 34 Vict. c. 75), the school might be transferred to a School Board either at a nominal rent or otherwise. In these circumstances, in our judgment, it cannot be said, as is said by the appellants, that the school premises are by statute incapacitated for ever from earning a rack-rent, and consequently the first point taken by the school trustees fails. It may be that the reason given by Lord Blackburn in the *Wakefield case* has been dissented from, but that does not necessarily make the decision itself wrong, for if in the *Wakefield case*, as in the present, the premises were not subject "in perpetuity to a public right," the decision is correct. In our judgment the *Wakefield case* as a decision stands, and consequently the district council have a charge upon the premises of the appellants.

We now come to the question whether this charge can be enforced by this court making an order for the sale of the school premises. It appears to me clear that the School Sites Act, 1841, never contemplated such a proceeding, for it enacts by the statutory form of conveyance that "the premises were to be conveyed for the purposes of the said Act and to be applied as a site for a school for poor persons of the parish, and for no other purpose whatever." As long as the premises remain a site for the school and are used as such, the court by ordering a sale, would be obviously acting in direct contravention of the special legislation of 1841, and, indeed, when the Act of 1841 was passed there was not, to our knowledge, any means by which a third party could obtain a charge upon the property, and *a fortiori* he could obtain no order for its sale. It is true by the general Act of 1875 (the Public Health Act of that year) in certain cases a local authority may get a charge upon premises for expenses incurred by them, but we can find nothing in the general Act to show that it was intended by the Legislature to override the manifest object of the special Act of 1841, which an order for the sale of the school premises would clearly frustrate. It may be said, Why give a charge if it is not to be enforced by an order for sale; but where in the general Act of 1875 can be found any indication of the Legislature that school sites when used for school purposes should be sold to pay paving expenses? It is familiar law that special Acts are not repealed by general Acts unless there is some express reference to the previous legislation upon the subject, or unless there is a necessary inconsistency in the two Acts standing together. The cases of *London and Blackwall Railway Co.* v. *Limehouse Board of Works*, 5 W. R. 64, 3 K. & J. 123, at pp. 127-128: *Thorpe* v. *Adams*, 19 W. R. 352, L. R. 6 C. P. 125; and *Fitzgerald* v. *Champneys*, 9 W. R. 850, 2 J. & H. 31, at pp. 54 and 55, are good examples of this.

For these reasons we are of opinion that Kekewich, J., was right when he held that the district council held a charge upon the school premises, but was not right in ordering a sale of them. The district council have a remedy against the trustees personally under the Act of 1875, but the time in this case has been allowed to elapse for the exercise of this remedy. As regards the charge which they have upon the school premises, the district council are not, in our judgment, entitled to ask the court for an order for the sale of them in the circumstances at present existing. The charge will stand, but the order for sale must be set aside, with costs here and below.

Appeal allowed.

Solicitors, *Lee, Bolton, & Lee; Leonard J. Tatham.*

From Prob. Div. and Adm. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — March 24; April 5.

SAUNDERS v. SAUNDERS. (a.)

Divorce—Practice—Co-respondent—Necessary party—Leave to proceed without—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 27, 28—*Divorce Rules,* 2, 4, 5, 6.

The court has a discretion, under section 28 *of the Matrimonial Causes Act,* 1857, *as to whether the petitioner may present a petition for divorce without adding a co-respondent. Such discretion is to be exercised*

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

having regard to the facts of each particular case, and it would be wrong in principle for the court to impose fetters upon the exercise of the powers which are left by law to its discretion in each case as it arises.

So held by the Court of Appeal, Lindley *and* Rigby, L.JJ. (A. L. Smith, L.J., *dissenting as to the exercise of the discretion in this particular case*).

Appeal of the petitioner, the husband in a suit for divorce, from Barnes, J.

The petitioner left this country on the 17th of April, 1894, and went to America. He returned on the 27th of May, 1896, and discovered that his wife had given birth to a child on the 27th of April, 1896, of which he was not the father. The birth of the child was registered without the name of any father. On the 2nd of June, 1896, the wife took out a bastardy summons against one Isaac Harry, alleging that he was the father of the child. The summons was returnable for the 17th of June, and was adjourned until the 8th of July for the attendance of witnesses. On the latter date the summons was struck out by the magistrates, the wife having failed to attend. The wife informed the husband's solicitors that Harry was the father of her child, and that she had never committed adultery with anyone else. On the other hand, Harry was prepared to swear that he had never had intercourse with Mrs. Saunders.

The husband moved before Barnes, J., for leave to proceed with his suit without adding a co-respondent.

Barnes, J., following a previous decision of his own (*Jones* v. *Jones*, [1896] P. 165, 44 W. R. Dig. 55) which had the approval of the President, refused leave.

The husband appealed.

Priestley, for the appellant.—There are cases both ways, and the practice is unsettled. It is not a fair construction of section 28 of the Divorce and Matrimonial Causes Act, 1857, to say that there must be a co-respondent in every case. Different judges have adopted different views, and in some of the following cases leave has been given and in others leave has been refused on different grounds. Although the last decision of Barnes, J. (*Jones* v. *Jones*), had the approval of the President, the practice is not settled and is not binding on this court.

The following cases were then referred to and discussed: *Jinkings* v. *Jinkings*, L. R. 1 P. & D. 330, 15 W. R. P. & D. Dig. 18; *Hook* v. *Hook*, 6 W. R. 868, 1 Sw. & Tr. 183; *Muspratt* v. *Muspratt*, 31 L. J. P. & M. 28, 10 W. R. Div. Dig. 15; *Quicke* v. *Quicke*, 10 W. R. 448, 31 L. J. P. & M. 28; *Carryer* v. *Carryer and Watson*, 13 W. R. 507, 4 Sw. & Tr. 94; *Payne* v. *Payne, Rodway, and Eddels*, 60 L. T. Rep. 238, 37 W. R. Dig. 67; *Gill* v. *Gill*, 37 W. R. 623, 60 L. T. Rep. 712; *Cornish* v. *Cornish*, L. R. 15 P. & D. 131, 38 W. R. Dig. 68; *Bagot* v. *Bagot*, 62 L. T. Rep. 612, 38 W. R. Dig. 68; *Miles* v. *Miles*, "Times" 20th March, 1896; and *Jones* v. *Jones*.

On the true reading of the section the persons to be before the court are those who are implicated by the petitioner, and not by the respondent.

Cur. adv. vult.

April 5.—LINDLEY, L.J.—This is an appeal from the refusal of Barnes, J., to allow the petition of a husband, who seeks a divorce from his wife on the ground of her adultery, to proceed without making the person who she says committed adultery with her a co-respondent.

Before considering the facts, I will state what I conceive to be the legal principles applicable to the case.

By section 27 of the Divorce Act every petition for dissolution of marriage "shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded"; and by section 28, "upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent on the said petition unless on special grounds, to be allowed by the court, he shall be excused from so doing." By section 11 of 21 & 22 Vict. c. 108, a person named as co-respondent may be dismissed by the court from the suit if the court thinks there is not sufficient evidence against him. By the Divorce Rules of 1865 every petition must be verified by the petitioner's verifying the facts of which he has personal cognizance and deposing as to his belief in the bulk of the other facts alleged in the petition (rule 2). Alleged adulterers must be made co-respondents unless the judge shall otherwise direct (rule 4), and applications for such direction must be supported by affidavits (rule 5). If the name of the alleged adulterer is unknown to the petitioner when he presents his petition, the name must be supplied as soon as known, and the petition must be amended accordingly (rule 6).

Now, looking at these Acts and rules, and construing them without assistance from authorities, it appears to me that by "alleged adulterer" in section 28 and rule 4 is meant alleged by the petitioner in his petition. If the petitioner does not allege any adulterer, section 28 and rule 4 do not apply to the case. But rule 6 shows that if the petitioner knows the name of the alleged adulterer the petitioner must insert his name in the petition, and then by section 28 and rule 4 the person so named must be made a co-respondent unless the judge on special grounds otherwise directs. This, however, raises the question what is meant in rule 6 by the name of the alleged adulterer being unknown to the petitioner. Actual personal knowledge by the petitioner of the adultery charged and of the guilt of an adulterer cannot be expected, and it appears to me absurd to suppose that no name of any adulterer need be stated in the petition unless the petitioner has personal knowledge of his guilt and identity. The expression "unknown" in rule 6 refers to name and not to guilt, and the expression "alleged adulterer" in rule 6 cannot refer to any person already named in the petition, for the rule only applies where the name of the alleged adulterer is known. It seems to me plain that, if a petitioning husband is in any way informed of the name of anyone said to have committed adultery with his wife, he must make up his mind whether he will charge such person with adultery or not. If he decides that he will, he must in his petition allege adultery between his wife and such person and make him a co-respondent, unless the judge excuses the petitioner from so doing. On the other hand, if the husband decides that he will not charge adultery between his wife and the person named to him as guilty of adultery with his wife, whether because the husband does not believe in the truth of the accusation, or because he is convinced that he cannot prove such person's guilt, or for any other reason, there is a difficulty, for such a case is not very clearly provided for either by the statute or by the rules. The practice in such cases I understand to be to charge adultery with some person unknown and to apply to the court for leave to dispense with a co-respondent upon a special affidavit stating the information which the petitioner has as to the supposed adulterer, and stating the grounds on which the petitioner asks to be excused from making him a co-respondent: see *Pitt* v. *Pitt*, L. R. 1 P. & D. 464, 16 W. R. P. and D. Dig. 8; *Tollemache* v. *Tollemache*, 28 L. J. P. & M. 2, 7 W. R. Div. Dig. 12. This is what the petitioner has done in this case. The Act and the rules, and the practice of the court based upon them, make it quite plain that in

such cases as these it is for the court, and not for the petitioner, to decide whether a person whose name is known to the petitioner as a person accused of adultery with his wife on the occasion of the adultery charged against her shall or shall not be made a co-respondent. On the other hand, it is for the petitioner to decide whether damages shall be claimed against a co-respondent or not. (See sections 33 and 50 of the Act.) What ought to be done about the costs of a co-respondent unwillingly made so by the petitioner, but ordered by the court to be made a co-respondent as a condition for proceeding with the petition, is a matter for the court to decide in each particular case. (Section 51 of the Act.) The court must be trusted to do what is right when all the facts are before it. The duty of the judge in deciding whether the petitioner is to be excused from making co-respondent a person who has been named to him as an adulterer is clearly indicated by section 28 of the Act; and although confined in its terms to the case where that person is accused by the petitioner, that section has very properly been taken as a guide in other cases, and I gather from the decisions on the subject that special grounds are required to be shown for not making co-respondents persons who the petitioner is informed are the delinquents. This practice is quite in accordance with the Act and rules.

On all applications to be excused from making a person a co-respondent, whether such person is charged with adultery in the petition or not, the judge's duty is by no means confined to the consideration of the interests of the petitioner, the respondent, and the other persons implicated. The Act shows plainly enough that the judge's duty is far wider than this. The provisions in the Divorce Act relating to the Queen's Proctor show that divorce is not regarded as a matter which concerns only husbands and wives and those guilty of adultery. Divorce is regarded as a matter of grave social importance, in which the public are greatly concerned; and the judge, in considering what ought to be done in such cases as that now before us, is bound to protect this public interest, and to do what he can to prevent collusive divorces, and to check all other abuses of divorce proceedings which experience may show are likely to occur. This has always been the view taken by the eminent men who have been entrusted with the duty of exercising jurisdiction in divorce cases, and will, I trust, never be lost sight of. The Legislature have purposely refrained from defining or enumerating special circumstances, and to define them is really to legislate. All that can be said is that the judge must be guided by the great principles laid down in the Act and rules, or to be gathered from them, and by the circumstances of each particular case as it arises. No doubt cases with common features constantly recur, and the best mode of dealing with them may be learned by experience, and become part of the ordinary practice of the court. But that practice should not be allowed to become a fetter, and should give way at once if circumstances arise which render its observance unjust or inexpedient. I am induced to make these observations because in *Jones* v. *Jones* a practice which may be conveniently followed in many cases looks as if it were in process of becoming a fetter on the judge. And in this very case we are told that the learned judge acted in accordance with the rule laid down in *Jones* v. *Jones*, rather than on an independent consideration of the circumstances of the case itself. It appears to me wrong in principle for any court or judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises. In *Jones* v. *Jones*, which was a case very like the present, Barnes, J., reviewed all the previous cases to be found in the reports. It appears from the last paragraph of his judgment that he was not satisfied that the petitioner there could not obtain evidence of adultery by the person whose name he knew. This was an abundantly sufficient reason for refusing leave to the petitioner to proceed without making that person a co-respondent. But Barnes, J., as I understand his judgment, laid down, and intended to lay down, with the consent of the President, a general rule which he thus expressed: "Where the relief sought against the respondent is on the ground of adultery alleged to have been committed with a man whose name and identity are known, and who is alive, the petitioner must make such person a co-respondent, and the court ought not to excuse him from so doing merely because he finds that he cannot obtain evidence which will prove his case against such co-respondent." If I understand this passage correctly, it means that if a husband seeks a divorce from his wife on the ground of adultery, and he knows the name of a person who the petitioner is informed was her paramour, the petitioner must make that person a co-respondent, although the petitioner is convinced that he cannot obtain evidence to prove the man's guilt, and although he adduces satisfactory evidence that he really cannot do so. No such rule can, in my opinion, be extracted from the statutes, nor from the rules promulgated under their authority, nor from previously decided cases. It is, in my opinion, rather opposed to than supported by the course adopted by Sir Cresswell Cresswell, Lord Penzance, and Lord Hannen. See *Muspratt* v. *Muspratt*, *Carryer* v. *Carryer*, *Jinkings* v. *Jinkings*, *Bagot* v. *Bagot*. Some cases before Butt, J., appear to be in conflict with these. But the truth is, there is no settled rule applicable to all cases, nor can I see how there should be. The rule laid down in *Jones* v. *Jones* might be well suited to many cases, yet it might in many other cases press very hardly on a petitioner, without being the least necessary for the protection of the public. Such a rule might well be often relaxed where a wife had been living in a brothel, or where she had had a child of which her husband could not have been the father; and the rule would be most mischievous in those common cases in which a wife falsely accuses one man in order to screen another. Instead of following any such rule as that laid down in *Jones* v. *Jones*, the court ought, in my opinion, to apply its mind to each particular case; and, being guided by the statute, the rules of court, and what experience shows to be dangers to be avoided, the court should decide what in each case it is most just and expedient to do. Guided by this principle, I proceed to examine this particular case. [His lordship referred to the facts, and continued:] The adultery of the wife seems capable of easy proof. No evidence can be obtained against the man she accuses, and the petitioner cannot bring himself to swear that he believes that man to be the real adulterer. The solicitor's affidavit shows that honest efforts have been made to obtain evidence against him. I see no reason to doubt any part of this story. But if Barnes, J., had considered the evidence and had said that he was not satisfied with it, I should have thought it wrong to overrule his decision on such a point. He appears, however, simply to have decided the case on *Jones* v. *Jones*. I cannot think this was right; and as it is the duty of this court to make the order which ought to have been made in the first instance, I am of opinion that the appeal should be allowed, and that leave to proceed without naming any co-respondent should be granted.

A. L. SMITH, L.J.—The respondent's non-attendance upon the 8th of July, 1896, is, in my opinion, to be accounted for by the fact that by the Bastardy Act only a single and not a married woman can by law support such a summons, and that her non-attendance does not show that her statement as regards Harry is necessarily untrue. Now, in circumstances such as these, is a petitioner entitled to proceed without making the supposed adulterer co-respondent? The petitioner asserts that he is, because, as he says, he has only the wife's acts and statements to rely upon as proof of Harry's adultery with her, which are not evidence against him; that he cannot obtain other evidence against him; and that, as he can establish the adultery of the wife by proof of the child's birth, and by his own evidence of absence beyond the seas, he need not make Harry a co-respondent; and that, if Harry is not made a co-respondent, the case will probably be undefended and of small expense, whereas, if Harry is made a co-respondent, he will be dismissed from the suit for want of evidence against him, and the petitioner will have to pay his costs. Assuming the wife's statement to be true, and that she did in fact commit adultery with Harry, I should think that the judge who tried the case would not by any means necessarily condemn the petitioner in Harry's costs, but, on the contrary, would leave Harry to pay his own costs, which he would richly deserve to pay. [His lordship read sections 27 and 28 of the Act of 1857, and rules 4 and 6 of the Divorce Court Rules, and continued:] The "alleged adulterer" in the Act and rules, in my judgment, means the person with whom the accused wife is supposed to have committed the adultery charged; it does not mean only the person whom the petitioner may charge with the adultery in his petition as being the adulterer. The case of *Pitt* v. *Pitt* shows that this is so. I apprehend that one object, at any rate, which the Legislature had in view when it enacted that "the petitioner shall make the alleged adulterer a co-respondent" was that the court should have before it a person whose interest it was to prevent a decree from being obtained at his expense by collusion between the husband and the wife, and who might be able to check statements made by the one or the other. That some husbands and wives do agree together to, if possible, obtain from the court a decree for divorce for purposes of their own cannot be denied. If the petitioner has been informed of the name of the person with whom the accused wife is supposed to have committed the adultery charged, in my judgment he is bound to insert the name of that person in his petition as co-respondent, "unless on special grounds he shall be excused by the court from so doing." No dispensing power is given to a petitioner in the matter, as I understand that the practice of the Divorce Court is that, if it finds that a petitioner was informed of the name of a person supposed to have committed the adultery charged with the wife, and has not made him co-respondent (no leave having been obtained to dispense with him), the court stays the petition, and orders the supposed adulterer to be joined as co-respondent. The statute and the rules are not to be evaded by a petitioner leaving out of his petition upon his own motion the name of the person supposed to have been guilty of the adultery charged. This person cannot be left out, unless on special grounds the court gives leave that he should be. The petitioner cannot proceed with his petition if he names no co-respondent, without the leave of the court. *Pitt* v. *Pitt* and *Tollemache* v. *Tollemache* decide this. [His lordship then said that the argument was that the decided cases showed that the court was bound to allow a husband's petition to proceed without a co-respondent where the alleged adultery was with a person unknown. His lordship having reviewed the cases upon the point decided between 1858 and 1890, continued:] In this remarkable want of unanimity of practice amongst the great judges who have presided over the Divorce Court since its formation, I can collect no such consensus of opinion as to establish any rule as to what constitutes "special grounds," within the meaning of section 28 of the Act of 1857, for dispensing with a co-respondent. Since 1890 what authorities there are show that the mere fact that the petitioner has only the wife's confession to rely upon as to her adultery does not afford special ground for dispensing with a co-respondent, if the petitioner has in fact information of the supposed adulterer's name and place abode. This class of case is ever and again recurring. In the year 1896, in *Jones* v. *Jones*, Barnes, J., went through the cases, and, with the assent of the President (Sir Francis Jeune), laid down the rule, as I read it, that the mere fact of a petitioner being unable to obtain evidence against a man who is alleged to have committed the adultery charged with his wife, although he has evidence that she has committed the adultery with him, is not of itself a sufficient special ground for exempting a petitioner from making that man a co-respondent. There must be something more. I agree with the rule. If it were held that the alleged want of evidence against the adulterer was sufficient, it would open the door wide to many a collusive suit, not only between the petitioner and the respondent, but also between them and the supposed adulterer, which certainly was not the intention of the Legislature, and against which the Court of Divorce is ever on its guard. This rule does not, as it seems to me, fetter the discretion of the court, which is given to it by the Legislature, when considering generally what are sufficient special grounds for dispensing with a co-respondent; it simply lays down that this one ground by itself is not sufficient.

In the present case, for the reasons above, I think that Barnes, J., came to a right conclusion in refusing leave to the petitioner to proceed with his suit without making Harry a co-respondent; and that the appeal should be dismissed.

RIGBY, L.J.—The ground on which the petitioner asks for relief is very simple—viz., that he left this country for America in 1894, was absent during the whole of 1895, and did not return until May of 1896, when he found that in April, 1896, his wife had given birth to a child. If he is in a position to prove his absence beyond seas during the whole time alleged by him, proof of the birth of the child would, of course, be conclusive as to his wife's adultery without further inquiry into the parentage of the child. His wife alleges that the father of the child was a man whose name she gives, but the petitioner's affidavits show that he has tried and failed to find any evidence against this man, and that the petitioner is unable to say that to the best of his belief the man is the father of the child. Under the circumstances he does not make a charge of adultery against him or propose to use evidence pointing to him as the father, and continues to charge against his wife adultery with some person unknown. No doubt it was the duty of the petitioner, though he does not allege adultery with his wife against any named adulterer, to apply to the court for liberty to proceed without making a co-respondent. This he has done, alleging the facts above stated as special grounds on which the liberty should be granted. Barnes, J., has refused the liberty, relying, as we are told, on a rule laid down by him in *Jones* v. *Jones*, that where the relief sought against the respondent is on the ground of adultery

alleged to have been committed with a man whose name and identity are known and who is alive, the petitioner must make such a person a co-respondent, and that the court ought not to excuse him from so doing merely because he finds that he cannot obtain evidence which will prove his case against such co-respondent. Now, I entirely concur in all that has been said by Lindley, L.J., on the duty of the court to avoid laying down any rule which can prevent it from exercising in any case the discretion given by statute as to relieving a petitioner on special grounds from the necessity of making a co-respondent. In my opinion the 28th section of the Act of 1857 shows that the intention of the Legislature was that such a discretion should always be vested in the court. But even as an enunciation of what ought to be the practice of the court, I think the rule as interpreted by its application in *Jones* v. *Jones* and in the present case goes far beyond what is authorized either by the statutes or the previous decisions of the court.

The interpretation given by the decisions in *Jones* v. *Jones* and the present case to the rule would make it go to this extent, that relief is sought on the ground of adultery with a particular man when the petitioner himself disclaims any such ground of relief, and does not propose to give evidence even against the respondent which in any way points to the person suggested as a proper co-respondent, and that the wife's mentioning the name of a man as father to her child is sufficient to oust the discretion of the court and to make it compulsory on the petitioner to make a charge which he never intended to make against a man whom he may believe to be quite innocent. I took a note of the decisions referred to by Mr. Priestley, including all that are commented upon by Barnes, J., in his judgment in *Jones* v. *Jones* and down to the year 1896. There are several in which liberty to proceed without a co-respondent has been given, notwithstanding that the petitioner has taken up a charge against him and named him in the petition. I do not think that there is one in which the court has refused leave to the petitioner to proceed without making a co-respondent unless the petitioner has taken up the charge against a particular man, by whomsoever made originally, and relied upon it in his petition. I do not say that it ought never to be done. There ought to be no hard and fast rule; each case should be determined on its own facts. *Quicke* v. *Quicke*, as I understand it, decided nothing more than that there must be an affidavit by the petitioner as to the facts on which he relied. But it is obvious that great hardship might be inflicted upon a petitioner, without any compensatory probability of advantage to the person charged by the wife or the public, by acting upon a rule that the wife's naming an adulterer should practically decide that he must be made a co-respondent. A guilty wife naming one or more men as adulterers with her, even though it might be for the purpose of screening the real adulterer, might thus render it practically impossible for the petitioner to proceed, and so deprive him of a divorce to which, on the merits, he would be entitled. In the present case, whether it falls within the rule of *Jones* v. *Jones* or not, I am of opinion that the petitioner ought to be allowed to proceed without making a co-respondent.

Appeal allowed.

Solicitors, *Crowders & Vizard*, for *W. Howard*, Danelly.

High Court of Justice.

Chan. Div. Kekewich, J. — March 23, 24; April 6.

VISCOUNT HILL v. BULLOCK. (a.)

Fixtures—Tenant for life and remainderman—Mansion house—Natural history museum—Stuffed birds and animals.

Specimens of stuffed birds and animals which form part of a natural history collection in a museum built on to the mansion-house, are not fixtures so as to devolve with the freehold under the limitations of the settlement.

This was an action by the Right Honourable Rowland Richard Clegg Hill, Viscount Hill, the tenant for life of the mansion-house and settled estates at Hawkstone, in the county of Salop, and William Slaney Kenyon-Slaney, the surviving trustee of the settlement, for an injunction to restrain the defendant, his servants and agents, from removing or causing to be removed from the said mansion-house any pictures or other chattels fixed to the walls or floors of the said house, or other fixtures therein, or any heirlooms or settled chattels, and also for a mandatory injunction ordering the defendant to restore any such fixtures, heirlooms, and chattels as had been removed by him.

The defendant was the trustee in bankruptcy of the Right Honourable Rowland Clegg, late Viscount Hill, deceased, who was adjudicated bankrupt on the 24th of August, 1894, and who died on the 30th of March, 1895. The defendant claimed the articles in dispute on the ground that they were the personal property of the late viscount and did not pass as fixtures to the present viscount under the limitations of the settlement. The settled estates had been disentailed by the plaintiff and his father in 1887, and on the subsequent resettlement they were conveyed to the use of the late viscount for life with remainder to the use of the plaintiff for life with remainders over. The list of the articles so removed and claimed by the defendant comprised the following: (1) The fixed cases with the birds and animals and other objects in "The Bird Gallery"; (2) the picture rods and stair rods throughout the house fitted in rings or brackets attached to the stairs or walls; and (3) the fixed tables and other furniture and decorative objects in the hall. The room above referred to as "The Bird Gallery" was built between the years 1831 and 1834, and was intended to form a museum for a natural history collection. Iron cases had been fixed to the walls of the museum, being supported or attached thereto by iron brackets let into the wall. The cases in the middle of the room were made of wood and were not fixed, but rested by their own weight. Wooden trays or drawers were fitted into these iron cases and were removable at pleasure. The specimens of birds and animals were of considerable value and were mounted in the usual manner, some standing by themselves, others being fixed to imitation rockwork or branches lying on the wooden trays and fitting inside the cases. At the trial the dispute between the parties was mainly confined to the question whether the specimens comprising the natural history collection were fixtures or personal chattels.

Renshaw, Q.C., Christopher James, and *H. J. Rowlands* for the plaintiffs.—These metal cases were as much a part of the structure of this museum as were

(a.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

the windows and the doors. The cases were fixed to the walls, and the birds are accessory to the cases and are therefore part of the freehold.

They cited the following cases: *Lawton* v. *Lawton*, 3 Atk. 12; *Lord Dudley* v. *Lord Warde*, Ambl. 113; *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382; *Norton* v. *Dashwood*, 44 W. R. 680, [1896] 2 Ch. 497; *Bulkeley* v. *Lyne Stephens*, 11 T. L. R. 564; *Holland* v. *Hodson*, 20 W. R. 990, L. R. 7 C. P. 328; *Hobson* v. *Gorringe*, *ante*, 356, [1897] 1 Ch. 182; *Ex parte Astbury*, 17 W. R. 997, L. R. 4 Ch. App. 630; *Elwes* v. *Maw*, 3 East. 38.

P. O. Lawence, Q.C., and *Muir Mackenzie*, for the defendant.—The defendant does not claim the cases, but the birds; he admits the cases are fixtures. The birds are not fixtures, for they are not accessory to the cases, but on the contrary the cases are accessory to the birds just as book-cases are accessory to books or drawers to the butterflies they contain. All these cases were made so that the birds might be enjoyed as chattels. The freehold was built for the birds, the birds were not collected so that the freehold might be enjoyed.

Christopher James, in reply.—The argument that the cases are accessory to the birds does not make any difference, they are one whole thing, they are cases filled up with birds, they are not merely cases with a few birds put anyhow. The plaintiffs want neither cases nor birds, they want cases of birds. These birds have been in the cases fifty years, and it cannot be argued that they are only put there temporarily. Books are not analogous, they are used daily, and they are not put in the shelves for ornament, as these birds were.

April 6.—KEKEWICH, J.—It is conceded that all the articles in question belong to the defendant as trustee in bankruptcy of the late Viscount Hill, except and so far as they can be treated as in fact or in the eye of the law annexed to the mansion-house of Hawkstone, of which the present Viscount Hill is now tenant for life in possession.

In the course of the argument, Mr. Lawrence, on behalf of the defendant, abandoned his claim to certain tables which had been removed, but not sold, and which were alleged to have been fixed to the walls of the apartments in which they stood in order to complete the design of these apartments. Mr. Lawrence did not admit that he did this on compulsion, and the abandonment of these particular articles cannot be treated as weakening his case or strengthening that of the plaintiff as regards any others. On the other hand, it was practically, if not nominally, admitted by the plaintiff that all such things—*e.g.*, glasses—as are generally treated as personal chattels, and which can be removed without injury to the freehold, passed to the defendant, and no more need be said about them. There was a contest to the last about a Royal uniform, generally described as "the trophy," which was fixed to a case hung on a wall. This having been not only removed, but sold, the defendant was not in a position to restore it, and I think he cannot be made liable for it. I am of opinion that "the trophy" falls within the class of personal chattels above mentioned.

There remains to be considered the question whether any and which of the contents of the museum belong to the defendant, or must be treated as part of the freehold. These contents consist of a collection of stuffed birds made with some care and catalogued. Mr. Lawrence from the first admitted that he could not remove the cases, which are of solid manufacture and are securely fixed to the walls in such a manner that they undoubtedly form part of the apartment—the museum—in which they stand. This, of course, does not satisfy the plaintiff, whose position was neatly and forcibly stated by Mr. James in reply. "I want," said he, "neither cases nor birds, but cases of birds." The birds are fixed as such things usually are—on twigs or imitations of rock, which in their turn are fixed on wooden trays fitted into the metal cases. There is really no difficulty in removing these wooden trays, nor really would there be any difficulty in leaving the trays and removing the birds so that they could be fixed in a similar or different manner elsewhere. It seems to me that the contents of the cases must be regarded as movable personal chattels, unless they can be brought within some recognized exception to the general law respecting fixtures. In fact the argument on behalf of the plaintiff depended entirely on the application to the circumstances of this case of the decision of Lord Romilly in *D'Eyncourt* v. *Gregory*. Before considering the principle which that case is said to have established, or, in other words, the exception to the general law which it is said to have laid down, it is well to observe what question was then before the court in respect of which the decision is applicable to the present case. The question arose on a will by which the tenant for life of settled estates and the owner of other estates in fee simple had endeavoured, by the doctrine of election, to force both into one settlement and to comprise in it the decorative contents added by himself to a mansion-house forming part of the settled estates. The key to the decision is found in a passage in Lord Romilly's judgment, commencing at the bottom of p. 393: "In the first place, I think it is obvious that the testator by the shifting clause meant to coerce as powerfully as he could the tenant in tail in possession of the settled estates, and to induce him to resettle those estates; and, in the event of his refusing to do so, the testator intended to take away from him every article of property he could." We must read the rest of the judgment, so far as it concerns the present case, with reference to that passage. "Having that in view," Lord Romilly says, on p. 396, "I think it does not depend on whether any cement is used for fixing these articles or whether they rest by their own weight, but upon this—whether they are strictly and properly part of the architectural design for the hall and staircase itself and put in there as such as distinguished from mere ornaments to be afterwards added." And a little lower down he admits the distinction which he endeavoured to make to be extremely thin and difficult of application. I do not think that any of the other authorities cited directly bear on the point before me. *Lawton* v. *Lawton* was cited more for showing how the court deals with these questions as between tenant for life and remainderman than for any other purpose, and I cannot see that it otherwise assists the plaintiff. Reference was made to some other decisions where well-recognized rules in favour of what are called "trade fixtures" were applied, and also to some where equally well-recognized rules touching the relative rights of mortgagor and mortgagee were discussed. There is no advantage in further alluding to them, for they really do not bear on the question in hand. *D'Eyncourt* v. *Gregory* has been cited and followed in two recent cases. In the first of these, *Bulkeley* v. *Lyne Stephens*, Stirling, J., applied Lord Romilly's principle to circumstances which, in his judgment, brought that case within it. He upheld the report of a referee who had found that certain statutes and other things specified formed part of the original design of the mansion-house, and in that sense were annexed to the freehold. In the second, *Norton* v. *Dashwood*, Chitty, J., again fol-

lowed *D'Eyncourt* v. *Gregory*, and held that tapestry passed as a fixture under a devise of the mansion-house, but, as I understand the judgment, because the tapestry was physically annexed, and not by reason of any architectural design. Here I have a case quite different in detail from *Bulkeley* v. *Lyne Stephens*, and, though not failing to note that the principle was there applied, I do not find in Stirling, J.'s judgment any lines according to which I can determine the limits of its application here. I, of course, see that if the cases are emptied of their contents the character of the museum will be entirely altered. In truth, it will cease to be a museum and will be converted into a room which may become a museum again, and in which some extensive and useful preparations have already been made towards that end. Until the cases have been again stored with their appropriate contents they not only answer no useful purpose, but may well be regarded as an eyesore. Yet I think the architectural design of the museum must be restricted to the preparations just mentioned, and cannot properly be extended to the collection in view of which those preparations were originally made. The contents of any particular case cannot be regarded as permanent, and, in fact, it appears that, as was natural, additions have from time to time been made to the museum, so that now, although still comprising those originally placed there, it also comprises others intended to make the collection more perfect. So far as I know, these additions have not introduced any variations into the original arrangement, but successive owners of the mansion-house might well from time to time make variations, and I should rather suppose that some would be occasionally required to maintain the scientific order of the collection.

These and other considerations force me to the conclusion that the contents of the cases cannot be regarded as falling within the principle stated by Lord Romilly, and I must hold that they are not annexed to the mansion-house but belong to the defendant. If this view be sound, it follows that the many objects of a like character to the contents of the cases which are to be found in the museum placed where the convenience of the moment or the taste of the occupant dictated also belong to the defendant. As regards all these, the position of the plaintiff is far weaker than as regards the contents of the cases, about which only I have entertained any serious doubt.

Solicitors, *Stibbard, Gibson, & Co.*, for *Rowlands & Co.*, Birmingham; *Pritchard, Englefield, & Co.*, for *E. Bygott*, Wem.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) April 1.

THE ATTORNEY-GENERAL v. FAIRLEY AND OTHERS. (*a*.)

Inland revenue—Settlement estate duty—Contingent settlement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-section* 1 (a)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1.

A contingent settlement of property is a settlement within the meaning of section 5 (1) *of the Finance Act*, 1894, *and the property so settled is liable to settlement estate duty under that section.*

A testator devised his residuary estate to trustees upon trust to pay the income thereof to his wife during her life, and after her death in trust for all his children who being sons should attain the age of twenty-one, or being daughters should attain that age or marry under that age, in equal shares, and if there should be only one such child the whole to be in trust for that one child, and he directed that the trustees should retain the share of each daughter upon trust to pay the income thereof to her for her life, and after her death in trust for the children of such daughter. The testator died leaving at his death two sons and one daughter, all being under the age of twenty-one and unmarried.

Held, that settlement estate duty was payable under section 5 (1), *not only upon the daughter's share, but also upon the whole residuary estate, as the whole was settled within the meaning of the section.*

Information claiming settlement estate duty under section 5, sub-section 1, of the Finance Act, 1894.

By his will John Fairley appointed the defendants to be executors and trustees of his will, and he devised all his real and personal estate not thereby otherwise disposed of to his trustees upon trust for sale and conversion into money, and after payment of debts and legacies to invest the residue and to stand possessed of the residuary trust moneys and the investments for the time being representing the same (called the residuary trust funds) in trust to pay the income thereof to his wife during her life if she should so long remain his widow, and if she should marry again then from and after her second marriage in trust to pay to his wife during her life an annuity of £50, and after her decease or second marriage in trust for all the testator's children, who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry under that age, in equal shares, and if there should be only one such child then the whole to be in trust for that one child, provided always that his trustees should retain the share of each of his daughters upon trust to pay the income thereof to his same daughter for life for her sole and separate use without power of anticipation during coverture and from and after her death in trust for the children of his same daughter or any of them, or any of their issue, in such shares if more than one, and in such manner as she should by deed or will appoint, and in default of such appointment in trust for the children of the same daughter, who, being male, should attain the age of twenty-one, or, being female, should attain that age or marry under that age in equal shares, and if there be only one such child the whole to be in trust for that one child, and in case there should be no such child of the same daughter then upon such trusts as such daughter should by deed, when not under coverture, or by will appoint, and in default of such appointment in trust for the testator's other children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry under that age, in equal shares, the shares accruing to daughters to be subject to the trusts thereby declared concerning their original shares.

The testator died on the 7th of November, 1895, and his will was proved by the defendants, his executors, on the 30th of November, 1895, and estate duty was paid on a net estate of £33,000.

The testator at the time of his death left three children—namely, two sons and one daughter, all being under the age of twenty-one years and unmarried.

The Commissioners of Inland Revenue claimed from the defendants, as such executors, settlement estate duty under section 5, sub-section 1, of the Finance Act, 1894, on the whole of the testator's

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

residuary estate; but the defendants refused to pay settlement estate duty on more than one equal third part of the residuary estate.

The Finance Act, 1894 (57 & 58 Vict. c. 30), enacts:

Section 5 (1).—"Where property in respect of which estate duty is leviable is settled by the will of the deceased, or, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the property:—

"(*a*) A further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(*b*) during the continuance of the settlement the settlement estate duty shall not be payable more than once."

Section 22.—"(*h*) The expression 'settled property' means property comprised in a settlement.

"(*i*) The expression 'settlement' means any instrument, whether relating to real property or to personal property, which is a settlement within the meaning of section 2 of the Settled Land Act, 1882."

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), enacts:

Section 2 (1).—"Any deed, will, agreement for a settlement, or other agreement, . . . or other instrument, . . . under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement."

Sir R. Webster, A.G., Sir R. Finlay, S.G., and *Vaughan Hawkins*, for the Crown.—By section 22 (*h*) and (*i*), a "settlement" for the purposes of the Finance Act, 1894, is to be a "settlement" as defined by the Settled Land Act, 1882, s. 2. The question then is, whether there is in this case a "settlement" within the meaning of section 2 of the Settled Land Act, 1882; whether in fact this property by this will "stands for the time being limited to or in trust for any persons by way of succession." We submit that there is a settlement within that section. In the first place, there is a settlement in trust, as the property is settled in trustees upon certain trusts. Then there is a life interest given to the widow, and after the death of the widow there are interests given in succession to the children. The property was therefore settled in trust under this settlement, and it was so settled for persons by way of succession. In addition to the life interest given to the widow, there is also a life interest given to the daughter, and there is a succession amongst the children, and shares which would accrue to them upon a contingency would constitute a succession: *In re Goodwin's Settled Estates*, 10 W. R. 612, 3 Giff. 620. Upon similar words in other Acts it has been held that there was a settlement: *In re Shepheard's Settled Estate*, L. R. 8 Eq. 571. 18 W. R. Ch. Dig. 122, and *Collett* v. *Collett*, L. R. 2 Eq. 203, in which cases it was held there was a settlement within section 1 of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120), and in *Dixie* v. *Dixie*, W. N. [1881] p. 49, there was held to be a settlement within the Leases and Sales of Settled Estates Act, 1877. There is also a right of accruer of the whole fund to the daughter upon the happening of certain contingencies, in which case the whole would be subject to the settlement and would stand limited in trust by way of succession as between her and her children. Again it will be said that the exception in the section applies, but in addition to the life interest given to the widow there is also a life interest given to the daughter which takes the case out of the exception. There is therefore a settlement of the whole estate within the meaning of the section.

Warrington, Q.C., and *Dibdin*, for the defendants.—It is admitted that the daughter's third share is settled and settlement estate duty has been paid with respect to that. The Act does not impose settlement estate duty upon the whole because by the happening of contingencies which may not happen the whole estate may afterwards become settled. If the daughter's life interest creates a settlement of the whole so as to render the whole liable to this duty then if she died under the age of twenty-one she would never become entitled to a share at all, and her life interest would not take effect, and yet duty would have been paid upon the whole. The period at which it is to be determined once for all what duty is payable is the death of the deceased, that is, the testator, at which time duty would not be payable upon the whole. For the purposes of this section the life interest given to the widow must be left out altogether, and the only thing not covered by that exception is the daughter's life interest in her share.

He referred to *In re Burdin's Will*, 28 L. J. Ch. 840, 8 W. R. Ch. Dig. 35.

WILLIAMS, J.—In my judgment the settlement duty imposed by the 5th section, is a duty imposed upon that part of the property which is settled, and not on the whole estate if only part of that estate be settled. Secondly, a contingent settlement of the whole or part is a settlement of the whole or part, as the case may be, and not the less so because there may be, by the same instrument, an alternative prior mode of dealing with the same property or part of the property, the continuance of which would exclude the contingent settlement altogether. Then, thirdly, I think the existence of such a contingent settlement for a life estate and estates in remainder excludes the defendants from the benefit of the exception in section 5. And, lastly, I think that an absolute settlement of a part of an estate (in this case we have it in the daughter's third), together with the contingent settlement of the residue—that is, of the two-thirds in this case given to the brothers—constitutes for the purpose of the Finance Act a settlement of the whole estate.

KENNEDY, J.—I entirely concur, and I merely state the last proposition, that the settlement of a part of an estate, such as the daughter's third share in this case, coupled with a contingent settlement of the residue—in this case represented by the brothers' two-thirds—ought to be treated for the purpose of this Act as constituting a settlement of the whole estate.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *Hewitt & Urquhart*, for *Doyle & Bowden*, Manchester.

Privy Council.

(*From the Supreme Court of Natal.*)

March 10.

THE SALISBURY GOLD MINING CO. (LIMITED) v. HATHORN AND OTHERS. (a.)

Company — Adjournment of meeting — Chairman's authority—Articles giving power to adjourn—Leave to appeal.

Where the articles of association of a company provided that the chairman might, with the consent of the members present at any meeting, adjourn the same from time to time and from place to place in P.,

Held, that the chairman was not bound to adjourn the meeting, even though a majority of those present desired the adjournment.

Under the special circumstances of the case special leave to appeal was given at the hearing.

This was an appeal from the Supreme Court of Natal.

The facts are given in their lordships' judgment.

Buckley, Q.C., Danckwerts, and *Gwynne James,* for the appellants.

Israel Davies, for the respondents.

The judgment of their lordships (Lord HALSBURY, C., and Lords HERSCHELL, WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND, and DAVEY, and Sir RICHARD COUCH) was delivered by

Lord HERSCHELL.—This appeal arises in an action brought by the respondents in the Supreme Court of the Colony of Natal. They are duly registered shareholders in the appellant company, against whose secretary, as representing the company, the action was brought. The respondents stated in their declaration that they sued for and on behalf of themselves and all others the shareholders of the company. The declaration alleged that an extraordinary or special general meeting of shareholders was held at Pietermaritzburg on the 9th of July, 1895, and that the meeting was called for the purpose of enabling the shareholders to consider—and, if deemed expedient, to confirm—a provisional agreement said to have been entered into by the directors for the "flotation" of about forty-nine claims of the Rand Mines (Limited), and about thirty-three and three-quarter claims, comprising the joint battery sites of the appellant company and the Jubilee Gold Co. into a company to be registered under the limited liability laws of the South African Republic. The company was to have a nominal capital of £275,000, divided into 275,000 shares of £1 each. It was further alleged that the circular convening the meeting said the shares would be dealt with as follows:

(*a*) 80,000 shares shall be issued as fully paid up to the Rand Mines Co.

(*b*) 70,000 shares shall be issued as fully paid up to this company and the Jubilee Gold Co.

(*c*) 100,000 shares shall form the working capital of the new company, the underwriting of which has been guaranteed by Messrs. Eckstein & Co. at par.

(*d*) 25,000 shares will be held in reserve.

The declaration then alleged that the chairman of directors of the appellant company, who presided at the meeting held on the 9th of July, explained that under the provision (*c*) set out above Eckstein & Co. were to have the 100,000 shares allotted to them at par, and that such shares would not be allotted to the public or to the shareholders of the defendant company, who would have no opportunity of subscribing to the same, whereas the terms of provision (*c*) did not bear the interpretation put upon them by the chairman, and did not authorize the action which the directors contemplated taking in the event of the proposals being accepted.

The declaration went on to allege that a motion for the adjournment of the meeting of the 9th of July, 1895, until the 8th of November, 1895, was duly made and seconded, and, if put to the meeting, would have been carried, but that the chairman illegally and improperly declined to put the resolution, claiming that under article 66 of the articles of association of the appellant company no such adjournment could take place without the consent of the chairman, who thereupon put the motion for the confirmation of the provisional agreement specified in the circular, which was lost on a show of hands, but a ballot being demanded, the appellant company have assumed that the confirmation was then carried. The declaration further alleged that all proxies used at the vote by ballot must have been given by shareholders, the majority of whom reside in Europe or elsewhere beyond the borders of the colony, and whose knowledge of the agreement submitted for confirmation must have been derived from the first circular convening the meeting.

The plaintiff claimed—

1. A declaration that the motion for the adjournment of the meeting should have been submitted to the vote of the shareholders present, and that the action of the chairman in declining to put the motion was wrong and contrary to law.

2. A declaration that the motion if duly put would have been carried.

3. An order of the court declaring the adjournment of the meeting for a period of four months from the date of the judgment in the action.

4 and 5. That the resolutions which the company purported to pass at the meeting after the chairman had refused to put the motion for adjournment should be declared void and invalid and be set aside, and that the company should be interdicted from treating as valid and acting upon any such resolutions.

6. That the company should be interdicted from giving effect to any agreement by which Eckstein & Co. would be allowed to subscribe for 100,000 shares at par in the intended new company, and by which the shareholders in the appellant company would be debarred from subscribing to any portion of such capital contrary to the meaning and intent of provision (*c*) as above set out.

The appellant company excepted to the declaration as showing no grounds of action in that—

(*a*) The adjournment of the meeting in terms of article 66 of the articles of association was at the discretion of the chairman.

(*b*) The provisional agreement put before and dealt with by the meeting was the provisional agreement set out in the notice and in the declaration.

(*c*) It was not alleged in the declaration, nor is it the fact, that the resolutions against the carrying out of which an interdict was sought were outside the powers of the meeting.

(*d*) There were no averment in the declaration that the plaintiffs would sustain damage, or that any of their rights would be infringed, by carrying out the resolution.

When the case came on for argument before the Supreme Court it was ordered that the defendant company's exceptions to the plaintiffs' declaration should be, and the same were, thereby overruled. This decision was arrived at by Gallwey, C.J and Wragg, J., Beaumont, J., dissenting.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The Chief Justice and Wragg, J., expressed the opinion that the construction placed upon the 66th clause of the articles of association by the chairman was incorrect, whilst Beaumont, J., was of the contrary opinion. The Chief Justice appears to have entertained the view that the refusal to put the motion for adjournment invalidated the subsequent proceedings. Wragg, J., however, reserved his opinion as to the effect of the chairman's action. An application was afterwards made to the Supreme Court for leave to appeal to her Majesty in Council, and the leave prayed for was granted by a majority of the court, Wragg, J., dissenting.

It was contended before their lordships that it was not a case in which it was competent for the court below to grant leave to appeal, inasmuch as the order against which the appeal was brought was not a final judgment, decision, or sentence, nor was it a rule or order having the effect of a final or definitive sentence. During the discussion of this point before their lordships it became evident that even if the order appealed against was not a final judgment or an order having the effect of a definitive sentence, a point which had caused a difference of opinion in the court below, and which was certainly open to doubt, the questions in controversy on the face of the pleadings were of much importance, and that a determination of them might put an end to further litigation. Under the circumstances, therefore, their lordships thought it right without occuping further time in the discussion of the preliminary question to recommend her Majesty to give special leave to appeal.

It may well be doubted whether, in any view of the case, the declaration discloses a good cause of action, but their lordships think it desirable to pronounce judgment upon the construction of the 66th article, which it is asserted justified the course taken by the chairman, without expressing an opinion on the validity of the objection urged, that even if the chairman erred in not putting the motion for adjournment the action could not be sustained.

The article is in these terms so far as material: "The chairman may, with the consent of the members present at any meeting, adjourn the same from time to time and from place to place in Pietermaritzburg." Before discussing the language of this article it is important to notice the provisions of the articles which immediately follow. By article 67 it is provided that, "Upon all questions a show of hands shall, in the first instance, be taken, and the question shall be decided by such show of hands unless upon or immediately after such show of hands a ballot be demanded in writing by at least five members personally present entitled to vote, but no ballot shall be allowed on a question of the adjournment of the meeting." The 68th article provides that when the vote is being taken by show of hands, each member present shall have one vote only, and proxies as such shall not be admitted to vote.

Their lordships are of opinion that upon the true construction of article 66 the chairman is not bound to adjourn the meeting, even though a majority of those present desire the adjournment. If the intention had been that the majority of the members present should have the right to adjourn the meeting whenever they pleased, their lordships think the article would have been differently worded. According to the terms of article 66 it is the "chairman" who may adjourn the meeting, it is to be his act, not that of the meeting, or of those present at it. He cannot, it is true, adjourn it of his own mere motion, but the terms in which the members present are given a controlling voice strengthens the view that the adjournment is to be the act of the chairman. It provides for the "consent" of the members present, which implies that the act is not theirs but his. It is said that there is an inherent power in any meeting to determine on an adjournment if it pleases, and that it is the duty of the chairman to put any motion for that purpose made and seconded. Whether this be so or not in a case where no such articles are to be found as those now under consideration, their lordships do not think it can be so in a case where the articles have expressly prescribed the conditions under which an adjournment may take place. It was contended for the respondents that the construction which the natural meaning of the language used suggests would lead to unreasonable results, and therefore could not have been that intended by those who framed the articles. It is true that it vests in the chairman large powers which might conceivably be used improperly by him, but on the other hand, if there were no check upon the power of those present at a meeting to adjourn it to a future date, it is equally conceivable that a small minority of the shareholders might seriously prejudice the interests of the company and defy the wishes of the majority of its members. The facts stated in the declaration of the present action will suffice to illustrate this. The meetings are to be held at Pietermaritzburg, many of the shareholders reside in Europe or elsewhere beyond the borders of the colony. They can vote by proxy and so express their views on any proposed action by the company that may come before a meeting for consideration, but the articles provide that proxies are not to be used on the question of the adjournment of the meeting. This being so, a limited number of members resident in or near Pietermaritzburg might, by carrying motions for adjournment, defeat proposals which the great majority of the members thought in the interest of their company. It is no doubt possible that a chairman might abuse the power which their lordships think vested in him; on the other hand, he may use it to protect the rights and interests of those who may be unable to be present. Their lordships see no sufficient reason, then, for departing from what seems to them to be the plain and natural meaning of the language used.

What has been already said is enough to show that this appeal must succeed, but it may be well to add that in their lordships' opinion the fact that, after the motion for adjournment was rejected by the chairman, the confirmation of the provisional agreement was declared carried, can, in their opinion, afford no ground for complaint. The agreement which was thus confirmed was that specified in the circular convening the meeting, and no gloss of the chairman, even if incorrect, and no statement by him as to what was intended to be done under it, could modify or affect the confirmation of the specified agreement.

Their lordships will humbly advise her Majesty that the appeal should be allowed. The respondents must pay the costs of the appeal and in the court below.

Solicitors for the appellant, *R. S. Taylor, Son & Humbert.*

Solicitors for the respondents, *Atkinson & Dresser.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.)
[and Q. B. Div.
(Vaughan Williams, J.)]

May 10, 11; June 16.

In re MORTER.
Ex parte NICHOLLS. (*a*.)

Bankruptcy—Scheme—Amendment of proof—Liability of guarantors—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.

A scheme provided for the payment of 7s. 6d. in the £ to the creditors on the amount of their unsecured debts by three instalments of 2s. 6d. each. The trustees under the scheme guaranteed the composition by the deposit of their promissory notes for 7s. 6d. in the £ on the amount of the unsecured debts proved at the date of the approval of the scheme.

After two instalments had been paid a creditor whose securities had fallen in value claimed to raise his proof from £285 to £611, and also to be entitled to the benefit of the guarantee on the larger amount.

Held, by Vaughan Williams, J., *that he was entitled to have his proof admitted for the larger amount; but that the guarantee of the trustees was limited to their liability on the promissory notes they had signed, and that there was no further contractual or statutory obligation which could be enforced against them.*

The Court of Appeal (Lord Esher, M.R., A. L. Smith *and* Rigby, L.JJ.) *affirmed this decision.*

Motion by Nicholls & Co., creditors of Morter, against Messrs. Harris, Reed, and James Morter, the trustees and guarantors under a scheme of arrangement with Morter's creditors.

The scheme in this case was one approved by the court in accordance with the terms of section 3 of the Bankruptcy Act, 1890, and provided for the payment of 7s. 6d. in the pound to the creditors on the amount of their unsecured debts, by three instalments of 2s. 6d. each. It vested the estate of the debtor in the respondents, who guaranteed the payment of the composition, and in fulfilment of their guarantee lodged their promissory notes with the official receiver a few days after the approval of the scheme to the amount of 7s. 6d. in the pound on the unsecured debts proved for at that date.

The applicants were entered by the debtor in his statement of affairs as creditors fully secured, but at the date of the approval of the scheme their securities were not equal in value to their debt, and they proved for £285. After two of the three instalments of 2s. 6d. had been paid, their securities fell considerably in value, and they sought to amend their proof by altering the valuation of the securities and proving for £611 as unsecured.

The respondents rejected the amended proof.

The applicants thereupon launched the present motion, by which they asked:

(1) A declaration that they were entitled to the benefit of the guarantees of the respondents.

(2) For leave to amend their proof by raising it from £285 to £611.

(3) For the reversal of the rejection of their proof by the respondents.

(4) For an order on the respondents to pay to them 7s. 6d. in the pound on the sum of £611.

Muir Mackenzie, for the applicants.

H. Reed, Q.C., and *Morten*, for the respondent James Morter.

A. R. Poole, Q.C., and *P. Rose-Innes*, for the respondent Harris.

The respondent Reed had become bankrupt since the approval of the scheme, and was not represented.

VAUGHAN WILLIAMS, J.—In this case the notice of motion asks me to declare that the applicants are entitled to the benefit of the guarantees of the respondents, that they are entitled to amend their proof by raising it from £285 to £611, and that the respondents were wrong in rejecting such amended proof. It also asks me to order the respondents to pay to the applicants 7s. 6d. in the pound on the amount of their proof as amended.

Now, the scheme in this case is one which has been approved by the court in accordance with section 3 of the Bankruptcy Act, 1890, and by it the estate of the debtor was vested in the respondents, who were to carry on the debtor's business and realize his assets and apply them, firstly, in payment of the usual costs; secondly, in payment of preferential claims; and thirdly, in payment of 7s. 6d. in the pound to the creditors on the amount of their unsecured debts by these instalments of 2s. 6d. each. In lieu of payment of such debts in full, further security was given by the joint and several promissory notes of the respondents to the amount of 7s. 6d. in the pound on the unsecured debts and deposited with the official receiver, to be distributed among the creditors upon the approval of the scheme by the court. On payment of the composition of 7s. 6d. in the pound the debtor's surplus assets were to be re-assigned to him. The scheme was in fact approved by the court upon the 13th of May, 1893, and upon the 25th of May the official receiver reported that the respondents had lodged with him their promissory notes to the value of 7s. 6d. in the pound on the sum of £8,586.

Under these circumstances I must first say whether I can make the declaration asked for as to the right of the applicants to benefit by the guarantees of the respondents or the consequential order against the respondents to pay the applicants what they ask for. In my opinion I can do neither. The only liability undertaken by the respondents was their liability upon the notes they signed, and there is no further contractual or statutory obligation in the nature of a guarantee which this court can enforce against them.

In the next place I should like to say something generally as to the effect of such a scheme as this. It is a scheme by virtue of which the property of the debtor is vested in trustees for distribution among certain persons described in the scheme. In my judgment that property, being so vested for distribution, must be distributed amongst the proper persons as defined by the scheme, and that none the less because some of them happen not to be entitled to the benefit of the guarantees. I do not know if it occured to the court when it approved this scheme that there were persons who might subsequently become unsecured creditors and entitled to benefit by this scheme by reason of a fall in the value of their securities, or whether the court foresaw that such persons would have no promissory notes in their favour, and no means of getting them. Such, however, is the fact, but I do not think that that fact excludes them from benefiting under the scheme if otherwise they fall within the terms of it. I do think myself that these persons are entitled to come in under the scheme by reason of the provisions in paragraph 3 thereof, for the payment "to the creditors of 7s. 6d. in the pound upon these unsecured debts."

(*a*.) Reported by P. M. FRANCKE and ERSKINE REID, Esqs., Barristers-at-Law.

It seems to me that, having now valued their security, they are entitled to prove in the scheme for the balance, but that they cannot disturb the two dividends of 2s. 6d. which have been already paid.

It is obvious that the framers of the Bankruptcy Act of 1890 meant a scheme under that Act to be a form of liquidation for the benefit of all the creditors in the insolvency, not a mere agreement with such creditors as might choose to come in under it. Section 126 of the Bankruptcy Act, 1869, ran on the lines of only binding such creditors as came in and assented to a scheme, but section 3 of the Act of 1890 runs on the lines of binding everybody, and the words of any scheme under that section should, if required, be strained so as to benefit everybody.

That being so, although I decline to make any order against the respondents as guarantors, I think that the applicants are entitled to have their amended proof admitted even now when there may be no estate, though I think it is possible there may be a residue against which they can prove. As each side has failed here on a question of principle there will be no order as to costs.

Nicholls & Co. appealed.

June 18.—*Muir Mackenzie* for the appellants.

H. Reed, Q.C., and *E. Morten*; *Bousfield, Q.C.*, and *P. Rose-Innes*, for the respective respondents, were not called upon to argue.

Lord ESHER, M.R.—The only point remaining in this case for us to decide is whether the learned judge who tried the case ought to have made the declaration which the appellants asked him to make, and which really came down to this: that the trustees should pay him 7s. 6d. in the pound upon the unsecured debt due to this creditor from the debtor. We have nothing to say as to the form of the order drawn up by him, for it is admitted that everything was regular, and therefore all we have to decide is whether the judge should have made this particular order under the particular circumstances of this case, and our decision will therefore be limited to that question alone. To decide that question it is necessary to look first at the scheme of arrangement itself. Under that we find that in consideration of the property of the debtor being assigned to the trustees, they, as a further security, offered to give personal security up to 7s. 6d. in the pound, to be secured by promissory notes lodged with the official receiver. Now, these trustees were not in the position of debtors of the creditors of the bankrupt. There was no liability upon them to pay anything to the bankrupt's estate irrespective of the fact that they were trustees. There was no contract, they were simply trustees, and they gave these promissory notes in respect of no debt due from themselves, but merely in order to secure to the creditors the payment of a certain part of their debts. Their relation, therefore, became that of simple guarantors, and there is nothing under the statute which says that as such guarantors these trustees were not to be entitled to all the rights which otherwise as guarantors they would be able to claim. When they undertook to become guarantors they placed a limitation on their liability. The promissory notes, which were to come to maturity on certain fixed dates, were to be delivered to the various creditors who accepted the arrangement immediately after it received the approval of the court. The scheme was accepted by a certain number of the creditors and received the approval of the court, but it was not until two of the instalments had become due and payable that the appellant thought fit to intimate for the first time that he desired to take advantage of the arrangement, and claimed to be entitled on proof of debt to the benefit of the guarantee given by the trustees. The trustees refused to entertain his claim, and quite rightly, because they were entitled to say that, not having sent in his claim at the time the others did, they had calculated what their liability as guarantors then was, and had arranged to meet the amount of that liability, and it would be obviously unfair that they should be liable to have their calculations upset by a creditor putting in a claim at some subsequent date. If this kind of thing were allowed, then guarantors might at any moment find the amount of their liability so altered that the arrangements they had made to meet it would be totally insufficient. For these reasons I think the learned judge was perfectly right in holding that this creditor had by his own act lost the right to call upon these gentlemen. His grounds for coming to that decision are set out with great clearness in his judgment, and I agree with them entirely. This appeal, therefore, must be dismissed.

A. L. SMITH, L.J.—I agree thas our decision in this case should rest upon what is the true construction to be placed upon the terms of this particular scheme. The appellants was perfectly aware that a scheme had been put forth under which these gentlemen, as the debtor's trustees, were to carry on his business as best they could for the benefit of his creditors. In spite of knowing all these facts, and also, we must assume, all about the guarantee, the appellant permitted more than a year to pass by before he attempted to come in under the scheme at all, and it would be certainly a violation of the rights of these gentlemen as guarantors if this court were to hold that in these particular circumstances a call could now be made upon them. That alone forms a sufficient reason why in my opinion this appeal ought to be dismissed.

RIGBY, L.J., concurred.

Appeal dismissed with costs.

Solicitors for the appellants, *Hollams, Son, Coward, & Hawkesley.*

Solicitors for the respondent Morter, *Hillearys.*

Solicitor for the respondent Harris, *R. Chapman.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — May 12.

In re MONTAGU'S SETTLEMENT.
DERBISHIRE *v.* MONTAGU. (*a.*)

Jurisdiction—Settled land—London leaseholds—Raising of money by trustees on mortgage for purpose of pulling down and rebuilding houses—Permanent benefit.

Where land is settled in favour of infants, the court has no jurisdiction to sanction the raising of money by mortgage of the settled land for the purpose of pulling down and rebuilding houses thereon, although the value of the settled land would be greatly increased thereby.

Decision of Kekewich, J., ante, p. 380, *affirmed.*

Appeal of the defendants from Kekewich, J. (reported *ante*, p. 380).

An application was made to Kekewich, J., on originating summons for the sanction of the court to the proposed expenditure of a sum not exceeding

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

£8,500 by the trustees of a settlement for the purpose of pulling down and rebuilding certain houses, by which the value of the property would be considerably enhanced.

Kekewich, J., held that the court had no jurisdiction to sanction such a scheme.

The defendants, the tenant for life and remaindermen under the settlement, appealed.

Warrington, Q.C., and *H. E. Wright*, for the appellants.—If the trustees were absolute owners acting for the best, the scheme would probably be carried out; the question is, can the court authorize it where no express power is given? The court is not acting as guardian of infants, but is administering a trust. What is proposed is not salvage, but the parties will not have what the settlor intended them to have. *Hibbert* v. *Cooke*, 1 Sim. & S. 552, is cited in order to show that there is no jurisdiction, but that is not correct. Section 70 of the Conveyancing and Law of Property Act, 1881, would give a clear title to a mortgagee.

T. A. Nash, in support of the appeal.

B. B. Rogers, for the trustees of the settlement.

LINDLEY, L.J.—I don't think any of us can see our way to saying that we have jurisdiction. Parliament has never gone so far as to cure this blot on the jurisdiction. If the parties were all of full age, no doubt it could be done. No authority goes the length of saying that such an expenditure can be sanctioned. *Frith* v. *Cameron*, 19 W. R. 886, L. R. 12 Eq. 169, goes to the very extreme, and there the rebuilding of the house was only sanctioned because it had become ruinous, owing to the foundations having given way. As to *Hibbert* v. *Cooke*, I do not understand the principles on which that case was decided. I regret the result at which we are bound to arrive, and the appeal must be dismissed with costs.

LOPES, L.J.—The applicant in this case wishes to raise money for the purpose of pulling down and rebuilding property. I have very little doubt that if it could be done a considerable increase of income would be secured. Has the court jurisdiction to make such an order? It is perfectly clear that there is no provision for it in the settlement, and there is nothing to help in the Settled Land Acts. It is said that the court has jurisdiction because it would be vastly for the benefit of the infants; but I don't think that is enough. In *In re Jackson, Jackson* v. *Talbot*, 21 Ch. D. 786, 31 W. R. Dig. 204, Kay, J., said: "I think that this jurisdiction should be jealously exercised, and only in cases which amount to actual salvage." This case cannot come within that, and I think Kekewich, J., was right in not exercising a jurisdiction which he did not possess.

RIGBY, L.J.—I am of the same opinion. If the Chancery Division has the jurisdiction, it must be conferred by Act of Parliament, and not assumed. Section 70 of the Conveyancing Act, 1881, was not intended to make the exercise of the jurisdiction any less carefully exercised than it was before. The appeal must be dismissed.

Appeal dismissed.

Solicitors, *Cree & Son; Wood, Bigg, & Nash; Cree & Son.*

High Court of Justice.

Chan. Div. Stirling, J. — March 31; April 1, 2, 3, 6; May 4, 5, 12, 19.

EXCHANGE TELEGRAPH CO. (LIMITED) v. THE CENTRAL NEWS (LIMITED). (a.)

Copyright—Infringement—Injunction—Exclusive information—Right of property.

Information acquired by the expenditure of labour and money becomes a valuable property in the hands of the person so acquiring it and can be communicated upon such terms as he thinks fit. Any person inducing anyone to whom the information is communicated to break the contract under which such information is received will be restrained by injunction. It is immaterial that the information so acquired has already been partly published so long as it has not been published to the whole world and there are persons who are willing to pay to acquire it.

Exchange Telegraph Co. *v.* Gregory, [1896] 1 *Q. B.* 147, 44 *W. R. Dig.* 44, *followed.*

This was an action by the plaintiffs to restrain the defendants from improperly copying information collected by the plaintiffs and communicated by them to their subscribers, and from communicating the information so copied to the subscribers of the defendant companies, the Central News, and the Column Printing Syndicate (Limited).

The plaintiffs, who are a well-known news agency, have a system whereby they collect news of various kinds, including the results of horse-races, and by means of telegraphic apparatus communicate that news to subscribers subject to certain conditions, one of such conditions being as follows:

"The news supplied by the company is to be used only in the newspaper, or posted only in the club, newsroom, office, or other place at which it is delivered. No copy of it shall be made for any other purpose than for such publication, and it shall not be transmitted, communicated, or delivered to any other party or parties by messenger, telegraph, telephone, or otherwise, nor shall the subscriber assign the benefit of the whole or part of this agreement, nor let upon hire the instrument or the right to use it, nor in any way part with the possession of the instrument without the written consent of the company."

It appeared that for about a year previously to November, 1896, the officers of the plaintiff company had suspected that their racing information was being improperly copied by the Central News. They were consequently on the watch for anything which might enable them to establish a case against their rivals.

On the 26th, 27th, and 28th of November, 1896, a race-meeting was held at Manchester, and on each of these days occurrences took place which confirmed these suspicions, and led to the bringing of the present action. Shortly stated, the nature of these occurrences was as follows:

The plaintiffs, after the conclusion of certain races, published results which, in some respects, either by accident or design, were erroneous, and immediately afterwards published corrections of the inaccuracies. The errors thus published by the plaintiffs were repeated in the information published by the defendants, as also were the plaintiffs' corrections. There being three separate instances of this kind on the 3rd of December, 1896, the plaintiffs issued their writ

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

against the Central News, and a motion for an injunction was made. The witnesses for the Central News by their affidavits denied that the Central News had copied the plaintiffs' telegrams, and stated that the information issued by them on the three days in question was received in the ordinary course of business from the Column Printing Syndicate. The writ was then amended by adding the syndicate as defendants, and a statement of claim was delivered, alleging that both the defendants, or one or other of them, copied the information without the consent of the plaintiffs.

At the trial of the action the plaintiffs relied upon the three instances of copying already alluded to, and also upon an occurrence which took place on the 1st of January, 1897, when a race-meeting again took place at Manchester. On that occasion the National Hunt was run, with the following result: "Knight of Rhodes, 1; Starlight, 2; Summer Lightning, 3." This result was transmitted from Manchester to the plaintiffs' office at Cornhill, where the plaintiffs' officers deliberately altered it by substituting for "Summer Lightning" "Common Blue," the name of another horse engaged in the race. The communications made by the plaintiffs to their subscribers ran as follows: "3.39, Manchester.—Knight of Rhodes, Starlight, Common Blue; four ran. 3.39.—Race started at 3.34. 3.44, Manchester.—Correction, Summer Lightning was third." The communications made by the Central News to their subscribers ran thus: "Knight of Rhodes won, 3.41, Manchester.—Knight of Rhodes, Starlight, Common Blue; four ran. Manchester, 3.42.—. . . another result places Summer Lightning third."

McCall, Q.C., and *M. Shearman*, for the plaintiffs.—We submit that this case comes within the *Exchange Telegraph Co.* v. *Gregory*, [1896] 1 Q. B. 147, 44 W. R. Dig. 44.

G. Hastings, Q.C., and *Rufus Isaacs*, for the Central News.—*Exchange Telegraph Co.* v. *Gregory* was a different case. In that case the plaintiff company paid for the particular information, and the plaintiff company would not give it to anyone else.

C. Macnaghten, for the Column Printing Syndicate.—The case against me is based on the *Exchange Telegraph Co.* v. *Gregory*, and that fails here. In *Gregory's case* the information could only have been got from a subscriber, but here it might have been obtained from outside sources.

McCall, Q.C., replied.

[*Shearman* referred to *Lamb* v. *Evans*. 41 W. R. 405, [1893] 1 Ch. 218; *Caird* v. *Sime*, 36 W. R. 199, 12 App. Cas. 326; *Prince Albert* v. *Strange*, 1 Mac. & G. 25; *Pollard* v. *Photographic Co.*, 37 W. R. 266, 40 Ch. D. 345; *Robb* v. *Green*, 44 W. R. 25, [1895] 2 Q. B. 315; and *Kiernan* v. *Manhattan Quotation Co.*, cited in Scrutton on Copyright, 3rd ed., p. 65.]

Cur. adv. vult.

May 19.—STIRLING, J., stated the facts, and held that it was established on the evidence that the communications made by the plaintiffs to their subscribers on the four days in question were the result of the labour of persons employed and paid by them, and continued: This being the conclusion of fact, the question next is whether there is any and what right accruing to the plaintiff in respect of it. On that point it was contended on behalf of the plaintiff that the case was governed by the *Exchange Telegraph Co.* v. *Gregory*, in which injunctions of different kinds were obtained by this same plaintiff company against the defendants. One of the injunctions so granted was based on the right of property in the plaintiffs in certain information communicated by the committee of the Stock Exchange to the present plaintiffs, and by them communicated in a similar way as in the present case to their subscribers subject to their conditions as to publication. The defendant, who was not a subscriber to the plaintiff company, in that case induced a person, which was contrary to his contract, to communicate the information so communicated by the Stock Exchange, and paid for by the plaintiff, to him. An injunction was granted against that. It was sought to distinguish the present case, as it was said that in that case the information had never become public. It was collected by the committee of the Stock Exchange for their own purposes and sold to the plaintiffs, and was never in any sense published until it came to their subscribers, whereas in the present case it was said that the information had become public to the world at Manchester, and that there could be no property in it.

Now, it appears to me that, although the information was made known to a large number of persons, it was not made known to the whole world. A great number of persons were ignorant of it. By the expenditure of labour and money the plaintiffs acquired this information, and it was in their hands at the particular time valuable property in this sense, that persons to whom it was unknown were willing to pay and did pay money to acquire it. The plaintiffs were at full liberty to communicate that information upon such terms as they thought fit, and accordingly they communicated it to their subscribers upon terms which I have already mentioned. A subscriber who communicated the information to third parties contrary to those terms would commit a breach of contract, and he might be restrained by injunction from so doing. The third party who induced a subscriber to break his contract, and in that way acquired and published information contrary to his contract, might, according to the decision in *The Exchange Telegraph Co.* v. *Gregory*, be also restrained by injunction.

[His lordship then held that it was established in the evidence as against the Column Printing Syndicate that they published for their own benefit information acquired from or through some subscriber to the plaintiffs, with knowledge or notice on the part of their manager that it was information acquired contrary to the terms imposed on the plaintiffs' subscribers, but that as regards the Central News the case was not made out.]

Judgment accordingly.

Solicitors, *Nicholson & Crouch*; *Smith & Goften*.

Chan. Div. Kekewich, J. — March 27; April 8.

In re SINCLAIR.
ALLEN *v.* SINCLAIR.
HODGKINS *v.* SINCLAIR. (*a.*)

Administration—Annuity payable during life or until alienation — Administration action — Valuation of annuity—Payment into court—Annuitant entitled to payment out of whole fund.

Where an annuity, payable to the annuitant for life or until alienation, had been valued in a creditor's action for the administration of the grantor's estate and the amount of such valuation paid into court to the account of the annuitant,

(*a.*) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Held, that, notwithstanding the condition relating to alienation, the annuitant was entitled to have the whole fund in court paid out to him.

Petition.

By an indenture dated the 23rd of June, 1890, and made between George Sinclair, of the one part, and Rose Lethbridge of the other part, George Sinclair covenanted, until the petitioner (George William Cavendish Venn, the nephew of Rose Lethbridge) should attain or die under the age of seventeen, to pay Rose Lethbridge for the benefit of the petitioner an annuity of £120, and until he should attain or die under the age of twenty-one, to pay her for the petitioner's benefit an annuity of £100, and would, after the petitioner attained twenty-one, pay the petitioner £80 a year for his life or until he should do or suffer some act or thing whereby or by means whereof the said annuity or any part thereof, if belonging to him absolutely, would become vested in or payable to some other person or persons, whichever should be the shorter period, the said annuities to be payable by equal quarterly payments on the usual quarter days.

By another indenture bearing the same date and made between the same parties, George Sinclair entered into covenants of a similar nature for the benefit of Margaret Cavendish Venn, Rose Lethbridge's neice.

The petitioner was born on the 19th of November, 1875.

George Sinclair died in July, 1893, and in the same year the two creditor's actions above-named were commenced against his executrix for the administration of his estate, and by the certificate of debts, dated the 10th of May, 1895, and made in pursuance of the order on further consideration, Rose Lethbridge was certified to be a creditor of the estate of George Sinclair to the amount of £3,897 3s. 2d., of which sum £1,903 3s. was admitted to proof in respect of the petitioner's annuities, and the residue in respect of Margaret Cavendish Venn's annuities. Such sum of £1,903 2s. was made up of the following items—namely, £257 16s. for arrears unpaid up to the 24th of June, 1893, £1,642 13s. 6d. for capitalized value of the annuities as in July, 1893, the date of George Sinclair's death, and £2 12s. 6d. for one-half the allowed costs of proving the said debt.

In pursuance of an order in the said action dated the 18th of July, 1895, and the schedule thereto, the sum of £951 11s., being a dividend of 10s. in the £1 on £1,903 2s., was carried over to the "account of George William Cavendish Venn (the petitioner), an infant, and Rose Lethbridge, the wife of Charles Lethbridge, his trustee," and a similar dividend was carried over to the account of Margaret Cavendish Venn.

By another order, dated the 25th of November, 1895, a sum of £445 10s. was directed to be paid to Rose Lethbridge out of the above-mentioned account for arrears of the petitioner's maintenance, and £12 3s. 3d. for the cost of the application, and the residue of the fund was ordered to be invested in Consols to the account of the petitioner and the income thereof paid to Rose Lethbridge up to October, 1896, if the petitioner should so long live.

By a further order dated the 15th of February, 1896, a second dividend of 10s. in the £1 on the said debt of Rose Lethbridge was ordered to be paid, and, pursuant thereto, a further sum of £951 11s. was invested in Consols and carried over to the petitioner's account, and the income of the whole fund was directed to be paid to Rose Lethbridge for the petitioner's maintenance.

The petitioner attained twenty-one on the 18th of November, 1896.

Before Rose Lethbridge was admitted as a creditor of the estate of George Sinclair in respect of the sum of £3,897 3s. 2d., the above-mentioned annuities were valued by Mr. Colquhoun, an actuary appointed by the judge in chambers, and the forfeiture clause affecting the petitioner's annuity was pointed out to him, and he valued such annuity with full knowledge of the facts. [The tenour of Mr. Colquhoun's report appears in the following judgment.]

By his petition the petitioner submitted that he was entitled to the fund in court, being the capitalized value of his annuity, but that, if he was not so entitled, he was entitled to have the fund invested in the purchase of an annuity for his life, and to have provision made for the payment of such annuity until such event as would work a forfeiture under the above-mentioned forfeiture clause.

Warrington, Q.C., and *Beaumont*, for the petition, asked that the fund in court might be paid out to the petitioner, and referred to *Ex parte Blakemore*, 25 W. R. 488, 5 Ch. D. 372,; *Ex parte Neal*, 28 W. R. 875, 14 Ch. D. 579; and *In re Jackson*, 20 W. R. 1023.

A. J. Allen, for George Sinclair's executor.—I submit that this conditional annuity was not capable of being properly valued and that the petitioner is not entitled to have the fund paid out to him. He is only entitled to have £80 a year paid out to him so long as the fund will last and he fulfils the condition. I do not object to that. I submit the right course to pursue is that adopted in *Carr* v. *Ingleby*, 1 De G. & Sm. 362, cited in Seton, 5th ed., vol. 2, p. 1384, and reported as a note to *Wroughton* v. *Colquhoun*, 1 De G. & S. 357. [KEKEWICH, J., referred to Seton, pp. 1377 and 2138 (Addenda), and to *Gratrix* v. *Chambers*, 2 Giff. 321, 9 W. R. Ch. Dig. 5, and *Todd* v. *Beilby*, 27 Beav. 353.]

Warrington, Q.C, in reply, referred to *Ex parte Bates*, 27 W. R. 927, 11 Ch. D. 914.

Cur. adv. vult.

April 8.—KEKEWICH, J.—The question which I took time to consider was whether the fund now representing the annuity of £80 secured by the deed of covenant of the 23rd of June, 1890, might now be paid to the annuitant in satisfaction thereof, or what other provision ought thereout to be made for such annuity. It became necessary, under the circumstances mentioned in the petition, to value the annuity, and the fund in court must be taken as representing that value. The covenant cannot be strictly fulfilled—that is to say, the annuity cannot be paid from year to year unless (which one cannot anticipate) forfeiture should ensue before the fund is exhausted. The rights of the annuitant have therefore been altered by operation of law without his default or assent. There can be no doubt that if the annuity had been covenanted to be paid for life simply, the rule which is universally adopted in the administration of estates where annuities are given by will and cannot be paid in full would have been followed, and the fund in court would have been paid to the annuitant. This course is adopted as a rough method of giving the annuitant the best that can be obtained for him, and it is recognized as a fair solution of a problem otherwise presenting some difficulties. The practice may be said to have been settled by *Wroughton* v. *Colquhoun*, and it has long been of universal application in cases of the character above mentioned. The difficulty here is occasioned by the limitation of the annuity to George William Cavendish Venn for life, "or until he shall do or suffer some act or thing whereby or by means whereof

the said annuity or any part thereof, if belonging to him absolutely, would become vested in or payable to some other person or persons." It is strange that there should be so little authority on the question what ought to be done when an annuity is thus limited, and because it cannot be paid in full has been valued and become represented by a fund in the hands of executors or in court. In Seton on Decrees, 5th ed., vol. 2, p. 1384, there is this passage: "Where assets are deficient, an annuity should be valued and abate proportionately, and the apportionment belongs to the annuitant absolutely: *Wroughton* v. *Colquhoun*, 1 De. G. & Sm. 357; *Innes* v. *Mitchell*, 1 Ph. 710, unless given subject to condition: *Carr* v. *Ingleby*, 1 De. G. & Sm. 362." There can be no doubt that the case of *Carr* v. *Ingleby* here referred to is an authority for the exception to the general rule. There appears to be no other authority for it. Counsel have been unable to find any, and my own researches have been equally fruitless. *Carr* v. *Ingleby* is reported only as a note to *Wroughton* v. *Colquhoun*. There is a statement of facts, and this, with the order, which is set out at length, justifies what is said in Seton, but there is no report of argument or judgment, and to this extent the case is unsatisfactory as a guide, standing as it does alone.

I have found some later cases in which it was cited but in none of them is there any comment on it, and the only case which it appears to have influenced is that of *Gratrix* v. *Chambers* where Stuart, V.C., held that a proviso as to forfeiture of an annuity prevented the application of *Wroughton* v. *Colquhoun*. That decision is open to two observations as regards the case in hand. First, there was no valuation of the annuity in fact (though one was urged by counsel as the proper method of arriving at the proper result); and secondly, the Vice-Chancellor took advantage of a charge of the annuity on a share of the estate to direct it to be paid in full out of that share until exhausted. Here there has been a valuation and the only fund out of which annuity can possibly be paid is that with which the petition seeks to deal. It is argued on behalf of the respondent that the contingency of forfeiture was not and could not be valued. That it is difficult of valuation is true, but that it could not be valued I take leave to doubt; and in bankruptcy such valuations are of necessity made. It is important to observe that although the continuance of the annuity depends on the non-happening of one event, on the happening of which it would, so to speak, be forfeited, yet there is no gift over, and the covenantor's estate can have no claim to the fund. It seems to me that whatever I do, strict technical justice is beyond my power. If the fund is paid to the annuitant and forfeiture ensues within a short period he will get more than was intended for him. If on the other hand I order the dividends to be paid to him he will certainly get far less than is due, while the fund itself would remain for the benefit of someone having no claim to it; and the first part of this result will probably follow if I take the intermediate course of directing the annuity to be paid out of income and capital until the fund is exhausted. A better attempt at justice would be made by investing the fund in the purchase of an annuity for the life of the petitioner. I say distinctly for his life, because it appears from Mr. Colquhoun's statement that it is not possible to purchase from an insurance office an annuity calculated on a valuation of the contingency of forfeiture, and what cannot be done with an insurance office is certainly out of the question with that of the National Debt Commissioners. Mr. Colquhoun suggested a way in which the difficulty might perhaps be met—namely, by fixing a surrender value to accrue if forfeiture occurs, but here again I am met by the objection that there is no one to whom this advantage can properly be given. Moreover, although by reason of the covenantor's estate having paid twenty shillings in the pound there was in the first instance appropriated to this debt a sum sufficient to purchase an annuity of the full amount, yet by certain reductions which have been made, and others which must now be made, the available money is, or at any rate may be, not sufficient for the purpose. Some of the reduction is due to expenditure on maintenance of the petitioner, and to that extent he could not complain if an annuity of less than £80 were secured to him; but it is a mere accident that in this case the fund over was sufficient to purchase an annuity of the full amount, or is nearly sufficient for that purpose now. The principle properly applicable to the case must necessarily be the same whether the sum calculated to be the value of an annuity is provided in full out of the covenantor's or testator's estate, or so abates with other demands on the estate that only a small proportion of the annuity can be secured. Under these circumstances and in view of the general rule of administration established by *Wroughton* v. *Colquhoun* I am disposed to order the fund to be paid to the annuitant, and then the only question is whether I am prevented from doing this by the authority of *Carr* v. *Ingleby*. Of course I am not competent to overrule that case, but having regard to what has already been said, I do not think that I am bound to follow it. I shall therefore order the fund to be paid out to the annuitant.

Solicitors, *W. W. Box; Allen & Son.*

Chan. Div.
Kekewich, J. } March 26; April 2.

In re JONES.
CHRISTMAS *v.* JONES. (*a.*)

Administration action—Costs—Administrator—Rights of administrator—Disallowance of charges—Interest on balances—Debt due from next-of-kin—Set-off by administrator—R. S. C., 1883, *ord.* 65, *r.* 1.

Where, in an administration action brought by the next-of-kin against an administrator the greater part of the administrator's claim for expenses of realization had been disallowed, but the administrator had acted bonâ fide *throughout,*

Held, that the administrator should be allowed his general costs of an administration action, notwithstanding the disallowance of a portion of his claim for expenses of realization, inasmuch as his claim was neither dishonest, improper, nor monstrous; and also that he should not be ordered to pay interest on balances of the estate which he had retained to meet such claim.

Some of the next-of-kin in the above administration action had brought an action against the administrator in his capacity of executor in another estate. This action had failed, and the next-of-kin were ordered to pay the costs, but had not done so.

Held, that the administrator was entitled to set off this debt due for costs against the shares in the intestate's estate due from him to such next-of-kin.

This was a summons in an action brought for an account of the share of an intestate, Eleanor Jones, in the estate of James Wright Jones, which was in the hands of the defendant David Jones, as administrator of the estate of Eleanor Jones.

The defendant, by an account delivered pursuant

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

to an order in the action, claimed, *inter alia*, to be repaid the sum of £60 advanced by him for the maintenance of Eleanor Jones, and a sum of about £500 in respect of expenses incurred by him for two journeys to South Africa (where J. W. Jones's estate was situated) and for realization. The account showed that he had received £708 9s. 5d. in respect of the estate, against which he claimed to be allowed for expenses £706 7s. 11d.

The defendant was son of Eleanor and brother of James Wright Jones. The defendant was also sole executor to his father, James Jones, who died in 1880, and in 1891 an action was brought against him by John Jones and Mrs. Elizabeth Williams (his brother and sister) to revoke the probate of the will of James Jones. This action failed, and John Jones and Elizabeth Williams were ordered to pay to the defendant the taxed costs, amounting to £265 15s. 9d. This sum had not been paid.

By an indenture of the 13th of January, 1893, Elizabeth Jones assigned to H. W. Christmas (the plaintiff in this action) all her interest under the intestacy of Eleanor Jones.

On the 2nd of January, 1895, John Jones assigned all his share under such intestacy to William Parker to secure £175.

By his certificate made in the present action on the 17th of May, 1895, the chief clerk found that David Jones had, as legal personal representative of Eleanor Jones, received £708 9s. 5d. in respect of her share in the estate of J. W. Jones, and had paid, or was entitled to be allowed on account thereof £93 11s. 10d., leaving a balance due from him of £614 17s. 7d., and disallowed the above-mentioned claims of £60 and £500.

David Jones having taken out a summons to vary the certificate, which was dismissed with costs, subsequently, under an order of the 12th of July, 1895, paid the balance found due from him into court, and an inquiry was directed as to what balances had been in his hands as administrator, during what periods, and under what circumstances.

By his certificate, made on the 21st of May, 1896, the chief clerk found that the defendant as administrator had in his hands from the 31st of March, 1893, to the 31st of January, 1894, a sum of £602 4s. 6d., and from the 31st of January, 1894, to the 15th of August, 1895, the sum of £614 17s. 7d.

The plaintiff, Harry William Christmas, on the 13th of June, 1896, took out the present summons, asking that the defendant might be ordered to pay interest on the sum of £614 17s. 7d., being the balance found due from him, costs of the plaintiff and other parties attending, and that the sum of money in court might be distributed as specified in the schedule.

The estate of J. W. Jones was situate in the Transvaal, and was at first supposed to be worth £20,000. It was necessary to take steps to ascertain who, under the Roman Dutch law, was entitled to the estate, and the defendant being advised it was necessary for the purpose of realization, took two journeys to South Africa, believing *bonâ fide* that he was entitled to be repaid his expenses in so doing.

The questions as to the interest on the balances and as to costs were argued first.

C. E. E. Jenkins, for the plaintiff.—The administrator should pay the costs as nearly the whole of his claims and charges were disallowed. It is within the discretion of the court (in R. S. C., ord. 65, r. 1). The proviso makes the claimant simply a creditor, though here he happens to be administrator as well. The journeys to the Transvaal were not in his capacity as administrator. This is in effect a breach of trust. He was the *causa causans* of these proceedings; he kept money and applied it to his own use, and the *onus* is shifted upon him to show that he is entitled to his costs. The balances should have been invested, and he should pay such interest as the court may direct.

Warrington, Q.C., and *Rolt* were only called upon as to costs of the disallowed charges.—The defendant retained these sums *bonâ fide* believing he was entitled to repay himself expenses incurred. Therefore he ought to be allowed costs. Ord. 65, r. 1 provides for the case where an executor has been guilty of misconduct, and unless he is so guilty he is entitled to costs: *In re Love, Hill* v. *Spurgeon*, 33 W. R. 449, 29 Ch. D. 348. The administrator has not "unreasonably resisted proceedings." The right of a trustee to the general costs of a suit is the same as that of a mortgagee, "unless he has forfeited them by some improper defence or other misconduct: *Turner* v. *Hancock*, 30 W. R. 480, 20 Ch. D. 303; *Cotterell* v. *Stratton* (*per* Selborne, L.C.), 21 W. R. 234, L. R. 8 Ch. App. 295. As to interest on balances, it is only on definite sums in his hands that the administrator can be ordered to pay. In this case the administrator never had such sums in his hands.

C. E. E. Jenkins, in reply.—It is a shocking thing for a trustee to keep a whole estate in his hands and say, "I will not give you any of it." *In re Beddoe, Downes* v. *Cottam*, 41 W. R. 17, [1893] 1 Ch. 547, defines what is "unreasonably resisting proceedings." The question is not "was the administrator honest," but, "has he acted reasonably?" The certificate found that definite balances were in his hands at definite times.

KEKEWICH, J.—It is quite possible that, if the defendant is allowed all his costs, charges, and expenses, and all costs as between solicitor and client of this action, this estate—already small—will be made much smaller; and I agree with plaintiff's counsel that it is not an inaccurate use of language to describe that as shocking. The estate was supposed to be £20,000, but afterwards it turned out to be only about £708; and thus the beneficiaries may in any event get very much less than they anticipated. That is also shocking. But what I have to consider is something of very much greater moment. If I disallow the administrator these costs — to which, according to the rules and practice of the court, he is fairly entitled—that would be far more shocking, because it would not only be against the rules and practice of the court, but directly contrary to honesty. A man who fulfils the difficult duties of administrator or executor and trustee is, in common sense and common justice, entitled to be recouped to the very last penny everything that he expends honestly and properly—that is to say, without impropriety—in his character of administrator, executor, and trustee; and the question which I have to consider is whether these costs, which the administrator here claims, have been incurred by him without impropriety in that character.

Plaintiff's counsel puts his case well enough, and says this man comes in with a claim against the estate which he is unable to support; that he claims as an outsider; and that as such he would come in as an ordinary creditor, and as regards these costs he ought to fail and to pay the costs with which otherwise the estate will be saddled. But if the costs are not those of an outsider, but are costs incident to the performance of his duty as administrator, then I have only to consider whether he has incurred these costs properly —that is, without impropriety. What is the meaning of that? Of course, if an action is brought for the

purpose of making the executor or administrator liable for breach of trust, and he is proved to have committed a breach of trust, and costs are incurred by resisting the action and bringing the breach of trust home to the executor, then it is only right that the executor should pay them as part of the penalty for the breach of trust. Again, if an executor brings in any claims strictly in his character of executor, which the court can see from the evidence—documentary or arising out of cross-examination or otherwise—or by a sort of intuitive process or general view of the case, are not honestly brought forward, then the court, notwithstanding the general rule, may fairly deprive the executor of his costs, and, if he is convicted of dishonesty may order the executor to pay the costs incurred. And again, apart from dishonesty, I say also that the court may visit the executor with costs or deprive him of costs where the claim is of a monstrous character—that is, one which no reasonable man could say ought to have been put forward, even although the executor may have believed it, and a solicitor may have prepared the case and counsel may have argued it. In a case of that kind the court has quite sufficient power to deprive an executor of costs, or even to order him to pay the costs occasioned to the estate. But, subject to these limitations, there is no doubt that the general rule prevails, and that an executor, even although he makes a mistake, and endeavours to charge against an estate items which the law will not allow him to charge, even though one could see that they ought to have been omitted and not claimed, and even though, as in this case, the endeavour to prove them has failed, and a summons to vary the certificate has been refused, with costs, still the executor or administrator is entitled to have his costs out of the estate if incurred without impropriety or fraud or anything which can be termed monstrous.

[On the facts his lordship came to the conclusion that there was no want of honesty or breach of trust on the part of the defendant, nor impropriety or anything that could be termed monstrous in the claims which he put forward, although the claims for the £60 and the £500 could not be sustained.]

It seems to me that, under these circumstances, I have no discretion. If I had I should certainly exercise it by allowing these costs. I think the defendant is entitled to them, because he has acted honestly. These are expenses which were not incurred in the first instance in his character as administrator; but he has now come here in his character as administrator to sustain his claim, and all that I am now considering is whether his reasonable costs of trying to sustain it ought to be allowed. It seems to me, on the principle of several cases which have been cited, and upon the general rule laid down by Lord Selborne in *Cotterell* v. *Stratton*, and the general practice of the court under the general order, that I am bound to do that; and if it is a matter for my discretion I think I ought to do it, and not a bit the less because I shall very much lessen the money coming to the beneficiaries interested in the estate. I think, therefore, I must allow the defendant all his costs of the action, including his costs, charges, and expenses. It will be necessary in sending the matter to the taxing-master to explain that the costs, charges, and expenses are not to include item 5 or items 14 to 36 (being the items which make out the two sums of £60 and £500) in the account. They must not be brought in as costs, charges, and expenses.

The other question is equally important in administration actions, and that is, whether the executor is to be charged with interest on the balances found by the certificate. The order is this: There is an inquiry whether the defendant as administrator of Eleanor Jones has had part of the estate in his hands, and, if so, for what periods and under what circumstances. Plaintiff's counsel says that in resisting the claim for interest the defendant is seeking to vary the chief clerk's certificate. I do not agree with that argument.

That inquiry precisely follows Form No. 6 in Seton's Forms, vol. 2, p. 983. That is the form of order when the court intends to hold an even hand respecting the liability of an executor for interest on balances such as these. That is shown by the insertion of the words "under the circumstances." It is to be decided hereafter whether the circumstances are such that the court has to fix the executor with interest. In Form 7 in Seton interest is charged on the balances in the hands of the defendant under the account of the general personal estate from twelve months after the testator's death, showing that interest after the testator's death should be paid on the money remaining from time to time in the executor's hands. Form No. 8 directs an inquiry whether any and what balances have, since the date of the order, been improperly retained by the plaintiffs, and interest is to be computed on such balances. What are the circumstances here? The money was not in the pocket of the administrator; it was not employed in his business; it had not been advanced to anyone, or lent; he had simply paid it away in the manner which he ought not to have done, no doubt, as against the estate, but was not improper in itself. It would be wrong now to say that interest on these balances, on which the administrator has made nothing, should be now paid by the defendant. It seems to me that as regards that point the plaintiff fails.

The further question was then argued as to whether the defendant could set off the costs due to him in the action by J. Jones and Mrs. Williams against the shares due to them respectively as next-of-kin of Eleanor Jones.

Warrington, Q.C., for the defendant.—*Taylor* v. *Taylor*, 23 W. R. 719, L. R. 20 Eq. 155. There is a right to set off.

C. E. E. Jenkins, for the assignees of the shares.—There is no such right, inasmuch as the debts are not due on the same right: *Whitaker* v. *Rush*, Amb. 407. One of the assignments was after the decree of the Probate Court: *Middleton* v. *Pollock*, 23 W. R. 766; *Medlicot* v. *Bowes*, 1 Ves. sen. 207; *Bishop* v. *Church*, 3 Atk. 691; *In re Willis, Percival, & Co., Ex parte Morier*, 28 W. R. 235, 12 Ch. D. 491. The money is due from the administrator in his fiduciary capacity; therefore there can be no set off. *In re Knapman, Knapman* v. *Wreford*, 30 W. R. 395, 18 Ch. D. 300, can be distinguished.

KEKEWICH, J.—If the decision of the Master of the Rolls in *Taylor* v. *Taylor* is sound, it seems to me that it completely covers this case. It is a decision by a judge of co-ordinate jurisdiction, and more than twenty years old, and counsel on neither side have been able to find any case in which this decision has been criticised. That goes a long way towards saying that I am bound to follow it. The argument to the contrary, under these circumstances, must rest entirely on this—that the Master of the Rolls was deciding a case adversely to a series of previous decisions which bound him, and that he, inadvertently or otherwise, departed from them, and that I am not to follow him. That argument is not tenable.

Without laying any stress upon the experience and judicial power of Sir George Jessel, I observe that

there is not the slightest indication in his judgment of an intention to depart from the other cases. He had the case of *Whitaker* v. *Rush* cited to him, and also his own decision in *Middleton* v. *Pollock*, and I observe that in that case nearly all the cases cited by counsel for the plaintiff were referred to on this subject and recognized. Therefore, I must take him to have come to the conclusion that what he said in *Taylor* v. *Taylor* was consistent with those earlier cases. If he so held, it is not right for me to say that he did not rightly so hold. As regards the case of *Whitaker* v. *Rush*, it is to be observed as an example of many cases which have been referred to as illustrating the principle that one debt cannot be set off against another if they are debts in different rights. That is the marginal note in *Whitaker* v. *Rush* to which the judge referred in giving judgment. Sir George Jessel cannot have intended to go against these decisions. What he did intend to decide was that this particular case was not an instance of two claims arising in different rights. There is this slight distinction between *Taylor* v. *Taylor* and this case—namely, that there the defendant had lent sums of money to the plaintiff, and counsel for the plaintiff says that shows that he recognized his position. I do not see that, or that there is the slightest difference between an advance out of funds in pocket and a liability arising from a judgment of the Court of Probate.

Therefore, the question resolves itself into this, Whether the two claims arise in different rights or not? The case of *Cooper* v. *Cooper*, 22 W. R. 713, L. R. 7 H. L. 53, is useful as showing what position the next-of-kin are in as regards the estate. They have a substantial interest in the property; they cannot get it until the account is made out and the debts paid, and the estate cleared. Starting from the very first moment of the death of the intestate, they have a substantial interest in the property. The administrator is not a trustee for the next-of-kin in the strict sense of the word. But he has a duty to them, subject to the payment of all the debts and claims upon the estate—namely, to hand over to each of them his aliquot share of the estate. He is in the position of bailiff for them of their share in the estate. When once it is ascertained, their claim against him is a legal claim. Therefore, if they owe him money, he has a right to set off against that the money to which they have a claim. That is what I understand the Master of the Rolls said in *Taylor* v. *Taylor*, at p. 160: "I ask to set off a personal legal debt due from you to me." Then, as regards this particular case, counsel for the plaintiff has not argued one point anticipated by counsel for the defendant—namely, that the money has been paid into court. It could not be argued. The money is paid into court for safe custody in order that the representative may be himself discharged from liability when the money is claimed. I think it is quite right to say that that would no more oust the right of set-off than the right of retainer.

The other point is a different one. Mr. Jenkins represents two of the next-of-kin. Both of them claim derivatively and are assignees, and as regards one of them his title arose after his debt became due from the assignor to the defendant by reason of the judgment in the Probate Court. As regards that, he must claim subject to any right of set-off, if it exists. As regards the other, the assignment was made before the judgment of the Probate Court, and it was argued that, therefore, that operated to attach to the share at once, so that the judgment at a later day could not affect the right of the assignee to be paid the share. Everyone who takes an assignment of a share in an estate in the hands of a legal personal representative must take it subject to the settlement of accounts as between the assignor and the legal personal representative, and it matters not whether they are accounts in the administration of the estate or accounts between the assignor and the legal personal representative.

Under these circumstances I shall follow *Taylor* v. *Taylor*. The order will be for the distribution of this estate according to the minutes annexed to the summons, except that the two-sixteenths payable to the plaintiff and the two-sixteenths payable to William Parker will be retained by the defendant.

Solicitors, *J. M. Umpleby*; *Field, Roscoe, & Co.*, for *Evan, Morris, & Co.*, Wrexham.

Chan. Div. (Vaughan Williams, J.) — May 6, 7.

In re LONDON METALLURGICAL CO. (NO. 2). (*a*.)

Company—Winding up—Liquidator—Litigation—Authority of the court or of the committee of inspection—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 12, *sub-sections* 1-4.

An order to the liquidator of a company directing him to call up all uncalled capital, and "for that purpose to take all necessary proceedings for enforcing such call," is not an authority to him under section 12, *sub-sections* 1-4, *of the Companies (Winding-up) Act*, 1890, *either to commence actions against such contributories or to employ a solicitor without further authority of the court or of the committee of inspection.*

But where such unauthorized actions have been commenced the committee of inspection may sanction subsequent proceedings in such actions, and such proceedings are then authorized within the meaning of section 12 *of the Act.*

Summons by the official receiver asking for a review of the taxation of the costs of the liquidator of the company in taking proceedings against contributories.

The company was being wound up and there was also a debenture-holders' action to enforce their security which covered the uncalled capital of the company. The same liquidator had been appointed in both proceedings.

On the 24th of May, 1894, the liquidator took out a summons, entitled: "Between William Francis Courthorpe plaintiff and the London Metallurgical Co. defendants"—which was the debenture-holders' action—and "in the matter of the Companies Acts, 1862 to 1890, and in the matter of the London Metallurgical Co. (Limited)," for an order of directions as to who was the proper person to get in and receive the amounts of the calls intended to be made by the liquidator on the contributories of the above-named company, and that the above-named plaintiff, the debenture-holders, or Mr. C. P. King, as the receiver in the action, might be ordered to indemnify the liquidator against all charges and expenses which the liquidator might incur or become liable to for the making and conferring of such calls, and in case the parties differed, that such indemnity might be settled in chambers.

On the 29th of May he obtained an order directing him to call up any uncalled capital on the shares held by the contributories, and "for this purpose" to "take all necessary proceedings for enforcing such calls, and out of the first moneys coming to his

(*a*.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

hands in respect thereof" should be at liberty to retain £100 to provide for his proper costs, charges, and expenses of and incident to making such calls and enforcing the same. The order was made without prejudice to the liquidator's claim for any further allowance. Without any further authority the liquidator proceeded to employ a solicitor and to bring sundry actions against contributories for the payment of calls, and incurred costs in so doing; some of the subsequent proceedings in some of these actions, however, received authority from the committee of inspection. When these costs came to be taxed the taxing-master allowed the costs of all the actions. The official receiver objected to the allowance of the costs of these actions as follows: "The items objected to are so much of the pages named as relate to the costs of the actions commenced by the liquidator against contributories of the company to recover the amount of call due from them. Under section 12, sub-section 1, of the Companies (Winding-up) Act, 1890, it was necessary for the liquidator to obtain the leave of the court or of the committee of inspection to commence any such action, and such leave was not obtained. The liquidator did not obtain the sanction either of the court or of the committee of inspection to employ a solicitor in such actions pursuant to section 12, sub-section 4, of the said Act. If the order of the 29th of May, 1894, is an authority to the liquidator to commence such actions and to employ a solicitor in the same, then the costs authorized to be incurred are limited to £100."

The taxing-master answered these objections as follows: "The order of Vaughan Williams, J., at chambers, made on the 29th of May, 1894, directed the liquidator to call up the uncalled capital, and for that purpose to take all necessary proceedings for enforcing such call. Having regard to that order it appears to me that it was competent for the liquidator, in the exercise of a reasonable discretion (acting under the advice of his solicitor), to bring actions at law and to take bankruptcy proceedings without any further authority from the court or any authority from the committee of inspection. Proceedings such as those contemplated by the order involved the employment of a solicitor, and therefore the employment of a solicitor was, in my opinion, sanctioned. The solicitors, whose bill I have taxed, were duly retained, and all proceedings taken under the bill appear to have been taken by them under the instructions or with the full knowledge and approval of the liquidator. The order of the 29th of May, 1894, did not define the particular proceedings to be taken, or restrict them in any way, but left the liquidator to take all such proceedings as might be necessary. The order did not limit the costs in amount to £100. It only reserves to the liquidator costs to that amount, leaving him afterwards to apply to the court for any further allowance for costs. I therefore certify the whole bill as taxed without regard to any limit. I disallow the official receiver's objections to my taxation."

The official receiver now applied by summons to have these costs disallowed.

Ingle Joyce, for the official receiver.—The order of the 29th of May, 1894, did not authorize the liquidator to commence the actions to which we object or to employ a solicitor. He should have obtained the authority of the court or of the committee of inspection before doing so: Companies (Winding-up) Act, 1890, s. 12, sub-sections (1), (4).

Buckley, Q.C., and *Montague Lush*.—On the facts the liquidator was justified in bringing these actions. They were necessary in order to enforce the company's claims against contributories, and the order of the 29th of May directed him to take all necessary proceedings. He was therefore justified in bringing these actions, and the taxed bill should be allowed.

VAUGHAN WILLIAMS, J.—The question at issue is one of considerable general importance, and I will try to lay down a rule which will be useful both in the present case and in other cases. In the present case the taxing-master has made a certificate in effect allowing the costs of all the actions, and it was only fair to the liquidator's solicitors to say that, as regarded *quantum*, not much has been taxed off their bills. They may be taken, therefore, to have been reasonable and not exorbitant bills. [His lordship then read the official receiver's objections and the taxing-master's answer thereto.] Now I will deal separately with the two grounds on which the taxing-master disallowed the objections, and first with that referring to the order of the 29th of May, 1894. That order was, as appears upon the face of the order, based upon a summons dated the 17th of April, 1894, which is issued in the debenture-holders' action and in the winding-up proceedings. [His lordship then read the material portions of the summons.] It was common ground between the receiver for the debenture-holders and the liquidator that when the summons was taken out the capital to be called up would to a certain extent be required to satisfy the debentures, and it must be borne in mind that primarily the capital was being called up for the benefit of the debenture-holders, and that they were *pro tanto* masters of the litigation and ought to indemnify the liquidator as against the costs. The order made on the summons was that the applicant do call up any uncalled capital on the shares held by the contributories. It was a decision on the question who should call up the unpaid calls. It is established that the liquidator is the proper person, and following this practice the order made was that the applicant, the liquidator, should call up any uncalled capital on the shares held by the contributories, and "for this purpose" should "take all necessary proceedings for enforcing such call, and out of the first moneys coming to his hands in respect thereof" should be at liberty to retain £100 to provide for his proper costs, charges, and expenses of, and incidental to, making the call and enforcing the same, the order being made without prejudice to any question as to the applicant's right to apply for a further allowance for costs. Therefore indemnity was given to the extent of £100. The object of the order was as stated above, and it did in general terms order the liquidator to take the necessary proceedings; but I do not think that the words ought to be construed as relieving the liquidator from any further obligations imposed on him by section 12 of the Act of 1890, sub-sections 1 and 4 of which are as follows:

"(1) The liquidator of a company which is being wound up by the court may, with the sanction either of the court or of the committee of inspection, carry on the business of the company, or bring or defend any legal proceeding in the name and on behalf of the company, or exercise any of the powers conferred by section 159 or section 160 of the Companies Act, 1862."

"(4) The liquidator of a company which is being wound up by order of the court may, with the sanction either of the court or of the committee of inspection, employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself. The sanction aforesaid must be a sanction obtained before the employment, except in cases of urgency, and in

such cases it must be shown that no undue delay took place in obtaining the sanction."

I agree that the words of the order are somewhat general, and I will take care in future that clearer words are inserted, so that the order may not be treated as authorizing proceedings in a particular form without further compliance with section 12. I also say that, having regard to the title of the application and to the proceedings in which the order was made, it was not intended to have any application after enough calls had been got in to pay off the debentures so long as the debenture-holders were really masters of the situation by being the persons beneficially entitled. It is quite right that the question of what expenditure it was worth while to make should be one which should primarily be disposed of by them, they giving a proper indemnity; but I do not think the order is intended to have any application after that time. However this may be, it was plain that whatever else the order might do it only authorized general proceedings and left it to the court to say what they were to be. What are necessary proceedings? In practice, both in bankruptcy and winding up, there is a tendency to talk of the "solicitor of the trustee" and "the solicitor of the liquidator"; but there is truth in no such officer. In all these cases there should be an authority naming the solicitor to be employed, and it is right and proper that on such a specific authority being given a limit should be imposed as to the costs to be incurred. No one could say that because the authority of the court or the committee for taking proceedings had been obtained under section 12, sub-section 17, that did away with the necessity for an application under sub-section 4 of the same section for sanction to employ a solicitor. The order of the 29th of May was, in my opinion, only meant as a performance of the function thrown on the court by sub-section 1. Then, was there any sanction by the committee of inspection? In both bankruptcy and winding up it is perfectly clear that the sanction of the court or the committee must be claimed before the proceedings are instituted, except in cases of urgency. In the present case no proceedings had been commenced in which the sanction of the committee had been obtained before the initiatory steps had been taken. Therefore, the solicitor cannot say that he had the sanction of the committee to the earlier steps of the proceedings. I am not saying that the court might not give sanction now, but when asked to give subsequent sanction it would bear in mind the principle established by the very words of the Act and rules, that the sanction must be obtained before the employment except in cases of urgency. But as to the later steps in the proceedings, they seemed to have been in some instances authorised; and on this part of the case the objections of the official receiver are too wide, because he seems to assume that unless the sanction is obtained before the commencement of an action—the issue of the writ—the whole action must be necessarily treated as if no sanction had been obtained. That contention is wrong.

The section says "bring or defend legal proceedings." I think that if the liquidator, without getting the necessary sanction, commenced an action, and then, after he had commenced the action, the attention of the committee of inspection was called to it, and the permission was asked to take a proceeding in the action, as, for instance, to issue execution, that the sanction so obtained for that step would comply with the section. In other words, I do not think that to "bring or defend legal proceedings" necessarily means the issue of the writ or whatever else must be the first step. I think you are bringing legal proceedings if you take such proceedings for examination as was taken in this case. His lordship then dealt with the particular costs of the actions and proceedings in the case before him, some of which were allowed and others disallowed.

I decide, first, that the order of the 29th of May, 1894, did not authorize these particular proceedings; I decide, secondly, that these proceedings were not all of them necessary, that to a certain extent they were necessary, especially in certain of the actions. Therefore the matter will go back to the master in order that he may, after looking at the affidavits, determine on the necessity of the actions. If he thinks they were necessary, upon his reporting to me I will give the sanction.

Solicitors, *Solicitor to the Board of Trade; Grant, Bulcraig, & Co.*

Q. B. Div.
(Wright and Bruce, JJ.) May 19; June 1.

SIMMONS v. MALLING RURAL DISTRICT COUNCIL. (a.)

Local government—Rural sanitary authority—Bye-law—Old building—Reasonableness—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Public Health Acts Amendment Act,* 1890 (53 & 54 *Vict. c.* 59), *s.* 23.

Under section 157 *of the Public Health Act,* 1875, *as amended by section* 23 *of the Public Health Acts Amendment Act,* 1890, *rural sanitary authorities are empowered to make bye-laws with regard to* (inter alia) *cesspools in connection with buildings.*

Held, that it was no defence to a summons for contravention of such a bye-law that the building in question had been erected before an order had been made by the Local Government Board under section 276 *of the Public Health Act,* 1875, *extending the powers of section* 157 *to the rural sanitary authority.*

The bye-law provided that a cesspool to be constructed in connection with a building should be at least 50 *feet distant from a dwelling-house or building in which persons were employed.*

Held, that the bye-law was reasonable.

Case stated by justices of Kent.

The appellant was summoned before justices in petty sessions for that he did unlawfully construct a cesspool in connection with a building at a distance within fifty feet from a dwelling-house, contrary to the bye-laws of the Malling Rural District Council, the respondents.

The bye-law in question was as follows: "Every person who shall construct a cesspool in connection with a building shall construct such cesspool at a distance of fifty feet at least from a dwelling-house or public building, or any building in which any person may be, or may be intended to be, employed in any manufacture, trade, or business."

The appellant was the owner of a public-house within the respondents' district. The house was an old building, having been erected many years ago, and had, down to October, 1896, two cesspools situate at a distance of about three feet from the house. One of the cesspools received the drainage from a urinal and two closets, and the other received the sink water. In October, 1896, the appellant, after notice from the inspector of nuisances, caused the two cesspools to be filled up, and converted the closets into earth closets, and constructed a new cesspool into which the drainage from the sink and urinal was conducted by underground pipes.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The extent of the appellant's property was such that it was not possible to construct the new cesspool at a distance of fifty feet from the appellant's house, but it was constructed at as great a distance as possible from the house—namely, seventeen feet.

The appellant's house was erected in a place which was not, at the time of the passing of the Public Health Act, 1875, included in an urban sanitary district, and was erected many years before any order was made under section 276 of that Act extending section 157 of the Act to the respondents' district, and the urinal, closets, and sink had existed in the condition in which they were before the alteration above referred to for many years prior to the said order.

Section 157 of the Public Health Act, 1875, was duly extended to the respondents' district. In 1895 the respondents made bye-laws under that section, which were duly allowed by the Local Government Board. Part 3 of the Public Health Amendment Act, 1890, had been adopted by the respondents.

It was contended for the appellant that the bye-law had no application because (1) he had not constructed a cesspool in connection with which the bye-law applied; (2) he had not erected any building within the respondents' district subsequently to the order of the Local Government Board extending section 157 of the Public Health Act, 1875, to the district; (3) the bye-law was *ultra vires* unreasonable and void.

The justices convicted the appellant, subject to this case, the question for the court being whether their determination was right in point of law.

The case was twice argued before the Divisional Court. On the first occasion the court expressed an opinion that, as the question as to the validity of the bye-law was one of general importance, notice of the proceedings should be given to the Local Government Board in order that the Board might, if it thought proper, appear by counsel.

Hohler (*Joseph* with him), for the appellant.—The bye-law is *ultra vires* and unreasonable. Section 157 of the Public Health Act, 1875, empowered urban authorities to make bye-laws with respect to the various matters mentioned in the section, including cesspools in connection with buildings. Under section 276 the Local Government Board might invest rural authorities with the powers of urban authorities as to making bye-laws. It is clear that the bye-laws to be made under section 157 only applied to future, and not to existing buildings. Then, by section 23, sub-section 1, of the Public Health Acts Amendment Act, 1890, section 157 of the Act of 1875 is extended so as empower urban authorities to make bye-laws with respect to certain additional matters; and section 23, sub-section 2, provides that bye-laws made under section 157, as extended by section 23, sub-section 1, of the Act of 1890, may be made so as to affect buildings erected before the times mentioned in section 157. Up to this point there is nothing in section 23 affecting rural authorities, but sub-section 3 of section 23 provides that the provisions of section 157, "as amended" by the Act of 1890, so far as they relate to bye-laws with respect to certain matters, including cesspools in connection with buildings, shall be "extended" so as to empower rural authorities to make bye-laws in respect to the said matters. The words "as amended" refer to the additional matters brought in by sub-section 1 of section 23, and not to the provisions of sub-section 2, applying the bye-laws of urban authorities to old buildings. Sub-section 3 expressly mentions all the powers which are to be "extended" to rural authorities. The provisions of sub-section 2 are not mentioned, and are therefore not included, and the powers of rural authorities with respect to bye-laws are confined to making bye-laws which shall affect only such buildings as were erected before the times mentioned in section 157 of the Act of 1875. He also contended that the bye-law was unreasonable on various grounds which are referred to in the judgment of Wright, J.

He cited *Waite* v. *Garston Local Board*, 16 W. R. 78, L. R. 3 Q. B. 5; *Heap* v. *Burnley Union*, 32 W. R. 661, 12 Q. B. D. 617; *Tucker* v. *Rees*, 25 J. P. 789, 9 W. R. C. L. Dig. 51.

Sir R. B. Finlay, S.G., and *H. Sutton*, for the Local Government Board.—This bye-law was sanctioned by the Local Government Board under the powers contained in section 184 of the Public Health Act, 1875. It is contended that it is unreasonable, because it provides for a fixed distance within which cesspools are not to be constructed. It is obvious that the line must be drawn somewhere, and the question as to what shall be the distance is eminently one for the local authority which is conversant with the requirements of the neighbourhood.

Macmorran, Q.C., and *A. Gill*, for the respondent, on the question of the reasonableness of the bye-law, referred to *Slattery* v. *Naylor*, 36 W. R. 897, 13 App. Cas. 446.

Hohler replied.

Cur. adv. vult.

June 1.—WRIGHT, J.—In this case the question for our decision arises on a bye-law made for a rural district under the powers conferred by the Public Health Act, 1890. Certain objections have been taken to the bye-law on behalf of the appellant. In the first place it is contended that if the bye-law is properly read in connection with the rest of the bye-laws it does not apply to buildings which were in existence at the time when the bye-law was made. The answer to that contention is that the language of the bye-law is quite general. The group or bundle of bye-laws of which it forms one is headed, "With respect to water-closets, earth-closets, privies, ash-pits, and cesspools in connection with buildings." In other parts of the bye-laws, where it is intended to restrict their operation to new buildings, the expression "new buildings" is used. There is therefore no reason why the operation of this bye-law should be cut down in the manner suggested. Then it is said that the bye-law is *ultra vires*. This point appears to me to be wholly untenable. The Public Health Act, 1875, s. 157, sub-section 4, gave power to urban authorities to make bye-laws with respect to the drainage of closets and cesspools in connection with buildings. It seems to have been thought that that power might not extend to old buildings, and by section 23 of the Act of 1890, urban authorities are empowered to make bye-laws as to certain matters which were not included in the Act of 1875, and section 23, sub-section 2, goes on to provide that any bye-laws under section 157 of the Act of 1875, "as above extended with regard to . . . cesspools in connection with buildings . . . may be made so as to affect buildings erected before the times mentioned" in section 157. Then sub-section 3 provides that the provisions of section 157, "as amended by this Act," that is to say, extended to old buildings, shall be extended so as to empower rural authorities to make bye-laws with respect to the matters mentioned. In my opinion this section expressly confers upon rural authorities power to make bye-laws relating to old buildings. Then it is said that the bye-law is unreasonable because of the 50ft. limit; and it

is pointed out that in some cases that limit will produce hardship. It is clear that public convenience requires that there should be some limit, and the limit must be fixed, and I cannot hold that 50ft. is unreasonable any more than 40ft. or 30ft.

It is also contended that the bye-law is unreasonable because it is destructive of property. It is said that in cases where there is no sewage system and a cesspool is necessary it will be impossible to have one if there is not sufficient land to allow of the cesspool being 50ft. from the building.

The answer to that argument is, that if there were already no cesspool there is no destruction of property, and if there is one, the owner need not move it. Lastly, it was suggested that the bye-law would tend to prevent the improvement of property. I doubt very much whether we can hold a bye-law unreasonable on that ground, for we are not in a position to say what is and what is not for the public interest in sanitary matters. The appeal must be dismissed.

BRUCE, J.—I am of the same opinion. At one time I had some doubt whether the bye-law was not unreasonable, but I am satisfied that it is not so. There must be some limit fixed, and I cannot say that 50ft. is an unreasonable limit. The same objections that have been raised in this case might in another case, where the limit was only 10ft., be urged with equal force.

Appeal dismissed.

Solicitors for the appellant, *Routh, Stacey, & Castle*, for *Knocker, Knocker, & Holcroft*, Sevenoaks.

Solicitors for the Local Government Board, *Sharpe, Parker, Pritchards, & Barham.*

Solicitors for the respondents, *Kays & Jones*, for *H. D. Wildes*, West Malling.

Q. B. Div.
(Hawkins and Wright, JJ.) May 10.

REG. *v.* LONDON COUNTY COUNCIL.
Ex parte WEBSTER. (*a.*)

Metropolis—New building—Wall within 20 feet of centre of highway—Illegal structure—Application for consent after erection—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 13, *sub-sections* 1, 4.

By the London Building Act, 1894, *s.* 13, *sub-section* 1, *no new building or structure or any part thereof shall be erected at a less distance than the prescribed distance from the centre of the highway without the consent in writing of the London County Council; and by sub-section* 4 *it is provided that the council may in any case where they think it expedient consent to the erection of such building at a distance less than the prescribed distance.*

Held, that this consent provided for by sub-section 4 *must be given in the same way as the consent to the building itself—namely, before the erection takes place—and that it therefore does not apply to a building already erected.*

The court has no power to compel the council to hear and entertain an application for their consent to the retention of an illegal structure already erected.

Rule *nisi* for an order for a *mandamus* to the London County Council to hear and determine an application for their consent to the retention of a newly-erected wall within twenty feet of the centre of a highway.

The rule had been obtained by Emma Webster, a married woman, the owner of a piece of land in Pearson's-avenue, Deptford, abutting on a highway. This piece of land had not been previously built upon, but it was divided from the highway by a wooden fence. This fence, which was within twenty feet of the centre of the highway, Mrs. Webster pulled down and erected in its place a brick wall.

Subsequently she built stables on this piece of land, the foreyard being bounded by the said wall, which thus became part of the structure. The stables, being thus within twenty feet of the centre of the highway, constituted an illegal structure within the London Building Act, 1894.

A summons was taken out by the London County Council against the builder for erecting the wall without their consent, and he was convicted. The wall, however, not being pulled down, the said council then took proceedings against Mrs. Webster, the owner, for continuing penalties, and she thereupon made an application to the council for their consent to the retention of the wall under the power given them by section 13, sub-section 4.

The council refused to hear the application on the ground that they had no jurisdiction to consent to a wall already erected, whereupon she appealed to the special tribunal of appeal created under the London Building Act, 1894. When before this tribunal objection was taken that, as the council had not decided one way or another as regards the retention of the wall, there was no decision to appeal from, and this view was upheld.

The present application was made in order to compel the council to hear the application, so that, if necessary, the owner could then go before the tribunal of appeal on the merits of her case.

By section 13, sub-section 1, of the London Building Act, 1894, it is provided that "No person shall erect any new building, new structure, or any part thereof, or extend any building or structure or any part thereof in such manner that any external wall of any such building, structure, or (if there be a forecourt or other space between such external wall and the roadway) any part of the external fence or boundary of such forecourt or other space shall, without the consent in writing of the council, be in any direction less than the prescribed distance from the centre of the roadway of any street or way (being a highway)."

By sub-section 4 of the same section it is provided that "The council may in any case where they think it expedient consent to the erection, formation, or extension of any building, structure, forecourt, or space at a distance less than the prescribed distance from the centre of the roadway of any such street or way and at such distance from the centre of such roadway and subject to such conditions and terms (if any) as they may think proper to sanction. . . ."

H. Avory showed cause against the rule.—The question here is whether this court can order the London County Council to hear an application for their consent to the retention of an already existing illegal structure. The council is not bound to entertain such an application, and moreover, they have no jurisdiction to do so. The application must be made before the erection of the structure. By sub-section 1 of section 5 this wall could not be legally built without the consent of the council, as provided by sub-section 4, and it is clear that such consent should have been obtained before the wall was built. Sub-section 5 provides for the alteration or re-erection of a building, and there it is clear that the consent of

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the district surveyor must first be obtained before the alteration or re-building can be carried out. This rule should be discharged.

Macmorran, Q.C. (*R. J. Drake* with him), in support of the rule.—This court can command the council to hear Mrs. Webster's application. The council are bound to give an answer one way or the other so as to enable the applicant to appeal. This they have not done. It would be unduly restraining the enabling clause to say that the consent of the council can only be obtained before the building is erected.

HAWKINS, J.—I am of opinion that we ought not to make this rule absolute. It seems to me that we ought not to do so upon a very short and simple ground. Section 13 of the Building Act of 1894 is in these terms. No person shall erect any new building or new structure, or any part thereof, or extend any building or structure, or any part thereof, in such a manner that any external wall of any such building or structure (or if there be a forecourt or other space between such external wall and the roadway), any part of the external fence or boundary of such forecourt or other space shall, without the consent in writing of the council, be in any direction at a distance less than the prescribed distance from the centre of the roadway of any street. The Legislature, however, felt that that hard-and-fast rule might sometimes work with great injustice and hardship upon those who were about to build and make a profitable use of their land, and sub-section 4 of the same sub-section therefore, as far as I read it, was enacted to provide a remedy for any such difficulty and for the alleviation of any grievance which might be felt by reason of the restrictive powers mentioned in section 13. Accordingly it was enacted that the council may in any case where they think it expedient, consent to the formation, erection, or extension of any building at a distance less than the prescribed distance from the centre of the roadway, provided the giving of such consent by the council shall not affect the rights of owners of adjoining lands. It is evident we must read these two sub-sections together, and doing so, I cannot entertain any doubt that section 13, sub-section 1, prohibits the erection of any new building or new structure unless consent in writing has been previously given to such erection. Sub-section 4 was introduced for the purpose of enabling them to modify this positive enactment, and to give their consent to the erection, formation, or extension of any building at a distance less than the prescribed distance from the centre of the roadway. I am, however, of opinion that the modified consent they have the power to give under sub-section 4 must be given in the same way as the consent to the building itself—namely, before the erection takes place. I think, therefore, that the structure, which is admitted in its present condition to be illegal and in contravention of the provisions of the Act, must be looked upon for the purpose of this inquiry as being an illegal structure, and I do not think that sub-section 4 was intended to compel the county council to consider any matter or give any consent when the building had, without their consent, been improperly erected beyond the limited distance from the centre of the highway. I do not think we have any power by *mandamus* to order them to entertain such an application, and I think therefore that this rule must be discharged.

I think myself there is a good deal to be said for the reason why the matter must rest with the county council. If they were in a case of this description to grant their consent, or rather be forced to grant their consent or to entertain the question whether they would give their consent or not for the retention of a building which was already illegally built and constructed, it would be an application to legalise that which was illegal, and this they would not, to my mind, have the power to do. However, it is not necessary for me to determine that, but if we were to grant this *mandamus* I can see how they might be flooded with similar applications, and then (without saying in the least degree that Mrs. Webster has done that) they might be flooded with applications by persons who have run up buildings knowing perfectly well that they were doing an illegal thing in the first instance, and trusting to the good nature of the county council, or other considerations, to their giving a consent after the illegality had been committed.

I think that we ought not to make the rule absolute, but that it must be discharged.

WRIGHT, J.—I am of the same opinion. Whether the county council have or have not power to give give the consent *ex post facto*, it seems to me quite clear that they are under no duty to give any answer one way or the other when they are applied to *ex post facto*, and in my opinion the application has no legal right such as would be required to support a *mandamus* to call upon them to do so.

Rule discharged.

Solicitors, *Blaxland; Sandom, Kersey, & Knight.*

Q. B. Div. (Wills and Grantham, JJ.) April 7, 8.

ATTORNEY-GENERAL *v.* THE NEW YORK BREWERIES CO. (LIMITED). (*a.*)

Inland revenue—Probate duty—Foreign will—English company—Registration of transfer of shares to executor of testator—Executor de son tort—"*Taking possession of and administering*"—55 *Geo.* 3, *c.* 184, *s.* 37—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 40.

A testator, the registered owner of shares and debentures in an English company, was domiciled and died in America. By his will, made according to the American law, these shares and debentures passed to his executors, who requested the company to transfer into their names on the register as holders, in place of the testator, one preference share, one ordinary share, and one debenture. The executors did not obtain probate of the will in England, nor did they intend doing so, and the company was aware of this. The transfer was duly registered in the books of the company in London.

Section 37 *of* 55 *Geo.* 3, *c.* 184, *provides that if any person "shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased without obtaining probate of the will or letters of administration . . . within six calendar months" he shall be liable to penalties.*

Held, that the company had not taken possession of and administered the deceased's estate within the meaning of that section, and that it had not so intermeddled with the estate as to constitute itself an executor de son tort *and render itself liable to the penalty imposed by that section.*

Information by the Attorney-General.

The defendant company was an English company incorporated under the Companies Acts, 1862 to 1886.

The capital of the company was £930,000, consisting of 30,000 preference shares of £10 each, 30,000

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

ordinary shares of £10 each, and £330,000 mortgage debentures.

The registered office of the company was situated in the City of London.

The objects for which the company was established as defined by the memorandum of association are:

(a) To carry on business as brewers, malters, licensed victuallers, mineral water manufacturers, hotel keepers, restaurateurs, and wine and tobacco merchants, and to establish and carry on any other trade or business whatsoever which can in the opinion of the board be advantageously carried on by the company in connection with or as auxiliary to the general business of the company.

(b) To acquire upon such terms and subject to such conditions as may be arranged and either directly or through trustees and in consideration of fully paid-up shares of the company or of cash or otherwise all or any part of the property rights, powers, and privileges of the H. Clausen & Son Brewing Co. and James Flanagan, carrying on business as Flanagan, Nay, & Co., both of New York, in the United States of America, and any other brewing business in the said States.

(c) To cause the legal estate in any American business acquired by the company to be registered in the name of any American company or of any person or persons or corporation in trust for the defendant company. And other objects incidental to or connected with those above specified.

By the articles of association of the company it was among others provided that the shares shall be at the disposal of the directors, and that no person shall be recognized by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share or (except as thereby expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder.

The transmission and transfer of preference and ordinary shares in the company were dealt with by clauses 37 to 47 inclusive of the articles of association. By clause 39 it was provided that a book to be called the register of transfers shall be kept by the secretary under control of the directors. Article 43 is as follows:

"In the case of the death of a shareholder the survivor or survivors where the deceased was a joint holder and the executors or administrators of the deceased where he was a sole holder shall be the only persons recognized by the company as having any title to his shares." By article 44 any person becoming entitled to a share in consequence of the death or bankruptcy of a member may on producing such evidence of title as the directors shall require and subject as thereinafter provided either be registered himself as holder of the share or have some person nominated by him registered as transferee thereof.

And article 47 provided that—

"A person entitled to a share by transmission shall be entitled to receive, and may give a discharge for any dividends, bonuses, or other moneys payable in respect of the share."

By virtue of an agreement dated the 10th of August, 1888, and made between the H. Clausen & Son Brewing Co. and James Flanagan, carrying on business as Flanagan, Nay, & Co., of the one part, and the defendant company of the other part, the company acquired certain lands, buildings, plant, furniture, and the goodwill of H. Clausen & Son and of Flanagan, Nay, & Co., and their stock-in-trade, all which property became vested in trustees for the defendant company, and the defendant company was at the death of Harry Clausen, the younger, hereinafter mentioned, and subsequently carrying on business under the said memorandum and articles of association.

By clauses 69a and 69b of the articles of association the directors of the company had power to borrow sums not exceeding £330,000 and to secure the repayment by the issue of debentures or debenture stock of the company charged on all or any part of its property. This power was exercised, and by an indenture dated the 25th of October, 1888, the company and its trustees granted its property to trustees to hold for the benefit of the debenture-holders subject to the conditions therein expressed. The said deed provides (*inter alia*) that "the company, its successors, or assigns shall at all times hereafter keep an office or agency in the City of London and a book or books therein which shall serve as a register of the said debentures, in which shall be entered the name and address of the holder of any of the said debentures and the number of every of the said debentures held by him."

The form of the debentures and the conditions endorsed thereon were varied by a subsequent deed dated the 12th of December, 1888, and the company charged with the payment thereof the whole of its real and personal property in the United Kingdom, and such other property as could be lawfully charged.

The conditions endorsed on the debentures provided *inter alia* as follows:

"The principal moneys and interest hereby secured will be paid at the registered office of the company, or at some bank in London or Westminster, to be from time to time appointed by the company and notified to the registered shareholders."

"Any notice may be given to the registered holder hereof by sending it through the post in a prepaid letter addressed to such holder at his registered address, or if he has no registered address within the United Kingdom, at the registered office of the company."

Henry Clausen the younger, a person domiciled in New York, in the United States of America, died on the 28th of December, 1893, having, by a will made according to the law of his domicil, appointed H. W. Schmidt and P. V. Stocky, both of New York, his executors.

On the 19th of January, 1894, letters testamentary of the estate of said Henry Clausen were granted by the Surrogates Court of the city and county of New York to the said H. W. Schmidt and P. V. Stocky.

At the date of his death the said Henry Clausen was the registered holder in the books of the defendant company in London of certain shares in and debentures of the defendant, the New York Breweries Co. (Limited), of the nominal value of £42,210—namely, 1,747 preference shares of £10 each, 274 ordinary shares of £10 each, and 220 debentures of £100 each. There was not, and never had been, any register of shares or register of debentures of the defendant company elsewhere than in London.

The will of the said Henry Clausen the younger was not proved in England, nor was administration or representation to his estate in any form granted or taken out in England.

At the request of H. Clausen's executors the defendant company transferred, in the books of the company in London, one of such preference shares, one of such ordinary shares, and one of such debentures into the names of the executors. The defendant company also, at the request of the executors, paid to them dividends on shares which had become due after Henry Clausen's death, and interest on debentures which had become due before his death. The defendant company and the directors thereof when

they so dealt with and disposed of the said shares and debenture and paid the said interest and dividends knew that no representation to the said Henry Clausen had been taken out in this country.

The information alleged that by acting as aforesaid the defendant company had in fact taken possession of and administered the shares and debenture, interest, and dividends so transferred, paid, and dealt with as aforesaid, being part of the personal estate of the said Henry Clausen situate and capable of being dealt with in England, and became an executor *de son tort* thereof, and also became liable to the penalties imposed by section 37 of 55 Geo. 3, c. 184, and by section 40 of 44 Vict. c. 12; and that the defendant company became and was liable, and ought to account to the Commissioners of Inland Revenue for the value of the personal estate of the said Henry Clausen in this country, and to pay such duty as would have been payable if probate or administration to the said Henry Clausen in this country had been duly obtained.

The value of the said shares and debentures belonging to the said Henry Clausen at his death was upwards of £10,000.

The information prayed that it might be declared that the defendant company had become and was liable to deliver to the Commissioners of Inland Revenue an account of the shares and debentures in the said company which were registered in the names of the said Henry Clausen the younger at his death, as hereinbefore mentioned, and of the dividends and interest thereon, being respectively personal estate of the said Henry Clausen deceased, and of the value of the said estate, and to pay such duty (including estate duty under section 5 of the Act 52 Vict. c. 7) as would have been payable if probate or administration had been duly obtained in England in respect of the personal estate of the said Henry Clausen, and has become and is liable to the penalties imposed by section 37 of the Act 55 Geo. 3, c. 184, and by section 40 of the Act 44 Vict. c. 12 by administering the said personal estate without obtaining probate or letters of administration.

Sir Richard Webster, A.G. (*Vaughan Hawkins* with him), for the Crown.—The defendant company is an English company in every sense within the meaning of the decision in the case of *San Paulo* (*Brazilian*) *Railway Co.* v. *Carter*, 44 W. R. 336, [1896] A. C. 31. The head office, where the register is kept, is in England, and the shares and debentures are therefore located there, and are taxable in this country: *Attorney-General* v. *Higgins*, 2 H. & N. 339, 5 W. R. C. L. Dig. 227. The company has become an executor *de son tort* by transferring the shares and debenture into the names of the executors and by paying them dividends and interest. This intermeddling is sufficient to render the company subject to the liability to pay probate and estate duty. The company has taken possession of and administered part of the personal estate of the deceased within the meaning of section 37 of 55 Geo. 3, c. 184, and is therefore liable to the penalties provided for in that section. The company also failed to obtain probate within section 40 of the Customs and Inland Revenue Act, 1881. The Crown is therefore entitled to the declaration it asks for.

Moulton, Q.C., (*Asquith, Q.C., A. M. Bremner, F. Gore-Browne*, and *Roskill* with him), for the defendant company.—There is no case against the company, and the Crown has no claim against it as an executor *de son tort* or under any statute. What the company did does not amount to a taking possession of or administering the shares and debenture. It cannot be said that by registering a transfer of the shares possession has been taken of them. That is a mere ministerial act recognizing the transfer of the shares to the executors. These shares passed by the will of the testator to the executors, and therefore belong to them, probate or no probate. By American law the company can be compelled to register the title, and it is no answer to say that no probate has been taken out in England. Section 37 was not aimed at persons in the position of the company. The company could not obtain probate or take out letters of administration or act as an executor. The words in section 37 must be construed in their ordinary meaning. There is nothing in section 11 of 47 & 48 Vict. c. 62 to prevent the company from handing over to an owner property that belongs to him. Executors are not bound to take out probate until six months after the death of the testator, and there is nothing to prevent them before doing so from receiving payment of a debt of the testator: *In re Stevens, Cooke* v. *Stevens*, *ante*, p. 284, [1897] 1 Ch. 422, see judgment of North, J., at pp. 429, 430. The words "take possession of and administer" only refer to such acts as an executor or administrator could perform: *Peters* v. *Leeder*, 47 L. J. Q. B. 573, 26 W. R. Dig. 89. As to the question of dividends and interest accruing after the death of the testator, they could never have been part of his estate; they belong to the executors to whom the shares and debenture passed.

Asquith, Q.C., followed.

Sir R. Webster, A.G., in reply, cited the following cases: *In re Commercial Bank, Corporation of India and the East*, 18 W. R. 411, L. R. 5 Ch. App. 314; *Sharland* v. *Mildon*, 5 Hare 469; *Paull* v. *Simpson*, 9 Q. B. 365; *Bodger* v. *Arch*, 10 Ex. 333, 3 W. R. C. L. Dig. 183.

WILLS, J.—I am of opinion that our judgment must be for the respondents. The claim of the Crown arises under section 37 of 55 Geo. 3, c. 184, which provides that "if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration" he shall forfeit £100. The question here is whether the defendants have taken possession of and have administered part of the estate of the testator. There are two Acts which are relied upon by the Crown as constituting such "taking possession of." I need not trouble myself with the further words as to administration, because if they took possession they certainly administered and dealt with the property, and therefore the real question is whether they took possession either of the shares or of the interest on debentures which had accrued at the time when the testator died. It seems to me that the "taking possession" which is referred to in section 37 refers to some act which, if the person had been an executor or an administrator he could have done in order to get hold of property which belonged to the deceased person. What the defendants did in this instance appears to have been a recognition of the title of the executors who had not obtained English probate and a transfer of the property into their names. I do not think that is "taking possession"; I think it is merely a ministerial act acknowledging the title of the executors. It was an act that could not have been done by the executors, and certainly would not be "taking possession" within the meaning of this section. It seems to me to be much more analogous to what they did in respect to the next matter, which is relied upon—namely, the handing over to the American executors of the interest which had accrued upon the debentures at the time the testator died, because, as was pointed out by counsel,

any dividends which accrued after that time never belonged to the testator, and could not have been included in the inventory of his property for the purpose of the estate duty or probate duty, or anything else connected with the administration, and therefore any dealing with it could not have been "taking possession" of a part of the estate of the deceased.

But now, what did the respondents do? They simply paid to the executors money which belonged to them as executors. Now, it is very old law that an executor may act in connection with the property of the deceased, and that people may deal with him as an executor before he has proved the will at all, and we cannot have a stronger illustration of that than the fact that an executor who has not taken out probate is entitled to sue, and the only condition is that, if he has to come into court to prove his title, he must produce probate, because there is no other recognized means of proof. This shows that the executor's title, as has been laid down over and over again from the earliest times, does not depend upon the probate, but upon the will. If this case depended only on that old law, it could hardly be seriously argued that the defendants had done anything wrong, or anything that was like a wrongful intermeddling with the property for the purpose of administering it, by paying a debt which they were bound to pay to the executors, although, if they chose to contest the executors' title, and if they drove them to prove it in a court of law, the executors would be obliged to take out probate before they could recover.

Now, has any legislation altered that very old law? Reliance is placed upon section 11 of the Revenue Act, 1884 (47 & 48 Vict. c. 62), which says that the production of a grant of probate or letters of administration "shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situate in the United Kingdom." Now, if that was a statute which had been passed before there was any definite recognition, deeply seated in the law, of the right of the executor to deal with the estate of the deceased before taking out probate, it might, perhaps, be said that the Legislature meant that the executor should not have a right to do anything with the property of the deceased before he had taken out probate; but that is an Act of Parliament which was passed after it had been the law for centuries that a man could deal as executor with the property of a testator without taking out probate, unless he wanted the intervention of the courts to help him. I cannot think that, by an expression of that kind in an Act passed to establish and to facilitate the collection of duties, it was ever intended to make such a radical change as that in the law of England, because it would introduce such intolerable inconvenience, and might work such intolerable wrong, that it might make it impossible for the most necessary steps for the protection of the property of the deceased person to be taken within a reasonable time, because oftentimes probate cannot be taken out and duties cannot be paid until complicated questions are settled. I think what was meant was that, where a person has to establish his right to sue as executor, and to receive the property in his capacity as executor, he must produce probate. That comes simply to an affirmation of the old law, or perhaps it goes a little further than that, because it gives a person who disputes the executor's right to recover or receive property the right to require the production of probate before it can be said that the executor's right is established. I do not think section 11 was ever meant to apply where there was no occasion to establish the executor's right, because nobody disputed it.

Unfortunately, in this case the result is that these American executors escape paying English duty. Well, I cannot help that. It seems to me that section 37 of 55 Geo. 3, c. 184, does not make it an offence for a person to deal with an executor as executor; it makes it an offence on the part of the executor or other person to take possession of or administer any part of a deceased's personal property without having taken out probate, and it provides within itself a very appropriate penalty which is to follow, and defines what it is to be. It does not make it a crime or an offence against the law to pay an executor; it only makes it an offence on his part to administer without taking out probate, and seeing that he has six months' grace within which he is at liberty to take out probate it is quite clear that it is not meant to prohibit all action of this kind on his part, but only if he does not afterwards take out probate, and possibly, also, if he does not intend to take out probate. I should be very glad if proper means could be found for making these New York gentlemen pay our English duty, but with that I have nothing to do. All I can say is, that it appears to me that the defendants have not really intermeddled with the administration of this estate. They have simply done that which the common law of England gives them the right to do—namely, to pay an executor without asking him to prove his title by the production of probate. It seems to me, therefore, that the case for the Crown fails, and that our judgment must be for the respondents.

GRANTHAM, J.—I am of the same opinion. The learned Attorney-General argued this case exactly as if the company were the executors, and the whole of his argument applied only to the secretary of this company as if he had been appointed executor or had the power of an executor. But when we come to look at the position in which the company was to the testator and the executors, the company was merely in the position of a debtor to the testator, and under an obligation to the testator to do something which the testator or the executors of the testator could compel them to do.

Now, I have looked in vain through the various sections of the Probate Acts to find any power prohibiting a person in the position of a debtor to the estate of a deceased person from paying his debt to the executors. It may be that the Crown will lose the duty. I confess I do not see that the defendants are bound to pay this duty themselves, but I think that as an English company there is another liability upon them, and that is to uphold the law as constituted in this country, because as was very frankly admitted by the learned counsel for the English company they ought not to register a transfer of shares without the production of probate. I suggested that that was the universal practice with regard to English companies, and with regard to shares held by English testators, and they said that the law was exactly the same and that the practice was exactly the same with regard to themselves, and it seems to me, therefore, that their duty is not to register these shares and not to pay over this money, but to say to the American executor, "We are bound by our law and by the constitution of this company, and we cannot register these shares without the production of probate." I cannot for a moment think that they would be under any legal liability whatever to the American executors if they acted in that way. I do not know that I need add anything further to what has fallen from my learned brother, in which I entirely concur, except to say this, that throughout all these sections you find that the language refers to persons administering or who ought to administer the estate as being liable. This company are not administering the estate in any

way; they are not the persons who ought to administer the estate; they are not the persons who ought to take out probate, and therefore under those circumstances I cannot see how they can be liable to the penalties which the Crown seeks to enforce against them.

Judgment for the defendants.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Burn & Berridge.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — May 21.

In re HUNTER.
HOOD *v.* ATTORNEY-GENERAL. (*a.*)

Will—Construction—Charity—Gift to purchase advowsons—Valid charitable gift—General charitable intention.

A testator gave the proceeds of conversion of his residuary, real, and personal estate to special trustees upon certain trusts for the promotion of "true Protestant and Church of England principles," which he explained as being the principles known as Evangelical.

Held, upon the construction of the whole will, that there was such a general charitable intention as made the gift a good charitable gift, notwithstanding difficulties raised by the language in which the trusts were declared.

Semble, *the trustees under such a will could be restrained by injunction from applying any of the trust property in the promotion of views inconsistent with those prescribed by the testator.*

Decision of Romer, J., *reversed.*

This was an appeal by the Attorney-General from a decision of Romer, J. (*ante*, p. 344).

Sir R. Webster, A.G., and *Ingle Joyce* (*Dibdin* with them), for the appeal.

Levett, Q.C., and *G. P. C. Lawrence*, for the respondents.

William C. Druce, for the trustees.

Ingle Joyce replied.

LINDLEY, L.J., examined the provisions of the will and continued: It appears to me almost impossible to read that will and see what the testator has said, and not come to the conclusion that he has expressed an intention to devote his residuary estate to purposes which by the law of this court are termed charitable. He has not said in so many words that the property, the capital and income of which may be applied for or towards the purchase of advowsons or presentations, is to be held upon any particular trusts; but the question is whether you cannot get that out of his will. Suppose the trustees were about to apply part of the residuary estate in the purchase of advowsons for the avowed purpose of appointing a clergyman of the Church of England of a Ritualistic tendency, would not that be a flagrant breach of trust? In my judgment it would, and I think the Attorney-General could get an injunction to stop it. I cannot come to the conclusion that merely because the words do not exactly fit there is an intestacy here. The testator has dedicated this residuary estate to the purposes of charity. That gets rid of the point which might and would arise if we came to the conclusion that the first of these clauses was not a good charitable disposition—viz., whether the gift here would be void if it were not charitable. I think there is a good deal in Mr. Ingle Joyce's suggestion that the gift is so definite that even if not charitable it would be good. I say no more about that point now. It will be very deserving of consideration when it arises in any case so as to require decision. It does not really arise here.

I think the appeal must be allowed.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors, *Hare & Co.; West, King, Adams, & Co.; Hollams & Co.*

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Feb. 15, 16.

SEAWARD *v.* PATERSON. (*a.*)

Contempt of court—Injunction—Breach by person not enjoined—Jurisdiction to commit.

A person not himself included in an injunction, or a party to the action, who knowingly aids and abets a defendant in a breach of it, may be committed for contempt.

The plaintiff demised to the defendant by lease a portion of the house No. 53, Fetter-lane, in the City of London, for twenty-one years from Christmas, 1895. The lease contained a covenant by the lessee that he would not during the term do or suffer any thing which might interfere with the full and quiet enjoyment by the lessor or his under-tenants of adjoining or neighbouring premises, or which should be or grow to be an annoyance, nuisance, damage, inconvenience, disturbance, or injury to the lessor or his superior landlord, or his or their tenants, or any of them, and that he would not during the term use the premises or suffer them to be used otherwise than for the purpose of a private club.

Subsequently the defendant permitted exhibitions of boxing to take place upon the demised premises, which the plaintiff alleged constituted a breach of the covenant.

The plaintiff brought this action in February, 1896, claiming an injunction to restrain the defendant from violating the covenant, and on the 15th of July, 1896, North, J., granted an injunction which followed the terms of the covenant.

On the 9th and 21st of October, 1896, the defendant, assisted by George Sheppard and Edwin Murray, who were his servants or agents, permitted further boxing entertainments to take place on the premises. The plaintiff thereupon moved that the defendant, Sheppard, and Murray should be committed for contempt in disobeying and aiding and assisting in disobeying the order of the court.

North, J., held that there was evidence that Sheppard and Murray knew of the injunction before the exhibitions last mentioned took place, and committed them as well as the defendant.

Against this decision Murray appealed.

Seward Brice, Q.C., Stephen Lynch, and *Ker Kays*, for the appellant.—The injunction did not apply to the appellant, and he cannot therefore be committed for a breach of it. The respondent would require,

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

first, to obtain a separate injunction against him: *Iveson* v. *Harris*, 7 Ves. 251; *In re Bahama Islands*, [1893] A. C. 138, 41 W. R. Dig. 51. This is not a contempt of a criminal nature, as in *In re Freston*, 31 W. R. 804, 11 Q. B. D. 545. The right to take advantage of a contempt of this kind is personal to the party who has obtained the injunction, as is shown by the fact that it may be raised by him: *Roberts* v. *Albert Bridge Co.*, L. R. 8 Ch. App. 753; *Harvey* v. *Hall*, 21 W. R. 783, L. R. 16 Eq. 324; *In re Davies*, 37 W. R. 57, 21 Q. B. D. 236. This process should not be resorted to if there is another pertinent remedy. There is another remedy—viz., ejectment. A person does not aid and abet in a boxing competition merely by being present at it: *Reg.* v. *Coney*, 30 W. R. 678, 8 Q. B. D. 534.

Swinfen Eady, Q.C., and *Methold*, for the respondent, were not called upon.

LINDLEY, L.J.—This case, like all cases of the kind, is one of importance. The court should always be chary about committing people for contempt. It should exercise a degree of caution proportionate to the power which it possesses. Unless it is to become useless it must deal with every such case in the interest of the public. I do not regard this case, however, as being near the line. It seems to me to be a plain, straightforward case. On the 15th of February, 1896, North, J., granted an injunction restraining Paterson from infringing the covenant in his lease. The injunction follows the general language of the covenant, but the real nuisance complained of and enjoined was the disturbance caused by boxing performances which Paterson allowed to take place on the premises demised. Murray was present in court during the proceedings. He says that he left before the injunction was actually granted; but there can be no doubt that he knew the result. Yet arrangements were made for having these performances repeated in September and October, and on the 9th and 21st of October some more of these performances took place. An application was then made to North, J., to commit Paterson for breach of the injunction. Paterson said that Murray was the person who had got up the performances and was really responsible for them. Proceedings were then taken to commit Murray, who was not a party to the action.

Now, consider the principles on which the jurisdiction of the court to commit Murray depends. He, like everyone else, is bound not to interfere with the course of justice. The case against him is not that he infringed the injunction, but that he aided and abetted in treating the order of the court with contempt. If he has done that, it is idle to say that he cannot be attached for contempt. Mr. Seward Brice contends that there is no such jurisdiction, and that it would be necessary to bring a separate action against Murray. As an old equity practitioner this contention caused me no little surprise. It is a familiar principle to my brother Rigby and myself that no one can be allowed to violate an order of the court; and if authority is required in support of it it is to be found in *Lewes* v. *Morgan*, 5 Price 518; *Lord Wellesley* v. *Earl Mornington*, 11 Beav. 181; *Avory* v. *Andrews*, 30 W. R. 564; and *Day* v. *Longhurst*, 41 W. R. 283. Mr. Seward Brice bases an argument against the jurisdiction on *Iveson* v. *Harris*, 7 Ves., where Lord Eldon, at p. 256, says: "I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause for the purpose of the cause. The old practice was that he must be brought into court, so as, according to the ancient laws and usages of the country, to be made a subject of the writ." What Lord Eldon is there addressing himself to is the persons who are bound by the injunction, not the persons who assist others in infringing an injunction. There is a wide distinction between a motion to commit for breach of an injunction and a motion to commit for contempt in obstructing the course of justice. The difference is very marked. In the one case the proceeding is taken against the party enjoined with a view to enforce the injunction for the benefit of the person who has got the order; in the other case it is taken against a person, whether a party to the proceedings or not, who has been guilty of a criminal contempt in violating an order of the court, and who, on the ground of public interest, cannot be suffered to do so with impunity. The difference between the two cases is well known. As regards the jurisdiction of the court to commit for the latter kind of contempt I entertain no doubt whatever.

I agree that if I could accept Murray's suggestion that he was present at these performances as a mere spectator, I could not come to the conclusion that his conduct had amounted to a contempt of court. But I cannot, on the evidence, believe that he was there simply as a spectator. I have not the least doubt that he was there, not as a mere spectator, but as a party interested. My belief is that he was at the bottom of the whole thing. It may be that he thought that these boxing matches would not amount to a breach of the injunction. Whether that be so or not, there can be no doubt that they do constitute a flagrant violation of it. It is a gross case of contempt.

My conclusion is that the appeal must be dismissed with costs.

A. L. SMITH, L.J.—I also come to the same conclusion. The real question was whether Murray, on the 9th or 21st of October, 1896, or on either of those days, was party or privy with Paterson, or aided and abetted Paterson, in committing a breach of the injunction of the 15th of July, 1896. As regards the law, I have no doubt that this court has jurisdiction to commit for contempt a person, whether bound by it or not, who aids and abets in committing a breach of an injunction. The authorities already cited—viz., *Lewes* v. *Morgan*, *Lord Wellesley* v. *Earl Mornington*, and *Avory* v. *Andrews*—are amply sufficient to establish this proposition.

I now come to the question whether it is clear on the evidence that Murray has been guilty of a violation of the injunction. Unless I am satisfied of this I should certainly decline to be a party to sending him to prison. I feel no doubt, however, that the evidence is quite sufficient to establish his complicity in the offence. [His lordship here reviewed the evidence.] Can it be said in the face of this evidence that Murray was at these meetings in the capacity of a spectator only? In *Reg.* v. *Coney* it is laid down that the mere fact of a man being a spectator at a prize fight did not make him an aider and abettor in the proceedings, and in that decision I entirely concur. But here the evidence shows that Murray was not present as a spectator only, but that he was aiding and abetting in a breach of the injunction.

I am of opinion that the decision of the court below should be affirmed.

RIGBY, L.J.—After the able analysis of the evidence which has been given by Smith, L.J., I need not again state the facts of the case. I will content myself with making a few remarks on Mr. Seward Brice's argument as to the jurisdiction of the court in matters of this kind. His contention appeared to me to amount to this, that the court has no jurisdiction to commit for contempt by way of punishment, but only to secure a plaintiff in his rights. So far as I

am aware there is no case in which that has ever been suggested. The *dictum* of Lord Eldon in *Iveson* v. *Harris*, already referred to, seems to me to have nothing whatever to do with this question. Undoubtedly he was right in saying that the court must be careful to consider to whom an injunction applies, and must not bring in people whom it was never meant to enjoin. That, however, is not at all relevant to the present case. That there is a jurisdiction to punish for contempt of court is undoubted. It is founded on the good, not of any party to the proceedings, but of the public at large, whose interest it is that the orders of the court should not be disregarded, and that people should not be allowed to assist in the breach of them—that is, in committing a contempt of court. In *In re Bahama Islands*, [1893] A. C. 138, 41 W. R. Dig. 51, the question of contempt of court was discussed at great length. In that case the Privy Council supported the view that the court has a punitive jurisdiction in cases of contempt, for they held that the prerogative of the Crown in such cases extends to the remission of punitive sentences. It is not the practice for the representatives of the Crown to interfere in cases of committal for contempt where the contempt consists in refusing to do what is right towards a party litigant, and that class of case is not dealt with by the Privy Council in the authority just cited. The two cases are easily distinguishable, but the court has jurisdiction in the former case no less than in the latter.

Mr. Seward Brice further contends that this jurisdiction can be exercised only for the benefit of the plaintiff. It is no doubt true that, in cases of this sort, the court does not act of itself, but upon information given by a party to an action. But when once the matter is brought before the court, it acts upon its own jurisdiction, and without regard to the person who has brought the matter before it. The right is not the private right of that person, and cannot be waived by him. I have no doubt as to the existence of the jurisdiction; and I am equally satisfied that this is a case in which it ought to be exercised. The aiding and abetting by Murray in the breach of the injunction appears to me to have been both wilful and reprehensible.

Appeal dismissed.

Solicitors, *Norris & Son; Proudfoot & Chaplin.*

High Court of Justice.

Chan. Div. North, J. — May 21.

HESTON AND ISLEWORTH URBAN DISTRICT COUNCIL v. GROUT. (a.)

Local government—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 151, 257—*Private Streets Improvement Expenses Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 25-34—*Effect of adoption of Act—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38.

A notice given under the 151*st section of the Public Health Act*, 1875, *is not invalidated by the adoption of the Private Streets Improvements Expenses Act*, 1892, *before the work is actually carried out.*

Adjourned summons.

The summons asked (1) a declaration that under and by virtue of section 257 of the Public Health Act, 1875, the sum of £157 14s. 10d., being the amount of the proportion of the expenses of sewering, levelling, kerbing, channelling, paving, metalling, and making good a certain street called Prince Regent-road, Hounslow, with interest at four per cent. and costs, is charged on Gloucester House, High-street, Hounslow, and that such charge is entitled to priority over any other mortgage or charge upon the said hereditaments; (2) an inquiry as to the existence of such incumbrances; (3) a sale to enforce such charge; and (4) a receiver.

The plaintiffs, the sanitary authority for the district, took steps to sewer a street, and after obtaining an estimate on the 30th of October, 1891, gave the defendant notice requiring him to carry out the work. Owing to delay caused by the requirements of the Local Government Board before sanctioning a loan, the works were not carried out until October, 1895.

On the 27th of June, 1896, the Private Streets Improvements Act, 1892, was adopted.

Section 24 of the Private Streets Works Act, 1892, is: "All powers given to a local authority under this Act shall be deemed to be in addition to and not in derogation of any other powers conferred upon such local authority by any Act of Parliament, law, or custom, and such other power may be exercised in the same manner as if this Act had not been passed."

Section 25: "Neither sections 150, 151, and 152 of the Public Health Act, 1875, nor section 41 of the Public Health Amendment Act, 1890, shall apply to any district a part of a district in which this Act is in force."

Section 38 of the Interpretation Act, 1889, so far as material is:

"(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not

"(*a*) Revive anything not in force or existing at the time at which the repeal takes effect; or

"(*b*) Affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

"(*c*) Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

"(*d*) Affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

"(*e*) Affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

"And any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed as if the repealing Act had not been passed."

Warmington, Q.C., Swinfen Eady, Q.C., and *Martin W. Smith*, for plaintiffs.—The defendant on service of notice became liable to do the works, or to pay a due proportion. The suggestion is that section 25 of the Private Streets Works Act, 1892, on the adoption of that Act, caused the notice under the Public Health Act, 1875, to cease to have effect. But this is prevented by section 38 of the Interpretation Act, 1889. [They cited *Felken* v. *Berridge*, 15 C. B. N. S. 257, 12 W. R. C. L. Dig. 80; *Barnes* v. *Eddleston*, 1 Ex. D. 67, 24 W. R. Dig. 164.] The other point taken is abandonment, but that must be established by notice.

Macmorran, Q.C., and *Ribton*, for the defendant.—Notice to do certain Acts was given in 1891. In 1894, being aware of the adoption of the new Act, the

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

defendant concluded that the old notice so long unacted upon was abandoned. The Act of 1892 alters rights, and not procedure only.

They cited *Abbott* v. *Minister for Lands*, [1895] A. C. 425, 43 W. R. Dig. 123.

NORTH, J.—This case is quite clear. The plaintiffs are the sanitary authority. Under section 151 of the Public Health Act, 1875, they took steps for sewering a street. An estimate was made, and on the 30th of October, 1891, notice was sent to the defendant requiring him, as owner of the premises described, to carry out the works. The three months expired on the 30th of January, 1892, and the defendant did not do the works. The plaintiffs, under section 151, had authority to do the works, but they did not commence them until 1895. It is said that the notice had been abandoned, but the evidence shows that the plaintiffs had no idea of abandoning the works. They had no money in hand, and, being unwilling to execute the works out of the rates, proposed to raise the money by loan. They applied accordingly to the Local Government Board, who directed one or two inquiries, and some time was taken up before the Board was satisfied. It was not until 1894 that all these difficulties were got over, and the work was done in October, 1895. The defendant let the time for disputing his liability pass, and the sanction of the Board was given in November, 1894. On the 27th of June, 1894, the Act of 1892 was adopted, coming into force upon the 1st of August. What was the position of the parties at that date? The rights created by the notice were kept alive by the provisions of the Interpretation Act, 1889. Section 150 of the Public Health Act, 1875, was repealed by the Act of 1892. Even assuming this to be the case, by section 24 of the later Act all powers are additional. Here proceedings had been taken under the Public Health Act, 1875, and proper notice was given. The defendant had a valid notice to do the work, and the plaintiffs are entitled to the relief they ask.

Solicitors, *H. R. Peake; Woodbridge & Sons.*

Chan. Div. North, J. April 13.

In re HANNAM.
HADDESLEY *v.* HANNAM. (*a.*)

Will—Class—Postponement of distribution—Substitutional gift—Death before class ascertained.

A testator, after giving a life estate to his widow, gave his residue "to my brothers and sisters in equal shares and proportions, the lawful child or children of any deceased brother or sister taking his, her, or their deceased parent's share."

Held, that the children of a brother who died after the date of the will, but before the testator, could not take.

Thornhill *v.* Thornhill, 4 *Madd.* 377, *followed.*

Motion.

A testator, by his will dated the 8th of June, 1863, gave, devised, and bequeathed all his real and personal estate to trustees upon trust for sale and conversion and directed the proceeds to be held upon trust to pay the income to his wife for her life provided she should so long continue his widow, and after her death or marriage in trust for the testator's children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry.

The will then proceeded: "And I hereby declare that in case there shall be no child of mine who, being a son, shall attain twenty-one years or, being a daughter, shall attain that age or marry, the said trustees or trustee shall, from the death of my wife or her marrying again, and such default or failure of issue which shall last happen, hold the said stocks funds, shares, debentures, securities, and rents, including any accumulations, in trust to pay the rents, dividends, and annual proceeds thereof to my dear mother for her life; and after her decease to sell and dispose of any real estate or any personal estate that may remain unsold, and to transfer and pay the said trust premises and the dividends and annual proceeds thereof unto my brothers and sisters in equal shares and proportions, the lawful child or children of any deceased brother or sister taking his, her, or their deceased parent's share."

The testator died on the 3rd of March, 1896, having outlived his mother and all his children.

He had nine brothers and sisters, three of whom died in his lifetime without issue, and another of whom died before the date of the will leaving issue. One brother, Richard Fitzwilliam Hannam, died after the date of the will, but in the testator's lifetime, leaving three children.

He attested the will, as did Thomas Hannan, who died without issue during the widow's lifetime, but after the testator's death.

The summons was heard in chambers on the 8th of March, 1897, when North, J., declared that, subject to the widow's interest, the residuary estate was divisible in equal shares among the brothers and sisters living at the testator's death other than Thomas Hannam, to the exclusion of such of the brothers and sisters as died in the testator's lifetime and of the children of any such brothers or sisters, and that the shares of the brothers and sisters taking under that declaration were liable to be divested in the event of their dying during the lifetime of the widow.

The children of Richard Fitzwilliam Hannam moved to vary so much of the order as excluded them.

Vernon Smith, Q.C., and *Boome.*—This is a gift to a class of parents with a substitutional gift to the children of parents dying before the period of distribution. Children of parents who die after the will, but before the testator are entitled to take: Theobald Wills, 4th ed., p. 541; Jarman on Wills, 5th ed., 1577; *Smith* v. *Smith*, 8 Sim. 353; *Jones* v. *Frewin*, 12 W. R. 369; *Habergham* v. *Ridehalgh*, 18 W. R. 427, L. R. 9 Eq. 395.

Macnaghten.—The cases cited can be distinguished, and do not bear out the text writers.

Fellows.—The cases is covered by *Thornhill* v. *Thornhill*, 4 Madd. 377. This case is said to have been overruled in *Collins* v. *Johnson*, 8 Sim. 356*n*, but there the gift was to individuals by name. See, too, *Ive* v. *King*, 16 Beav. 46, p. 53; *King* v. *Cleaveland* (*No.* 1), 26 Beav. 26, pp. 31, 32, where Lord Romilly says that where the original gift is to a class the gift over does not operate if the deceased object predeceases the testator.

Vernon Smith replied.

NORTH, J., read the will and stated his reasons for the conclusion arrived at in chambers, and said: It is said that there are certain cases which ought to induce me to take a different view. First of all, however, there is *Thornhill* v. *Thornhill*, which is clearly in point and undistinguishable. It is said that it

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

has been overruled directly and impliedly. *Smith* v. *Smith* was not a case at all like the present. It is true that Shadwell, V.C., said: "I think that the decision in *Thornhill* v. *Thornhill* is wrong." No reason is given for that opinion, but it was stated by counsel in argument that *Thornhill* v. *Thornhill* had been overruled by Sir C. C. Pepys in the case of *Collins* v. *Johnson*. But that case was decided upon the construction of an involved clause about residue, and was not in the slightest degree in variance with *Thornhill* v. *Thornhill*. *Jones* v. *Frewin* was a case something like the present. The judgment is very shortly reported, but as I understand it Lord Hatherley held the gift was not a class gift at all. In the present case I find it quite impossible to say that a gift to my brothers and sisters in equal shares and proportions is a gift to individuals and not a gift to a class. In *Habergham* v. *Ridehalgh* there was a gift to certain persons, tenants for life with remainder, in a particular case, to their children, and in that case the death of the tenant for life in the lifetime of the testator did not prevent the remainder in favour of the children of that tenant for life from taking effect.

The result is that I do not find *Thornhill* v. *Thornhill* impeached in any way, although Mr. Jarman in his valuable work says that it has not been favourably received. Sir John Romilly expressed a clear opinion on the point in *Ive* v. *King* and *King* v. *Cleaveland* (*No.* 1), and expressed an opinion in favour of the view taken in *Thornhill* v. *Thornhill*.

I must adhere to the view I took in chambers, and dismiss the motion with costs.

Solicitors, *Swann & Co.*, for *Wm. Newton*, Newark, *Collyer-Bristow, Russell, Hill, & Co.*, for *Haddelsey & Sons*, Caistor.

Chan. Div. }
Kekewich, J. } May 15.

In re BATT'S SETTLED ESTATES AND THE SETTLED ESTATES ACT, 1877. (*a*.)

Married woman—Settlement—Petition—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 50—*Examination of married woman — Affidavit of no settlement — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 71), *ss.* 1, 5.

The separate examination under section 50 *of the Settled Estates Act*, 1877, *is no longer necessary in the case of a married woman (party to a petition under that Act for confirming a contract of sale) who was married before* 1883, *but acquired her interest in the settled hereditaments after that date, and an affidavit of no settlement will not be required.*

In re Standish, 25 *W. R.* 8, *followed.*

Petition.

This was a petition for an order confirming a conditional contract of sale.

Upon the hearing of the petition it appeared that one of the petitioners was a married woman who was married before the Married Women's Property Act, 1882, but who acquired her beneficial interest in the property after the Act.

Owing to the peculiar nature of the limitations affecting the property, a sale could not be effected under the Settled Land Acts, 1882 to 1890, and the present application under the Settled Estates Act, 1877, was rendered necessary.

W. S. Eastwood, for the petition.—I submit that in the circumstances the separate examination of the married woman under section 50 of the Settled Estates Act, 1877, is not necessary: *Riddell* v. *Errington*, 32 W. R. 680, 26 Ch. D. 220; *In re Harris*, 33 W. R. 393, 28 Ch. D. 171; and the Married Women's Property Act, 1882, ss. 1 and 5. I also submit that an affidavit of no settlement by the married woman is not necessary: *In re Standish*, 25 W. R. 8.

Ingpen, for the purchaser.

Methold, amicus curiæ, informed the court that he had been counsel on petitions when a similar question arose and the separate examination was not required.

KEKEWICH, J.—It is most desirable that a uniform practice should prevail where a question of title is involved. Having regard to the cases cited and the instances referred to, I come to the conclusion that the examination of the married woman is not necessary, and that an affidavit of no settlement is not required.

Solicitors, *Chas. Rogers, Sons, & Russell; Smith & Hudson.*

(*a*.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Chan. Div. }
Kekewich, J. } April 27.

LAZARUS v. THE ARTISTIC PHOTOGRAPHIC CO. (LIMITED). (*a*)

Light—Access—Photographic studio—Injunction—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

A photographer is entitled to the uninterrupted access of such a light as will enable him to enjoy his studio for photographic purposes, and his right will not be affected by the fact that he has not enjoyed the light required for that particular purpose for the period of twenty years.

Motion.

The plaintiff had carried on the business of a photographer at No. 536, Oxford-street for the ten years previous to this action in a studio at the rear of the premises. About twelve feet from the east side of this studio was another studio attached to No. 534, Oxford-street, where the defendant company also carried on a photographic business.

In the month of February, 1897, the defendants began to raise the roof of their studio, and thereby occasioned interference with the light in the plaintiff's studio. Notwithstanding the plaintiff's complaints, the defendants continued their building and put on a sloping glass roof, which they subsequently coloured red in order to remedy the glare and reflect a better light.

The plaintiff brought the present action and moved for an injunction to restrain the defendants from erecting, or permitting to remain erected, any buildings on their premises so as to darken, injure, or obstruct any of the ancient lights of the plaintiff as then enjoyed by him until the trial of the action.

The evidence adduced showed that the light of the plaintiff's studio had been so interfered with, as well in respect of the direct access of light as by the reflected glare from the glazed roof, as to render it useless for the purposes of the plaintiff's photographic business, and that the attempted remedy did not in fact improve the light required for photography.

By consent the motion was treated as the trial of the action.

(*a*.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

Bramwell Davis, Q.C., and *Stewart Smith*, for the motion.

J. G. Butcher, for the defendants.—The plaintiff has not enjoyed this special photographic light for twenty years, and he is not therefore entitled to an injunction to restrain interference with it: *Lanfranchi* v. *Mackenzie*, 15 W. R. 614, L. R. 4 Eq. 421; *Moore* v. *Hall*, 26 W. R. 401, 3 Q. B. D. 178. The plaintiff is only entitled to an ordinary light for ordinary purposes. [KEKEWICH, J., referred to *The Attorney-General* v. *Queen Anne's and Garden Mansions Co. (Limited)*, 37 W. R. 572, 5 T. L. R. 430, where his lordship, after examining the authorities, had decided that enjoyment of light for a special purpose for the prescriptive period was not necessary to support a claim to such light.]

KEKEWICH, J.—Except for one purpose I put aside entirely all questions as to reflected light—I mean the extra supply of light which comes as reflected back from the glazed roof of the defendants' new studio. It may be an advantage for reading and writing, but it is a great disadvantage for photographic purposes. I do not think it is material whether the reflected light is an advantage or a disadvantage. I put it aside as not touching the merits of this action. The real question is, whether this new studio interferes with the access of light to the plaintiff's studio, and so interferes with it as to diminish the reasonable enjoyment and comfort of his studio. Mr. Butcher says that such enjoyment only implies an ordinary light for ordinary purposes, but not for taking portraits by photography, and he goes on to say that as the plaintiff has not carried on the business of a photographer for twenty years, he cannot claim the right to what has been called in argument "extraordinary special light," but which really means light for this extraordinary purpose. It seems to me to be beside the question to say that he has not carried on business for twenty years. He has been carrying on the business for some time, about ten years, and I hold, without going into the cases on the point, that he is entitled to protection to the access of light for photography. The question is, has that been interfered with? The evidence shows that there has been a serious interference with the access of light by means of the new studio, quite irrespective of the reflected light. It appears that the new studio is only twelve feet distant, and even less at some points. It stands to reason that there is some interference with the light. From the evidence it appears that, in respect of light, the plaintiff's studio is badly situated as it stands, and it would be much worse off if the defendants' studio were allowed to remain as it is. The plaintiff cannot afford to part with any light, and if a little is taken from him, that little is of more importance to him than more would be in the case of a studio which was better situated. It seems to me on the evidence that there is such an interference here with the access of light as hinders the enjoyment by the plaintiff of his studio for photographic purposes. He is entitled to complain of that. I will therefore grant an injunction restraining the defendant company from erecting or keeping erected their studio so as to obstruct the plaintiff's light.

Solicitors, *Edward M. Lazarus; Mann & Taylor.*

Chan. Div.
Kekewich, J. } April 7, 8.

In re CROSSLEY.
BIRRELL *v.* GREENHOUGH. (*a.*)

Mortmain—Charity—Metropolitan Consolidated Stock—Charge on lands, rents, and property—Pure or impure personalty.

Metropolitan Consolidated 3½ per Cent. Stock issued under the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 *Vict. c.* 102), *is impure personalty, as it confers on the holders an interest in land within the Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *s.* 10 (*iii.*)

Originating summons by the executors and trustees of the will of J. T. Crossley, Q.C., to determine, *inter alia*, the following question—namely, Whether the sum of £4,000 Metropolitan 3½ per Cent. Consolidated Stock, forming part of the testator's residuary estate, was personal estate not capable of being bequeathed by will for charitable purposes, either under the Act 9 Geo. 2, c. 36, or under the Mortmain and Charitable Uses Act, 1888.

The testator died on the 3rd of January, 1892, and his will was proved on the 2nd of April, 1892.

By his will made the 6th of September, 1890, after various specific gifts, gave "so much and such part" of his "residuary estate" as should "consist of or have arisen from or been produced by the investment or re-investment of property" which at the time of his decease was "pure personal estate capable of being lawfully bequeathed by will for charitable purposes" to a charity as therein mentioned, and he gave such parts of his residuary estate as could "not lawfully be given by will for charitable purposes" to George David Greenhough absolutely.

By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), s. 5, all consolidated stock created for the purposes of the Act "shall be charged indifferently on the whole of the lands, rents, and property belonging to the Board.

The defendants were the residuary legatees of G. D. Greenhough, two persons appointed by the court to represent the charity, and her Majesty's Attorney-General.

Crawley, for the plaintiffs, stated the facts.

Warrington, Q.C., and *Mark Romer*, for the charity.—The Metropolitan Consolidated Stock comes within *Attree* v. *Howe*, 26 W. R. 871, 9 Ch. D. 337, and is pure personalty. *In re Pickard, Elmsley* v. *Mitchell*, 42 W. R. 375, [1894] 2 Ch. 88; 3 Ch. 704, 43 W. R. Dig. 30, is also in our favour. *Cluff* v. *Cluff*, 24 W. R. 632, 2 Ch. D. 222, which is an authority against us, was not argued, and *In re Holmes*, 62 L. T. Rep. 383, 38 W. R. Dig. 216, is distinguishable, inasmuch as in that case the holder could get the land itself, in this case he cannot do so. [KEKEWICH, J., referred to *In re Hallett, Howarth* v. *Massey*, 5 T. L. Rep. 285.]

Renshaw, Q.C., and *Yardley*, for the residuary legatee.—*Cluff* v. *Cluff* and *In re Holmes* apply. The latter case was approved in *In re Pickard*, where the charge was on the "revenues" only, and not on the land itself: *In re David*, 38 W. R. 162, 43 Ch. D. 27.

Ingle Joyce, for the Attorney-General.

KEKEWICH, J.—If I was at liberty to decide the case entirely according to my own view of what is common-sense and right, I should not have the slightest hesitation in at once saying that this is not

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

an interest in land within the meaning of the Mortmain Acts. It seems to me that there is some absurdity in saying that a man who invests his money in corporation stock, the security for the interest of which consists to some extent of land, has an interest in land.

A man who invests in that way does not look to the land, he does not take in express words by virtue of any instrument a charge on the land; he cannot enforce his rights by foreclosure or sale, and in common parlance he does not dream of having an interest in land. But that, unfortunately, is not what I have to consider. The bead roll of cases is too long for me to refer to, and counsel have referred to several of the cases. Certainly the tendency of modern times, quite irrespectively of the Mortmain and Charitable Uses Acts of 1888 and 1894, is to take out of the mischief of the Mortmain Act (9 Geo. 2, c. 36) much that was held to be within it before; but there are a certain number of decided cases which remain unaffected by recent authorities. *Attree* v. *Hawe* is an extremely valuable authority on all questions of this kind because the whole law was thoroughly considered in the Court of Appeal strongly constituted, consisting of the late Jessel, M.R., and the late James, Baggallay, and Bramwell, L.JJ., but it must not be forgotten that the decision in that case was with reference to debenture stock under the provisions of the Companies Clauses Act, 1863, which is substantially in the same position as debentures issued under the Companies Clauses Consolidation Act, 1845. Reference was there made as in other cases to *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201. I venture to think that that case, which is an extremely important one, has been very much misunderstood with reference to this branch of the law. The real meaning of that case in reference to this branch of the law is to be found in two or three words of Davey, L.J., in *In re Pickard, Elmsley* v. *Mitchell*, at p. 715 of [1894] 3 Ch., where he says: "They (that is, Turner, L.J., and Lord Cairns, in *Gardner* v. *London, Chatham, and Dover Railway Co.*) in substance said this, 'Whatever may be the words used, it is a charge only on the fruits of the undertaking.'" And that is in effect precisely what Lord Cairns said in his celebrated judgment in *Gardner* v. *London, Chatham, and Dover Railway Co.* as to the fruit-bearing tree. When once you get hold of that, all the comments on the meaning of the word "undertaking," supported by reference to *Gardner* v. *London, Chatham, and Dover Railway Co.* fall to the ground, because what was held to be charged was not the undertaking, including the land as part of the undertaking, but the fruits of the undertaking. There was no charge on the land, and in fact *Gardner* v. *London, Chatham, and Dover Railway Co.* is a distinct decision that the debentures were not a charge on the surplus land; *Attree* v. *Hawe* therefore, dealing with debenture-stock, is not of so much value as otherwise it might be. Here I am not dealing with the debenture-stock of a trading corporation, but with the stock of a municipal corporation created under the Metropolitan Board of Works (Loans) Act, 1869. Here we have a distinct charge on the land, and Mr. Warrington's argument comes to this, that the question is one of words. The Act says that there is a charge on the land, but it is a charge on the land which is not to be enforceable in the way in which charges on land are generally enforced. That, he says, is only a way of expressing the rights of the stock-holder, which he cannot enforce by obtaining any interest in the land. I do not hesitate to say that I could wish to hold that to be sound, because I do not believe it was ever intended by the Legislature, if it is an interest in land, that it was technically to be an interest of the kind which falls within the Mortmain Act, but I feel myself constrained by the authorities. In the first place, Hall, V.C., in the case of *Cluff* v. *Cluff* distinctly held two bequests of £3,500 of this very stock to the Freemasons' Charities were of impure personalty and therefore void.

The case ought not to have been reported, because there was no argument, nor, so far as I can make out, was there anyone there to argue on behalf of the Freemasons' Charities. I suppose that the learned judge and the learned counsel thought that the point was not worth serious argument, and therefore the charities were not served, or it may be that the charities had an opportunity of appearing, and did not think fit to appear. It is an unsatisfactory decision, but it is an expression of judicial opinion, and I find it thus cited in Tudor's Charitable Trusts, 3rd ed., p. 409.

It has also been held that Metropolitan Board of Works Consolidated Stock cannot be bequeathed to a charity: *Cluff* v. *Cluff*. So that it has got into the text-books, and is to be regarded of some authority. I do not think I could decline to follow that unless I were satisfied that it was wrong, and that there were other decisions inconsistent with it. But I turn to the decision of Kay, J., in *In re Holmes, Holmes* v. *Holmes*. I do not think that is precisely the same case, or that is has a direct bearing, but still I think the substance of his judgment is in accordance with that of Hall, V.C., in the other case: *Attree* v. *Hawe*, and *Gardner* v. *London, Chatham, and Dover Railway Co.* were cited to Kay, J., but he did not proceed upon either of those cases, but on the principle that it was a charge on land. That case seems to me to be against the view that I am asked to take, that this sum of stock is pure personalty. Then besides that I have the case of *In re Hallett, Howarth* v. *Massey*, 5 T. L. Rep. 285, before North, J. I confess that as that case is stated in the Times Law Reports, it seems to me to be inconsistent with the decision of North, J., himself, affirmed by the Court of Appeal in *In re Pickard, Elmsley* v. *Mitchell*, but there the stock in question was Leicester Corportion 3½ per Cent. Redeemable Stock, apparently not being a direct charge on land, except as being the property of a corporation, and North, J., held that he was bound by numerous decided cases to hold that it was a charge on the land. The matter, therefore, comes to this. Here there is a charge on the land, and the authorities, without going further into them, seem to me to say that a charge on the land brings a case within the mischief of the Mortmain Acts. Therefore, I think I must hold that this sum of Metropolitan Consolidated Stock has not been properly given to the charity.

Solicitors, *H. & G. Keith; S. R. Lewin & Co. Solicitor to the Treasury.*

Chan. Div. } Byrne, J. } May 5.

COLEMAN v. THE BUCKS AND OXON UNION BANK. (a.)

Banker and customer—Trust money—Notice of trust—Payment of trust money to private account of trustee.

A bank credited a trustee's (J. G.) private account with moneys received by him as a trustee, he having no other account at the bank. The trust money had been received by the bank from their London agents with an advice note stating that it had been paid to the account

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

"J. G. Trust," but the bank had no other knowledge of the trust. The trustee, J. G., was advised of the payment by the bank manager, but gave no direction as to opening a trust account. The trustee's private account having been overdrawn, and the trust money being lost,

Held, that the bank was not liable to replace it.

Trial of action.

This was an action in which the plaintiffs, the trustees of the will of Thomas Bovingdon, of Amsterdam, Buckingham, who died on the 22nd of May, 1878, claimed a declaration that the defendants were liable to make good to his estate the sum of £1,411 2s. 2d., with interest from the date of the receipt.

The facts of the case were as follow:

The testator by his will dated the 23rd of February, 1873, appointed his wife, his son William Bovingdon, and James Gurney executors thereof, and devised and bequeathed his real estate and the residue of his personal estate to his said trustees on the trusts therein contained.

The will was proved by the said three executors.

William Bovingdon died in 1881, and Mrs. Bovingdon in 1883.

The sum of £1,400, part of the moneys subject to the trusts of the said will, was in 1883 invested by Gurney on the mortgage of certain freehold property.

In 1892 the mortgage was paid off, and the sum of £1,400, with some interest thereon, making together the sum of £1,411 2s. 2d., was on the 16th of August, 1892, received by Messrs. Parker & Wilkins, of High Wycombe, solicitors on behalf of Gurney, and in accordance with a direction given by him was paid by them into the High Wycombe branch of the London and County Bank, with instructions to that bank to credit James Gurney's trust account at the Chesham branch of the defendant's bank with the amount.

The defendants were advised at their branch bank at Chesham by their London agents, the London and Westminster Bank, of the receipt of a sum of £1,411 2s. 2d. by an advice note, which was as follows: On whose account, James Gurney's Trust; by whom paid, Parker & Wilkins, High Wycombe; £1,411 2s. 2d. Gurney had not at that time or subsequently a trust account at the defendants' bank, but he had a private account there from November, 1889, to June, 1895. On the same day the bank advised Gurney as follows: "We beg to advise you as understated to your credit—viz., Parker & Wilkins, £1,411 2s. 2d, which we have duly placed to your account."

At that date the private account of James Gurney was overdrawn to the extent of £1,694 11s. 1d. in pursuance of an agreement then existing between him and the defendants that he should be allowed to overdraw to the extent of £2,000 against certain securities deposited with the bank of the value of £5,000.

Gurney, who was in the habit of receiving his passbook about once a fortnight, did not give any instructions to the bank as to the trust funds; but continued to draw cheques in the usual way. The money was, as a matter of fact, applied by the bank to the reduction of the overdraft. Gurney subsequently again overdrew his account, and gave further security.

In 1895 he was adjudged bankrupt, and the plaintiffs were appointed trustees of the will of Thomas Bovingdon in his place.

At the date of his bankruptcy there was due from him to the bank a considerable overdraft. The bank manager in his evidence admitted that he knew that the money belonged to some trust, but stated that he did not feel justified in the absence of instructions from his customer in opening a separate account.

Eve, Q.C., and *Tanner*, for the plaintiffs.—To make the bank liable to make good the loss, it is only necessary that they should have had notice of a trust. It cannot be denied that they knew that these moneys were trust moneys, and it was therefore their duty to carry them to a separate account. They received the moneys with a notice that should have set them on their guard. But in face of this notice they took it upon themselves to deal with the moneys as against the rights of people who had a better claim than themselves. Having admitted what they have done, it is too late for them to turn round and claim the moneys against Gurney's *cestuis que trust*: *Foxton* v. *Manchester and Liverpool District Banking Co.*, 44 L. T. Rep. 406, 29 W. R. Dig. 14; *Bridgman* v. *Gill*, 24 Beav. 302, 6 W. R. Ch. Dig. 90; *Pannell* v. *Hurley*, 2 Coll. 241; *Ex parte Kingston, In re Gross*, 19 W. R. 910, L. R. 6 Ch. App. 632; *Bodenham* v. *Hoskyns*, 2 De G. M. & G. 903. It is not necessary to show that the bank made any profit.

Birrell, Q.C., and *Procter*, for the defendants.—No knowledge that the fund was a trust fund can be imputed to the defendants in such a manner as to make them liable for a breach of trust. The bank knew nothing about the trust. There was nothing to show the bank that Gurney was not a residuary legatee of the trust fund in question. When it is said that those who know a fund is a trust are liable for a breach of trust the word "know" must be taken in a wide sense. The case of an executor is not parallel. An executor as such takes no beneficial interest. In the cases where banks have been made liable they knew not merely that the money was trust money, but who were the actual persons to whom it belonged. There must be actual knowledge. Mere suspicion is not enough. [They referred to *Martin* v. *Rocke, Eyton, & Co.*, 34 W. R. 253, 53 L. T. Rep. 946; *Bridgman* v. *Gill*; *Gray* v. *Johnston*, 16 W. R. 842, L. R. 3 E. & I. App. 1; *Thompson* v. *Clydesdale Bank, Limited*, [1893] A. C. 282; *Lockwood* v. *Abdy*, 14 Sim. 437.] The bank drew Gurney's attention to the payment in of the money. The fact that he made no reply authorized them placing it to his private account. There was no benefit to the bank in the transaction; if the money had not been paid to Gurney's account they would have stopped giving him credit.

Tanner, in reply.—The defendants cannot get over the fact that they took trust money and applied it to the payment of a debt. The case is exactly covered by the judgment of Fry, J., in *Foxton* v. *Manchester and Liverpool District Banking Co.*

BYRNE, J.—This case is one of some importance, and I cannot say that it is altogether free from difficulty. One James Gurney was a customer of the Bucks and Oxon Union Bank (Limited), the defendants in this case, and he had a private banking account at the Chesham branch. He had, however, no other account there. A sum of £1,411 2s. 2d., being trust money to which James Gurney was entitled, but only as trustee, was paid by means of a cheque drawn by the solicitors, who had received the money in respect of the realization of part of the trust property drawn upon the London and County Bank, London. [His lordship proceeded to recapitulate the facts as given above, and continued:] Now, James Gurney had been given a direction that the money was to be paid to a trust account; but the direction was not communicated to the defendants' branch in any way. All that they got was that a

On whose account.	By whom paid.	£ s. d.
James Gurney's Trust.	Parker & Wilkins.	1,411 2 2

James Gurney had, in respect of his private account, his only account at the bank, an allowed overdraft to the extent of £2,000. At the date when this money was paid in—viz., the 15th of August, 1892, he was overdrawn to a considerable extent at the bank. The manager of the bank had not the slightest reason to suppose that James Gurney was not in a perfectly good and solvent condition. They allowed him this overdraft, and they continued afterwards to allow him a further overdraft on further security. They held some security for their £2,000 overdraft. Now, the manager, when he received this notice, knew that the £1,411 2s. 2d. was money forming part of some trust or other; he did not consider, having regard to what he knew of James Gurney and his position and so on, that there was any necessity for making any special inquiry about it, and he did not consider himself justified, on those instructions, in opening a new account in James Gurney's name; so he, of his own motion, paid it into the private account—the only then existing account—of James Gurney; he credited it, rather, to that account.

Now, I am satisfied on the evidence that the bank had not the slightest notion at that time of benefiting themselves by what was done. I am satisfied that they had no notion that James Gurney intended to commit a breach of trust by making away with that money in any way. As a matter of fact the account was not closed in any way—no line was drawn; but the account went on for some time, until, notwithstanding this payment of £1,411 2s. 2d., James Gurney's account became overdrawn by the amount of some £500 or so, when a new arrangement was come to, and the bank required more security; they allowed the further overdraft to the sum of £5,000; and, apparently, though to what precise amount I do not know, they continued to allow several large overdrafts to be made till the bankruptcy of James Gurney, which happened some time afterwards.

The next thing that happened, after carrying this £1,411 2s. 2d. to the private account of James Gurney, was that the manager advised him to that effect. [His lordship read the manager's letter, and continued:] Now, it is quite true that James Gurney, knowing himself that he had given no direction that it was to be paid to trust account, on receipt of that document might have understood it to mean that it was paid to a trust account in his name; but that ignorance could not have continued very long. He was in the habit of receiving his pass-book about once a fortnight; and must have seen within a very short period afterwards that the money had been so carried to his general account. Undoubtedly that was an irregularity; and undoubtedly, if he had been well advised, he would have written at once and said it ought to be carried to a trust account, so as to be ear-marked separate from his own. He did nothing of the sort; he accepted the position, and left matters as they were. The legal effect of what happened on that occasion, as has been pointed out, was to reduce James Gurney's overdraft by the sum of £1,411 2s. 2d., and, practically upon these facts and upon no other material facts, I am asked to say that the bank are liable to make good to the *cestuis que trust* this sum of £1,411 2s. 2d.

The case differs, I think, from any of the cases that have been cited before me. A case that has been referred to, and always is referred to in cases of this description, of course, is the case of *Gray* v. *Johnston*. The result of that case is that where there is an account ear-marked as an executorship account, and also a private account, if a cheque is drawn upon the executorship account in favour of the private account, and the effect of that is to reduce the indebtedness to the bank in respect of the private account, that alone is not sufficient, no benefit being intended or bargained for, to fix the bankers with liability to the *cestuis que trust*.

Now, that was a case of honouring a cheque, upon which the executrix only could draw. There are other cases in which moneys have been drawn from an account ear-marked in trustees, or ear-marked in some other way, and carried to a private account under circumstances that the court has come to a conclusion that a benefit was intended and designed for the bankers; but I do not think that there is any case upon the books which goes so far as to say that if this had been a case where the bankers had obeyed precisely and strictly the advice they had received, and carried this to a new separate ear-marked account, "James Gurney's account," and without knowing any more about it the trustee had drawn a cheque for the amount and paid it in to his private account, I do not think that is a case in which the bankers have been held to be liable upon that alone.

Then it is said there is a distinction between this case and the one I have just put, because the bankers did something which may be regarded as a blunder or an error of judgment. I think myself they should have carried it to an ear-marked and separate account, but I believe it was perfectly innocently, without the slightest notion that a breach of trust was intended, or without any idea of any benefit to themselves, that they carried it to the only account then open—the account of James Gurney, and as I say, James Gurney knew of this very shortly afterwards, and adopted what had been done.

Can I hold the bank liable under these circumstances to the *cestuis que trust?* I think not. I think I should be carrying the doctrine further than it has been carried in any of the cases which have been cited to me.

The first case to which I need refer is the case of *Bridgman* v. *Gill*. In that case the plaintiffs had opened an account in their names as trustees, and it was headed in some way to identify it with the trust account. There was evidence in the case that the bankers had known that it was trust money. The tenant for life was indebted to the bankers in the sum of £760. At the suggestion of the bank he who had no right to draw on the trust account at all drew a cheque upon the trust account, which the bankers acted upon, debited the plaintiff's account with the sum of £750, and thereby the indebtedness of the tenant for life to the bankers became discharged. The Master of the Rolls said, in giving judgment: "The case as it stands upon the undisputed facts is this. In 1843 a sum of money was standing in the defendants' books to the credit of the plaintiffs, and which the defendants transferred to themselves in discharge of a debt due to them from another person, and this was done without the slightest sanction or authority of the plaintiffs to support it." I think that case is very far away from this, and I agree with the Master of the Rolls, if I may respectfully say so. On the facts as they there stand it is rather surprising that the case should have been resisted on the ground that it was.

Then there is the case of *Pannell* v. *Hurley*, which is often referred to. In that case the trustees had a banking account headed, "Henry Pannell's Estate—Clarke, Russell, & Davy." Subsequently the account stood, "Henry Pannell's Estate, *per* Joseph Davy, Trustee," he then having become the sole surviving trustee. Davy being indebted to the bank-

ing-house on his private account and in a sum on joint account of himself and another, and having £308 standing to his credit on the trust account, drew two cheques on the trust account and directed them to be placed to the credit of the other account; this was done, thereby discharging the debt due to the bank in respect of the private account, and the account on which he was jointly indebted with another. "The defendants Hurley & Whitter, those were the persons who stood in the positions of the bankers, by their answer denied that, except as might appear from the heading of the accounts that they had any notice or knowledge that the sum of £308 12s. was held upon the trusts mentioned in the bill, or that the dealing therewith, as before stated, was a breach of trust; and they stated that the whole of the transaction as to the drawing of the cheques took place without privity or knowledge in any manner of either of them, or as they believed of the defendant Brown"; but evidence was given to show, and apparently did show, that those two gentlemen were perfectly well aware that they were trust accounts, and that they knew the nature of the trust, and the Vice-Chancellor in the course of the argument says: "If the only notice to the bankers had been the title of the account, this might have been a case of more difficulty"; and at p. 245 (2 Coll. Ch. C.) this is the way he sums up this case: "Money is due from A. to B. in trust for C.; B. is indebted to A. on his own account; A. with knowledge of the trust concurs with B. in setting one debt against the other, which is done without C.'s consent." And he holds that the transaction cannot stand. That again is a case differing essentially from the present one.

Then there is the case of *Bodenham* v. *Hoskyns*, the circumstances there being, as found by the Vice-Chancellor, that from the commencement of the account which was headed "The Rotherwas Estate Account," the bankers knew that the moneys paid in to that account were the moneys of Mr. Bodenham (that is, not the person having the account with them, but another person) arising from the rents and proceeds of the Rotherwas Estate, and that the account was kept by Parkes, their customer, in his character of receiver, and under these circumstances his honour held that the bankers had not the right to say that the receiver could so deal with the Rotherwas Estate account as to appropriate his principal's money at any time to the discharge of his private debts to the bankers. He says it is contrary to the principle according to which a person who knows another to have in his hands or under his control moneys belonging to a third person cannot deal with those moneys for his own private benefit, when the effect of that transaction is the commission of a fraud on the owner. But, of course, there it was clear, according to the finding of the Vice-Chancellor, that the bankers knew that the moneys were the moneys of a third person. The case went upon appeal; and Knight Bruce, L.J., stated that their lordships were of opinion that upon the present evidence the decision was right, but said if the defendants liked to add to the evidence they might. As a matter of fact, they subsequently submitted to the dismissal of the appeal with costs. That also appears to be a reasonably clear case and also removed from the present one. Then the case of *Ex parte Kingston, In re Gross* was referred to, but I do not think I need deal with that any further.

Then there was a case of *Foxton* v. *Manchester and Liverpool District Banking Co.*, and it is important to refer to that because one of the observations of Fry, L.J., then Fry, J., has been much relied on by the plaintiffs in this case. That was a case where "a sum of money was standing in the books of the banking company to the credit of the trustees of the late W. H., and the bank, knowing that the trustees (each of whom had an overdrawn account at the bank) were not beneficially entitled, allowed them to transfer sums of money at various times from the trust account to their respective private accounts, and it was held that the *cestuis que trust* were entitled to recover from the bank. That was a case upon the evidence—I need not go into all the circumstances—where there was a benefit designed for the bank. They had been calling on the parties having private accounts to reduce their indebtedness, and they did it with the intention of reducing their indebtedness. In the course of giving the judgment Fry, J., states the facts and then says: "Now, it appears to be plain that the bank could not derive the benefit which they did from that payment, knowing it to be drawn from a trust fund, unless they were prepared to show that the payment was a legitimate and proper one, having reference to the terms of the trust. It is said that they did not know what the trust was at that time. That appears to me, I confess, to be immaterial, because those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money."

Then he goes on to deal with the case upon the facts, and he finds that the bank did know in substance who the *cestuis que trust* of the funds were. I am asked to say that that amounts to a decision to this effect: that wherever there is an account which, upon the face of it is a trust account, and the customer draws a cheque upon that trust account, and pays in the cheque to the credit of his own private account, that the bankers are bound to see and inquire (that is how I understand the proposition is put) that the customer is in point of fact entitled to the money which he so transfers from one account to another. I do not think that that was the meaning of the learned judge in this case. If the bankers have the slightest knowledge, or reasonable suspicion, that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further inquiry into the matter.

But the present case is not that case at all, and, notwithstanding the powerful and able arguments that have been addressed to me on the other side, and notwithstanding certain considerations which suggested themselves to me, as, for instance, if this money had first been carried to a trust account it may be that the trustee would not so readily have committed the breach of trust which he did actually commit in applying the trust money for his own benefit—I say, notwithstanding considerations like that, and notwithstanding the fact that in point of law the money must be regarded as having been applied at the moment in reduction of the overdraft, I do not think that in the present case I can hold the defendants liable to make good this amount.

I think I have dealt with all the points raised before me, certainly so far as they now occur to my mind, and as I say, the case is one of considerable importance and not without difficulty; but having come to the conclusion I have, the only thing I can do is to dismiss the action and with costs.

Action dismissed.

Solicitors, *Letts Brothers*, for *Parker & Son*, High Wycombe; *H. P. & J. H. Cobb.*

Q. B. Div.
(Day and Lawrance, JJ.) May 24.

FULHAM VESTRY (*Appellants*) *v.* THE LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

Metropolis—Nuisance—Sewer—Jurisdiction of justices—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 2, *sub-section* 1 (b).

By the Public Health (London) Act, 1891, *s.* 2, *sub-section* 1 (b), "*Any pool, ditch, gutter, watercourse, cistern, water-closet, earth-closet, privy, urinal, cesspool, drain, dung-pit, or ash-pit so foul or in such a state as to be a nuisance or injurious or dangerous to health . . . shall be nuisances liable to be dealt with summarily under this Act.*"

The appellants, as the sanitary authority, summoned the respondents to abate a nuisance from "foul smells" arising from a surface sewer ventilator constructed by them in a roadway within the appellants' district.

Held, that the provisions of section 2, *sub-section* 1 (b) *of the Public Health (London) Act*, 1891, *did not apply to public sewers, and that the justices were right in refusing to make the order on the ground that they had no jurisdiction to deal with the complaint.*

Case stated by justices of Kensington.

The appellants, as the sanitary authority of Fulham, had obtained a summons against the London County Council upon a complaint made under the Public Health (London) Act, 1895, s. 5, on the refusal of the respondents to comply with a notice served upon them by the appellants to abate a nuisance from foul smells, dangerous to health, arising from a surface sewer ventilator constructed by the respondents in the surface of a roadway within the appellants' district. The sewer formed part of the main drainage system of London.

On the hearing of the summons the London County Council took the objection that the Act of 1891 dealt only with nuisances arising from private property, and that if a nuisance as alleged existed, the justices had no jurisdiction since it arose from public sewers.

The justices on that ground dismissed the summons.

W. O. Danckwerts, for the appellants.—The foul smells arising from this surface sewer ventilator amount to a nuisance dangerous to health. It can be put right very easily by having a proper ventilator erected. The justices have jurisdiction to make the order, for the nuisance arises from a "watercourse" or "drain" within the meaning of the section, which is not confined to nuisances arising on private property only: *St. Helen's Chemical Co.* v. *St. Helen's Corporation*, 1 Ex. D. 196, 24 W. R. Dig. 165. The object of the Act was to provide a speedy and inexpensive mode of dealing with nuisances arising from any cause whatever dangerous to health.

Bosanquet, Q.C., and *Horace Avory*, for the respondents.—The words of the section cannot be construed as including a public sewer. If a defect exists the London County Council can only be made liable by indictment or *mandamus*. The sewer forms part of the main drainage system of London. The summary jurisdiction given by the Act against owners of private property to compel them to abate a nuisance is not applicable in the case of public works, and the justices were right in declining jurisdiction: *Queen* v. *Parlby*, 37 W. R. 335, 22 Q. B. D. 520.

Danckwerts replied.

DAY, J.—I am clearly of opinion that this appeal should be dismissed on the ground that the justices were right in declining jurisdiction. Section 2, sub-section 1 (*b*), under which the proceedings were taken, does not refer to nuisances arising from defects in the main sewers of London, which are public works vested in the county council. The words of the section are peculiarly applicable to nuisances arising from the acts of owners of property, as distinguished from acts which might be caused by the misconstruction of great public works entrusted to any public body. It may be that the county council have made these sewers badly, and may, as was contended, have made an egregious mistake in the construction of these ventilators, but assuming that were so, the remedy of the public would be by indictment or *mandamus*, and not by the summary procedure made applicable by this act to owners of private property. The county council are entitled to have this question tried at law by a judge and jury; that is the only tribunal which is competent to decide a question such as this, which is clearly not one that ought to be decided by a couple of magistrates sitting in petty sessions.

LAWRANCE, J.—I agree. If the appellants' contention is right it would be necessary to read into section 2, sub-section 1 (*b*) of the Act of 1891 the word "sewer." Now, that word is omitted from the section, and I suspect purposely so, in order to show that it refers to nuisances caused by the fault of owners of private property. It was contended that this could not be so because by section 141—the interpretation section—the expression "premises" was to include "messuages, buildings, hereditament of any tenure, whether open or closed, built on or not, and whether public or private, and whether maintained or not under statutory authority." And it was argued that the definition of "premises" covered the ventilator, which it was sought to have reconstructed. I do not think that the contention of the appellants has been made out, and I agree that the appeal has failed.

Appeal dismissed.

Solicitor for the vestry, *Blanco White.*

Solicitor for the London County Council, *W. A. Blaxland.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Q. B. Div.
(Hawkins and Wright, JJ.) May 10.

SUFFOLK LUNATIC ASYLUM COMMITTEE *v.* THE GUARDIANS OF THE POOR OF THE STOW UNION. (*a.*)

Lunacy—Pauper lunatic—Maintenance—Adjudication of settlement—Subsequent maintenance order by justices—Action to enforce order—Jurisdiction of judge to go behind order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 287.

In the case of an action brought under section 314 *of the Lunacy Act*, 1890, *for the recovery of money ordered to be paid under section* 287 *for the maintenance of a pauper lunatic, the court is bound to take judicial notice of a previous order of adjudication of settlement, and for future maintenance of the same lunatic, which was still in force at the time when the order upon which the action is brought was made.*

This was an appeal by the defendants from the judgment of his Honour Judge Eardley Wilmot, sitting at Stowmarket, in the county of Suffolk. The

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

action was brought to recover the sum of £18 10s. 6d. against the defendants under section 314, sub-section 2, of the Lunacy Act, 1890, in respect of the expenses incurred in the maintenance of a pauper lunatic under an order made by two justices, being visitors of the county asylum, and purporting to be made under section 287 of the said Act.

The defendants contended that the justices could only make an order upon the union to which the lunatic was chargeable, and this union they contended was Nottingham and not Stow, as the pauper's settlement had previously been adjudicated to be in Nottingham.

The facts of the case are as follows: On the 10th of December, 1890, the pauper was, under a magistrate's order, received in the Ipswich Asylum, as there was no room in the Suffolk County Asylum. On the 16th of March, 1891, the pauper was removed to the Suffolk County Lunatic Asylum, under an order made by two visitors of that asylum.

On the 15th of June, 1891, the justices in petty sessions at Stow made an order under section 287 of the Lunacy Act, 1890, adjudicating the settlement of the pauper to be in the parish of St. Mary, Nottingham. From this order the guardians of the Nottingham Union appealed to the Suffolk Quarter Sessions, but the appeal was dismissed and the order confirmed. It subsequently transpired that the hearing of the appeal was informal, as one of the justices taking part in the hearing of the appeal was an interested party, being an *ex officio* guardian of the Stow Union and also a ratepayer in that union, and the order of quarter sessions was accordingly quashed. The order of the petty sessions adjudicating the settlement therefore stood.

On the 5th of December, 1896, a subsequent order was made by two justices of the county of Suffolk, under section 287 of the Lunacy Act, on the Stow Union for the maintenance of the pauper. It was in respect of this order that the action was brought. The learned county court judge was of opinion that the case was governed by *Kettering Union* v. *Northampton Lunatic Asylum*, 34 W. R. 894, 34 L. J. M. C. 198, and that he was bound by the order of the 5th of December, 1896, as the order was good on the face of it, and he therefore gave judgment for the plaintiffs for the amount claimed, leaving it to the defendants to reimburse themselves such sum in the way pointed out in section 291.

From this decision the defendants now appealed.

R. Cunningham Glen (*Rawlinson* with him), for the appellants.—Under section 286 a pauper lunatic in an institution for lunatics is only deemed to be chargeable to the union from which he has been sent until it has been established that the lunatic is settled in some other union, from which time he is deemed to be chargeable to the union in which it has been established he has been settled; that consequently, after it has been established that he is settled in such other union, justices can only make an order under section 287 upon the union in which the pauper lunatic has been adjudicated to be settled. In this case such union is the union of Nottingham. The order of 1891 by which the lunatic's settlement was adjudicated to be in such union never having been quashed, the two justices who were visitors of the county asylum had no jurisdiction to make the order of the 5th of December, 1896, upon which this action was brought, and the plaintiffs, therefore, have no cause of action.

Macmorran, Q.C. (*Poyser* with him), for the respondents.—The county court judge could not go behind the order of 1896. This was only a provisional order, and the justices had jurisdiction to make it. The defendants could have got rid of that order by a fresh application for adjudication of settlement. There may be a change of settlement, and therefore a previous adjudication cannot be conclusive.

R. Cunningham Glen replied.

WRIGHT, J., delivered the judgment of the court: It is admitted now that the judicial determination of the petty sessions of the 15th of June, 1891, that this pauper was chargeable on the union of Nottingham, stands as a binding order at present governing her *status* in that respect, notwithstanding the quashing of the confirming order on *certiorari*. The question, then, is what is the effect of that order. Either in ignorance of that order, or being advised that that order had dropped since the quashing of the order of quarter sessions, the magistrates, acting as they supposed under section 287 of the Lunacy Act, 1890, have made an order upon the Stow Union. That section provides that any two justices may make an order on the guardians of the union to which the lunatic is chargeable for payment of the reasonable charges of the maintenance of the lunatic. On orders of that kind actions may be brought, and an action has in this case been brought in the county court against the Stow Union for the recovery of the charges for the maintenance of the pauper. The Stow Union set up the defence that this order was made without any authority, on the ground that there existed a binding judicial interpretation that it was not Stow but Nottingham which was the chargeable union. The county court judge has held himself bound by the order made on the Stow Union.

The question therefore arises whether the county court judge could go behind that order. The point was raised in the case of *Finch* v. *The York Union Guardians*, 35 L. T. Rep. 360, and there Blackburn and Lush, JJ., did not express any opinion one way or the other, but left it as a question that ought to be decided upon demurrer. We have to decide it now, and that is really the only question in the case.

Now, if the result of our holding that the county court judge could inquire into the matter and go behind that order were to be that he would have to inquire into the settlement for himself, or reopen decisions as to what the settlement was, I for one should say we ought certainly not to so decide because he has no power to hold such inquiry, and it cannot be intended that he should. But that is not the case here. All that is desired is that we should say that he has jurisdiction to take notice of and ought to have taken notice of the previous order of adjudication of settlement; and in considering whether we ought to hold that he has jurisdiction, I think we must bear in mind that the order under section 287 is an *ex parte* order and is not subject to appeal. It is not really a judicial determination at all. It is an administrative order made as a matter of course on the application of the proper authority and on giving some information, I suppose, that a particular union is thought to be the one to which the pauper is chargeable. An order of that kind there must be some means of getting rid of, although it is not subject to appeal, directly it is shown that it did not follow the authority under which it is purported to be made. In the present case the justices in making the order under the section made an order on the wrong party. The Nottingham Union was in truth the union to which the lunatic was chargeable, and the magistrates, disregarding that, have made an order against another union which is not and cannot be liable. The matter seems to be one of some doubt and difficulty, but on the whole I think we must hold that the county court judge ought to have received evidence that the Nottingham Union was liable and

not the Stow Union, and to have acted on such evidence. We think that the appeal ought to be allowed, and that there should be a new trial.

Order for a new trial.

Solicitors for the appellants, *Rexworthy, Barnard, & Co.*, for *Wilkes*, Stowmarket.

Solicitors for the respondents, *White, Borrett, & Co.*, for *Cobbold*, Ipswich.

Prob. Div. & Adm. Div. } March 13.
Admiralty. }

"THE ALTAIR." (*a*.)

Salvage—Tug and tow—Claim for salvage by tug by whose acts the necessity for salvage assistance has been in part occasioned—Instance of inequitable salvage agreement—Amount agreed on not awarded.

The owners, master, and crew of a steam-tug engaged to tow a vessel are not entitled to salvage remuneration for services in the nature of salvage services rendered to the tow beyond the scope of the towage contract where it appears to the satisfaction of the court that the tug has by her own wrongful acts contributed to place the tow in jeopardy.

The court will refuse to award an agreed amount for salvage where the bargain to pay such sum is shown to it to have been manifestly unfair and unjust.

There were two actions of salvage, afterwards consolidated, instituted—one on behalf of the owners, master, and crew of the steam-tug *Blazer* against the barque *Altair*, her cargo and freight; and the other on behalf of the owners, masters, and crews of the steam-tugs *Humber*, *Gipsey King*, and *Southern Cross*, against the same vessel, her cargo and freight.

The plaintiffs in both actions sought to recover salvage remuneration in the circumstances stated in the judgment, and the consolidated actions were heard before by the judge in court (Barnes, J.) on the 5th and 6th of March last, assisted by two of the Elder Brethren of the Trinity House.

Aspinall, Q.C., and *Crawford*, for the owners, master, and crew of *The Blazer*.

Sir Walter Phillimore and *Butler Aspinall*, for the other plaintiffs.

Joseph Walton, Q.C., and *Stubbs*, for the defendants, the owners of *The Altair*, her cargo and freight.

The following authorities were cited: *The Niobe*, 36 W. R. 812, 13 P. D. 55; *The Isca*, 35 W. R. 382, 12 P. D. 34; *The Prinz Heinrich*, 36 W. R. 511, 13 P. D. 31.

Cur. adv. vult.

BARNES, J.—In this case the owners, masters, and crews of the steam-tug *Blazer*, of Liverpool, and of the tugs *Humber*, *Gipsey King*, and *Southern Cross*, of Grimsby, claim salvage remuneration for services rendered by these tugs to *The Altair*, a four-masted German barque of 2,346 tons register, which stranded about one and a-half miles E.S.E. of Douna Nook, to the south of the entrance of the Humber, shortly before 5.30 a.m. on the 19th of January, last, whilst on a voyage from San Francisco to Holland, drawing 22ft. 9in. The defendants admit that the Grimsby tugs are entitled to salvage reward, and the only question so far as they are concerned is one of amount. The defendants, however, dispute the right of the plaintiffs interested in *The Blazer* to receive salvage remuneration, on the ground that the stranding of *The Altair* was (as the defendants allege) caused by the negligence of those in charge of *The Blazer*, and they claim by way of counter-claim against the owners of *The Blazer* for the damages sustained by the defendants in consequence of the said alleged negligence. It will be convenient to dispose of the claims of the Grimsby tugs first.

The Altair grounded at the place before-mentioned, about a quarter-of-an-hour before high water, whilst in tow of *The Blazer*, having been towed by that tug from Falmouth. The wind was light from about N.N.W., and the sea smooth. The weather was foggy at the time of the grounding, but it cleared in a few minutes afterwards. *The Altair* swung near parallel with the shore and rested on a hard level bottom. *The Humber*, a tug engaged in salvage operations on work and labour terms at a vessel called *The Arcadia*, a steam trawler aground not far from *The Altair*, left this work and came to assist *The Altair*. The master of *The Humber* required the sum of £500 to tow for the one tide, whether the vessel came off or not, and as he refused to take less than this sum, and as *The Humber* was the only tug there besides *The Blazer*, the master of *The Altair* was compelled to accept these terms, and engaged *The Humber* to assist *The Blazer*. *The Blazer* and *The Humber* towed for an hour or an hour and a-half, and at first moved *The Altair* a little, but the tide fell and she remained fast. *The Humber* was then sent to Grimsby for more tugs and returned with *The Gipsey King* and *The Southern Cross*. In the meantime men from the shore assisted the crew in jettisoning cargo, and about 224 tons were thrown overboard, of the value, including freight, of about £1,500, and the vessel was thereby lightened to the extent of nine inches. It was high water about 6.12 p.m., and about 4 p.m. the two tugs began to tow at *The Altair*, and in about half-an-hour, in fact, almost as soon as the full strain of the tugs was felt *The Altair* came off. The master of *The Humber* was on *The Altair* directing the tugs. *The Altair* was then taken by the tugs to an anchorage off Grimsby, one of them, *The Gipsey King*, fetching a pilot, and later on they all assisted her into dock at Hull, although the master of *The Altair* objected to more than one tug assisting after the vessel was successfully taken off the ground. At the time the vessel came off there was a moderate breeze from the eastward, and there was little sea. There was a fresh breeze on the 20th from the eastward. The weather on the 21st was moderate, and on the 23rd there was bad weather from the north-east. *The Altair* sustained no damage from the grounding. The total value of the property salved was £36,276. As the vessel came off when the tide had still a considerable time to rise, and as she had been lightened by the jettison, and having regard to the fact that *The Blazer* is larger and more powerful than the other three tugs put together, the Elder Brethren are of opinion that *The Altair* would in all probability have come off at or before high-water on the afternoon tide by the exertions of *The Blazer* alone.

The first question to determine is whether or not the agreement to pay *The Humber* £500 is to stand. The principles which are to guide the court in determining this question have been indicated in many cases. In one of the last—*The Strathgarry*, [1895] P., at p. 264—they were fully considered by Bruce, J., and I need not repeat what is stated in his judgment. The question to be determined is whether this agreement, which was undoubtedly made under compulsion, was manifestly unfair or unjust. The position of *The Altair* was serious if any bad weather had come on, and the value of the property was

(*a*.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

large; but the wind at the time of the first towage was light and the sea smooth. I am advised that there was no risk whatever to *The Humber* in the towage, and although she left *The Arcadia* to assist *The Altair*, and although the importance to the latter vessel of prompt assistance before the tide fell was great—for if she had been towed off at once her difficulties would have been ended and the jettison of the wheat avoided—yet, in my opinion, as *The Humber* was only assisting the more powerful tug *Blazer*, and was incurring no risk in doing so, it could hardly be expected, having regard to numerous former decisions of this court, that there was any reasonable certainty of her obtaining an award exceeding the sum of £500 for a successful hour's towage; whereas, if the tug was paid for towing for that time successfully at ordinary towage rates, a very trifling sum would be sufficient. I am of opinion that, under the circumstances, the bargain was manifestly unfair and unjust. The case of *The Strathgarry* was relied on, but the circumstances of that case were totally different from those of the present case. Bruce, J., found that the master of *The Strathgarry* prepared the form in which the agreement was made, and wished to prevent the possibility of a larger claim being made upon him in the event of the towage leading to a successful result, and that the performance of the towage involved considerable risk to the towing vessel. If there had been any material risk to *The Humber* in performing the towage, my opinion would have been different. To sanction the agreement in this case would practically tend to encourage the masters of tugs round the coasts of this country to refuse to render services for less than what they might rely on receiving if their services should prove successful, and to stipulate that they should be paid to this extent whether their services shall be successful or not, even though the services involved no risk to the tugs. Estimating the services of *The Humber* on ordinary salvage terms, I am of opinion that for these services, which, shortly stated, were towing on the morning tide, proceeding to Grimsby for tugs, taking part in the successful services on the afternoon tide, and assisting the vessel to an anchorage, £400 is an adequate salvage remuneration. The services of *The Gipsey King* and *Southern Cross*, treating them as continuing till the vessel was anchored, though they ceased to be necessary as soon as she came over the ground, were rendered in fine weather and without any risk to the tugs. As matters turned out, I believe that the vessel would have come off without the assistance of these tugs, and that their services were not really necessary. At the same time, these tugs came at request, and did what they were required to do efficiently, and it was no doubt desirable that there should not be the least uncertainty about the vessel coming off on the afternoon tide. I award to *The Gipsey King* £200, and *The Southern Cross*—the more powerful and valuable of the two—£300. The three tugs insisted on attending *The Altair* into dock, although her master protested, and although only one tug besides *The Blazer* was necessary; and as a claim for these services, which are only towage services, is made, it is desirable to dispose of it in this suit. It was stated that two-fifths of £60 would be paid to a second tug for assisting such a vessel in from sea, and therefore for assisting from the anchorage I think £20 is quite enough. This sum is to be paid by the owners of *The Altair*, as they would have had to pay about this sum in ordinary course, and it must be divided between the three Grimsby tugs. The said sums of £400, £200, and £300 make £900 in all, and if *The Blazer* is entitled to salvage reward, then, having regard to her value, size, and power compared with those of the other tugs, the total amount to be awarded for salvage remuneration in this case would possibly be double that sum.

An important question, however, arises with regard to the claim of *The Blazer* and the counterclaim. It was not disputed that if there were no fault on the part of *The Blazer* in relation to the grounding of *The Altair*, the services of *The Blazer* in assisting to get *The Altair* off the ground and to a place of safety were outside of the towage contract; but, in answer to *The Blazer's* claim for salvage, it was alleged that the grounding of *The Altair* was solely due to the negligence of those on board *The Blazer*, and that, therefore, not only could she not claim salvage, but that her owners were liable for breach of the towage contract, or a breach of duty to the extent of the losses incurred by the defendants, including the amounts awarded to the remaining tugs, and that in any event *The Blazer* was guilty of contributory negligence, and could recover no salvage.

The law applicable to the relation between tug and tow was stated by Lord Kingsdown in the case of *The Julia*, 14 Moo. P. C. C. 210, 10 W. R. H. L. Dig. 10. The passage to which I refer was quoted by Sir Barnes Peacock in delivering the judgment of the Privy Council in the case of *Smith* v. *The St. Lawrance Tow Boat Co.*, 21 W. R. 569, L. R. 5 P. C. 308, and by Lord Blackburn in the House of Lords in the case of *Spaight* v. *Tedcastle*, 29 W. R. 761, 6 App. Cas. 217. It is as follows: "When such a contract is made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If in the course of the performance of this contract any inevitable accident happened to the one without any default on the part of the other, no cause of action would arise; such an accident would be one of the necessary risks of the engagement to which each part was subject, and create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misrepresentation or unskilfulness on his part contributed to the accident." In the present case *The Blazer* was engaged to tow *The Altair* from Falmouth to Hull for the sum of £120. At Falmouth the master of *The Blazer* gave the master of *The Altair* a code of signals for use on the voyage, and some further signals to be used in case of fog were exchanged. The master of *The Blazer* said that he told the master of *The Altair* that the navigation of the ship would depend on the latter. The master of *The Altair* denied this, and further said that the master of *The Blazer* told him that he (the master of *The Blazer*) had been several times to the Humber, and that the last time was not very long since. This was denied by the master of *The Blazer*. The master of *The Altair* was an excellent witness, and I believe his version of what occurred then and subsequently.

After the vessel left Falmouth the course was set by *The Blazer*, and never interfered with by those on board *The Altair*. [His lordship then discussed the course in fact taken up to the stranding, and proceeded:] The master of the tug and the master of the ship both calculated that this course would bring them to the Spurn Lightship; but it is quite clear, having regard to the chart, the sailing directions, and the state of the tide, that a sufficient allowance for its effect was not made by them. Pursued as this course was, it naturally brought the vessels to the place of stranding, far to the southward of where they should have been. At the time the departure was taken it was

clear weather, but it afterwards came on foggy. If the vessels had been on a proper course the Spurn Lightship would have been seen or its fog signal heard. At the time of the stranding the vessel had run a distance from the point of departure almost exactly equal to the distance of that point from the lightship, and as nothing was seen or heard of the lightship the masters should have known for some time before the stranding that the vessels were not on a proper course. No soundings were taken from the tug. On board *The Altair* soundings were taken. The first at 3.40 a.m., when a sounding of 8½ fathoms was obtained, and from that time soundings were taken every five or ten minutes, 8 fathoms being always the result. At about 5.20 a.m. a sounding was obtained from *The Altair* of about 7 fathoms, 4 feet, and thereupon the master was preparing to signal the tug when a sound of breakers was heard on the port bow, and although the tug then ported, before anything further could be done the tug touched the ground and *The Altair* grounded and remained fast at the spot above stated. The Elder Brethren advise me that the course pursued by the vessels was, in the circumstances, an improper one, and more particularly that it was negligent to continue it so long when nothing was heard or seen of the Spurn Lightship, and, further, that the master of the tug ought to have taken or caused to be taken repeated soundings. The excuse made by him was that he thought that the ship would sound, and that he could not take soundings easily without stopping. But the Elder Brethren tell me that in ordinary practice in thick weather both tug and tow ought to sound, and that soundings could easily have been taken from the tug even while she was in the motion, and that the soundings, if taken by the tug as the vessels proceeded, would have shown that they were not on the correct course, and that, if a sounding had been taken by the tug, the leading vessel, shortly before the stranding, it would have shown that she was close in shore, and would have to haul out at once, and that if she had only done so the stranding of *The Altair* would not have occurred. If the responsibility for the course and soundings rested with the tug I have no doubt that those on board her were negligent with regard thereto, and that this negligence led to the disaster. But it was urged before me that the control of the navigation in this respect rested with the tow alone, and that those on board her should have checked the tug's course and are solely responsible for not doing so, at that at any rate those on board the tow were guilty of negligence in not so doing, and that their negligence contributed to the grounding. It is necessary, therefore, to consider where the responsibility rested, and the conduct of those on board *The Altair* in the matter. The first point depends upon the application of the principles laid down in the case of *The Julia*, to which I have above referred. Two cases illustrate how these principles should be applied. The first is the case of *The Robert Dixon*, 28 W. R. 716, 5 P. D. 54, where a tug which was engaged to tow a vessel from Liverpool round the Shenies, towed her without receiving any directions after the vessels got out to sea on such a course in bad weather that she was set low into the shore, required to be towed out from danger, and sustained the loss of anchors and chains. It was held that the tug could not claim salvage remuneration, and that her owners were liable for the loss. Lord Esher said: "I am very much inclined to think that a tug is bound to obey the orders of the captain, and if the captain had insisted on the tug keeping that course, the tug would have been bound to obey; certainly the captain could not have complained of the tug obeying him. But here, on the plaintiffs' own showing, the only evidence was that at the beginning of the towage the tug was directed to tow the ship in a particular course. I assume that to have been the right course; but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and, unless she was ordered to the contrary, she had the command of the course." No point was made in that case of negligence on the part of the ship. There may have been some difficulty about giving orders in the bad weather from the ship to the tug, or some other grounds for negativing an inference that the ship acquiesced in the course taken by the tug.

The other case is *Smith* v. *The St. Lawrance Tow Boat Co.*, 21 W. R. 569, L. R. 5 P. C. 508, where a vessel in tow of a tug proceeded in a thick fog and grounded in consequence in the River St. Lawrance, and it was held that the weather was so bad that the vessels ought not to have been under way, and that as they continued under way without any attempt on the part of those on board the tow to stop the tug, those persons must be taken to have assented to the tug proceeding; that there was negligence on the part both of those on board the ship and tug in proceeding in the way in which they did during the fog; and that as those on the ship contributed to the accident which occurred, the owners of the ship could not recover from the owners of the tug for the loss they had sustained. The danger of proceeding in that case was obvious. Sir Barnes Peacock, in delivering the judgment of the Privy Council, said: "It appears to be clear that, when no directions are given by the vessel in tow, the rule in the case of tug steamers is that the tug shall direct the course. The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow." Then he proceeded to point out how both vessels were negligent for proceeding in the fog, and that the ship contributed to the accident by negligence in allowing the tug to proceed, and not ordering her to stop when it was dangerous to the knowledge of those on board the ship to proceed.

There seems no doubt that the tug is under the control of the master of the ship; but practically the tow cannot be always giving directions as to the course set by the tug, and I am informed by my assessors that the tow usually does leave the course, in such towages as the present, to the tug, and would not interfere unless there were reasonable grounds for doing so. As a matter of fact, in the present case, the direction of the course was assumed by the tug; and it was, perhaps, not unreasonable that it should be so, because the master of the tug had been to the Humber several times before, whereas the master of *The Altair* had only once sailed out of that river, in the year 1884.

I am of opinion, therefore, that as no direction were given by the ship to the tug, the latter was responsible for the direction of the course. I have found that the negligence of those on the tug, in the matters above stated, caused the disaster, and I hold that no salvage remuneration can be claimed by her.

Then, was the master of *The Altair* negligent in not checking the course of the tug by signal or otherwise? In his favour it was contended that he knew that the tug-master had been in the Humber before, and might reasonably expect the tug-master, with his experience, to make proper allowance for the tide, and that, although the soundings which the master of *The Altair* was getting would, if carefully considered, show that he was approaching shallower water, yet that he might reasonably expect that the leading vessel would take soundings and act upon

them if they showed that the tug, which was 135 fathoms ahead of the tow, was getting into shoal water so as to render it necessary to haul her tow off. The master of the ship, however, had the same sailing directions and chart as the master of the tug had, and should have known that the course set from the Outer Dowsing Lightship did not allow sufficiently for the tide. If the weather had remained clear this would not have been so important, because the Spurn Lightship would have been made and the course could have been changed. But the weather became foggy, and when the vessel had run nearly the distance to the Spurn Lightship without it being seen or heard, ought the master of the ship to have allowed the tug to proceed? I am advised that he ought not to have done so. The entrance to the Humber is dangerous unless vessels entering are sure of their position. The channel between the Spurn Lightship and the Bell Buoy is only a mile and a-half wide, and it seems to be essential that, in such weather as existed, the lightship should have been made out before the entrance was attempted, and if that could not be done the vessel should have hauled off and waited till the weather cleared. The soundings taken by the master of *The Altair* should have shown him that he was running into shallow water.

I am of opinion that the master of *The Altair* was negligent in not checking the course of the tug. He was about to do so when the accident happened, but it was too late. In my opinion, and in that of the Elder Brethren, he was allowing the vessel to run unchecked into obvious danger. Moreover, if he had ported his helm as soon as he had obtained the last sounding the vessel would probably not have grounded.

If I were to hold that the master of *The Altair* was blameless in the matter, I should in effect decide that the master of such a vessel was justified in trusting the course entirely to his tug when entering a difficult port in foggy weather, and I should be introducing a dangerous precedent.

It was further contended for the defendants that, notwithstanding negligence on the part of the master of *The Altair*, the defendants could still recover on their counter-claim, and the case of *Davies* v. *Mann*, 10 M. & W. 546, and other cases following it, were relied on. But the proposition established by these cases is that "although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendants' negligence, he is entitled to recover." From what I have found as to the negligence of the master of *The Altair*, it follows, in my opinion, that he might, by the exercise of ordinary care, have avoided the consequences of the tug's negligence, and ought to have done so. I find that the grounding was directly contributed to by the negligence of both the masters. The case is analogous to the case of *Smith* v. *St. Lawrence Tow Boat Co.*

I therefore give judgment in favour of the Grimsby tugs for the sums of £400, £200, and £300 against all the defendants, and for £20 against the defendants, the owners of *The Altair*, with costs. I pronounce against the claim of the owners, master, and crew of *The Blazer*, with costs, and against the counter-claim.

Solicitors for owners, master, and crew of *The Blazer*, *Pritchard, Englefield, & Co.*

Solicitors for other plaintiffs, *Pritchard & Sons.*

Solicitors for defendants, *Stokes & Stokes.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) — May 27.

UNIVERSO INSURANCE CO. OF MILAN *v.* MERCHANTS' MARINE INSURANCE CO. (*a.*)

Insurance—Marine—Premium—Liability of assured—Custom whereby broker is liable—Company's policy—Promise by assured to pay premium.

The general custom in the business of marine insurance whereby the broker and not the assured is liable to the underwriter for the premium is not limited to the case of a Lloyd's policy, but applies also to the case of a company's policy containing a promise on the part of the assured to pay the premium.

Appeal from the judgment of Collins, J., at the trial of the action without a jury.

The action was brought to recover £1,361 17s. 6d. for premiums on policies of reinsurance effected by the defendants with the plaintiffs through Messrs. Tweedie, a firm of insurance brokers. The business between the plaintiffs and the defendants was transacted upon the terms of an agreement which was prepared but never executed. By this agreement the plaintiffs were to take by way of reinsurance one-half of the aggregate of certain risks taken by the defendants. The premium payable to the plaintiffs was in every case to be at the same rate as that received by the defendants less 7½ per cent., and the premiums, less 7½ per cent. retained by the defendants as commission, were to be paid monthly by the defendants to Messrs. Tweedie, and by them to the plaintiffs' representative in London.

The policies of reinsurance were in the form which is known as a company's policy; they commenced with a recital of the proposal of the insurance to the plaintiffs, the proposers being in most cases stated to be the defendants, while in some cases the name of Messrs. Tweedie was inserted, and they proceeded to witness that, in consideration of the person or persons effecting the policy promising to pay the premiums, the plaintiffs promised and agreed with the insured to perform and fulfil the contract.

Messrs. Tweedie having suspended payment and executed a deed of assignment to a trustee for the benefit of their creditors, the plaintiffs called upon the defendants to pay the amount which was due in respect of premiums, and on their failure to do so brought this action.

The defendants relied on a general custom whereby the broker and not the assured was liable to the underwriters for the premium on a policy of marine insurance, and they gave evidence to show that the custom applied to a company's policy as well as to a Lloyd's policy; and they contended that the premiums were payable by them, not to the plaintiffs, but to the trustee of Messrs. Tweedie, against whom they claimed a right of set-off.

Collins, J., was of opinion that the custom was not limited to the case of an ordinary Lloyd's policy, but extended to a policy containing a promise on the part of the assured to pay the premium, and he accordingly gave judgment for the defendants.

The plaintiffs appealed.

Sir Robert Reid, Q.C., and *Carver*, for the plaintiffs.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants.

Cur. adv. vult.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

May 27.—Lord ESHER, M.R.—In this case the plaintiffs seek to recover premiums upon policies of insurance effected with them by the defendants. The policies are not in an unusual form. To my mind there is no difficulty in the case so soon as the question is understood. It seems to me that the plaintiffs are attempting to upset a course of business which has been carried on in London for a hundred years or more. The custom is that the underwriter does not look to the assured for payment of the premium directly, but to the broker. That custom need not be proved in this case; it has been proved so often that the courts take judicial notice of it. It is said that in this case the parties have agreed that the assured shall pay the premiums, and that therefore the custom is negatived. But it has never been supposed hitherto that the mode of dealing in accordance with the custom was contrary to the writing in the policy. It is not a contradiction of the policy, it is a mode of carrying out the contract embodied in the policy. Here the policies say in terms that the assured are to pay the premiums, but that must mean that the mode in which the payment is to be made is to be the customary mode. It is universally understood by all persons engaged in the business of marine insurance that that is the way in which the contract of insurance is to be carried out. The plaintiffs, therefore, have no right to sue the assured for the premiums, and the judgment of the learned judge must be affirmed.

A. L. SMITH, L.J., read the following judgment: Although the present case arises out of a re-insurance by the plaintiff company of marine risks theretofore undertaken by the defendant company, it may be treated as if the plaintiff company were the underwriters of a policy of marine insurance upon the defendants' ship effected in the ordinary course of business in London through the instrumentality of a broker. The question is whether the underwriter in these circumstances can sue the assured for premiums due to him for so underwriting, or must he look to the broker and to him alone for payment. It cannot be denied that for about a century, at any rate, "according to the ordinary course of business of marine insurance as carried on in this country between the assured, the broker, and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter; but as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured and to pay it to the underwriter." I am here quoting the words of Bayley, J., in the case of *Power* v. *Butcher*, 10 B. & C., at pp. 339, 340, and what was in the year 1829 held by the Court of King's Bench to have been the then well-established custom in the business of marine insurance. It would appear from *Edgar* v. *Fowler*, 3 East 222, in 1803, that this custom was then existing, and Lord Ellenborough, in *Edgar* v. *Bumstead*, 1 Camp. 411, expressly recognized it and gave judgment on account of what he termed "the well-known course of dealing between the insurance broker, the merchant, and the underwriter." The evidence given in this case shows that this custom has never been departed from, and still exists, whether applied to underwriters underwriting at Lloyd's or to companies who underwrite at the present day. Arnold, in the first and second editions of his work upon Insurance, the first published in 1848 and the second in 1857, cites the above passage from *Power* v. *Butcher* as being the well-known law upon the subject, and in his second edition he sums up the matter thus: "Hence the general rule of law is that the broker is the debtor of the underwriter for premiums, and the underwriter the debtor of the assured for loss." Phillips, in the fourth edition of his treatise on Insurance, vol. 1, section 507 (in the year 1854), thus lays it down: "In England the premium on a marine policy is due from the assured to the broker, and from the latter to the underwriters. The broker has an action against the assured for the premiums, and the underwriters against the broker. All other claims and liabilities arising on the policy are between the assured and the underwriters." It is impossible for the plaintiff company to deny the existence of this custom, applicable as it is to the business of marine insurance in general in this country; but they are entitled to insist, if it be the case, that by their policy with the defendant company this undeniable custom is excluded, the express terms of the policy being contrary to and inconsistent with the custom, and this raises the real question in this case. I must, in the first instance, point out that if the plaintiffs' contention be correct, then this well-known line of business in this country has been entirely overturned when companies and not individuals are underwriters, for it is proved that the policy in question, so far as material to this point, is the ordinary form of policy which has been and is in use by the underwriting offices in general.

The point now taken by the plaintiffs arises because they find that they are unable to obtain the premiums due to them for underwriting the defendants' risks from the broker who effected the policy, he having suspended payment, and the plaintiffs now seek, we are told, for the first time, though like suspensions have often happened before, to get rid of the above-mentioned custom by arguing that by their contract of insurance they have excluded it; or, in other words, that the custom is contrary to and inconsistent with the express terms of the contract. The contract in question, which is not under seal as my brother Collins thought, is as follows: "Whereas it hath been proposed to the Universo Insurance Co. (Limited) by the Merchants' Marine Insurance Co. (Limited) . . . to make with the said company the insurance hereinafter mentioned and described, Now this policy witnesseth that in consideration of the said person or persons effecting this policy"—*i.e.*, the defendants—"promising to pay to the said company"—*i.e.*, the plaintiffs—"the sum of £37 10s. as a premium of and after the rate of £7 10s. per cent. for such insurance, the said company takes upon itself the burthen of such insurance to the amount of £500." In a Lloyd's policy the clause relating to the premium is this: "We, the assurers, confessing ourselves paid the consideration due unto us for this assurance by the assured." Now, why is it under a Lloyd's policy that the underwriter has to look to the broker for payment of the premium, and not to the assured? It is, as was pointed out by Lord Wensleydale (then Parke, J.) in *Power* v. *Butcher*, because, "by the course of dealing—that is, by the custom—the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured." This statement of Lord Wensleydale was approved of by Lord

Blackburn in *Xenos* v. *Wickham*, 11 W. R. 1067, 14 C. B. N. S., at p. 456.

In the present case the broker, according to the ordinary course of business, kept an account with the plaintiffs, and in that account gave them credit for the premium when the policy was effected. Then, why is it to be said that by the policy in question the custom is excluded, the custom being that the broker is considered as having paid the premium to the underwriter when the policy was effected, and the underwriter as having lent it to the broker again, and so becoming his creditor?

It is said, because the present policy is expressed to be granted in consideration of the defendants' promising to pay the premium to the plaintiffs, and that this is inconsistent with the custom, and therefore excludes it. But in my judgment this statement in the policy means that the defendants promise to pay the premium to the plaintiffs according to the universal custom in which such payments are made in the business of marine insurance in this country when a policy is effected through the instrumentality of a broker.

It seems to me, therefore, that there is nothing in the written contract which excludes the custom, and I agree with Collins, J., in the judgment he has arrived at, and consequently this appeal should be dismissed.

CHITTY, L.J., read the following judgment: The established custom in marine insurance effected through a broker is, that the assured is not, and that the broker is, liable to the underwriter for the payment of the premium. The ground of the custom appears to be that in most cases the assured is not, and the broker is, known to the underwriter, and accordingly that the underwriter gives credit to the broker alone, and that there is an account between the broker and the underwriter in which credit is given for the payment of the premium. In order to sustain this course of business, and to enable the underwriter to recover from the broker the premium, when it is not in fact paid, it is considered in law that the premium has been paid to the underwriter by the broker, and that the underwriter has lent the premium to the broker. Now, not only is this custom firmly established, but it is settled law that it applies to a Lloyd's policy. A. L. Smith, L.J., has in his judgment gone through the authorities which support these propositions, and has dealt with them fully: it is unnecessary for me to cite them again. The policy before us is not a Lloyd's policy, but a policy which has been in vogue for many years, and is known as a company's policy. Marine policies of this class are all substantially in the same form. They differ in one point from a Lloyd's policy, and it is in respect of this difference that the substantial question arises for consideration on this appeal. There was ample evidence before Collins, J., which justified his holding, as he did, that the custom applies to a company's policy, such as that which we have before us; but the question is whether, as a matter of law, the custom is or is not excluded by the terms of the policy. Collins, J., has held that it is not.

Now, in a Lloyd's policy the underwriter confesses that the premium has been paid to him by the assured, although in fact it has not been so paid. A Lloyd's policy is not under seal; consequently the underwriter is not estopped by the policy itself from showing that the payment which he has acknowledged has not in fact been made. In an ordinary case of contract not connected with marine insurance, and apart from the custom, an acknowledgment of the receipt of money forming the consideration for the promise would go strongly to show that the person in whose favour the receipt is given is liable to pay the consideration which has not in fact been paid. But on a Lloyd's policy the custom steps in and negatives any such liability on the part of the assured, and it prevails to the extent of relieving him from all liability to pay the premium.

The policy before the court is not under seal. It purports to be granted in consideration of the persons effecting the policy—that is the defendants, the assured—promising to pay the plaintiffs, the insurers, the premium. The defendants did not execute the policy; but by accepting the policy the defendants must be held to have given the promise, subject, however, to the custom, unless it is excluded by the terms of the promise. In this case there were the usual accounts between the plaintiffs—the insurers—and the broker, in which credit was given for the premium in the customary manner. According to the custom, as already stated, the broker is deemed to have paid the premium to the underwriter and to have borrowed it from the underwriter. Collins, J., calls this a fiction; I do not dissent from his terms, but, like all fictions in law, it was raised for the purpose of justice, to give effect to the true understanding of mercantile men and to sustain the universal course of business between business men. Fiction or no fiction, it is law too firmly established to justify us in disregarding it. Now, applying this law to the policy in question, it seems to me that the promise by the assured to pay the premium may be read as a promise to pay in the customary manner—namely, by the broker; or, alternatively, that the broker is to be deemed according to the custom, and in point of law, to have paid the premium, and that by such payment the promise on the part of the assured has been fulfilled. In the result I think that the custom is not excluded, and that the judgment of Collins, J., is right.

Appeal dismissed.

Solicitors for the plaintiff, *Thomas Cooper & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

High Court of Justice.

Chan. Div. North, J. } May 20.

In re FULLER, HORSEY, SONS, & CASSELL AND LEATHLEY'S CONTRACT. (*a.*)

Vendor and purchaser—Custody of title deeds—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 2, *r.* 5.

A vendor of land cannot, in the absence of express stipulation, retain possession of title deeds because they relate to personal estate also in which he still retains an interest.

Summons under the Vendor and Purchaser Act, 1874.

The applicant was the purchaser of certain building land at the East-end of London at a sale by auction on the 16th of July, 1896.

A memorandum was duly signed, and an abstract of title was delivered.

Requisitions were sent in, one of which was: "18. What deeds will be handed over upon completion?" The answer was "All."

The vendor, however, refused to deliver over a

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

mortgage deed of the 31st of December, 1885 (under a power in which the sale to the purchaser was effected), on the ground that this deed related also to certain policies on the life of the mortgagor for £3,000.

A. St. John Clerke, for the purchaser.—In the absence of special stipulation the vendor is bound to give up the deeds. Section 2 of the Vendor and Purchaser Act, 1874, altered the law. If a vendor retained land before that Act, the question whether the vendor was entitled to retain the deeds or not depended upon the respective values of the land sold and retained: Sugden Vendor and Purchaser, 14th ed., p. 433. "Part of the estate" in the Vendor and Purchaser Act does not include personal property. The Act deals exclusively with land. The title of the Act is "An Act to amend the law of vendor and purchaser, and further to simplify title to land." The preamble is: "Whereas it is expedient to facilitate the transfer of land by means of certaim amendments in the law of vendor and purchaser." Section 1 begins, "In the completion of any contract of sale of land," and the whole Act only applies to cases in which land is sold. There is no doctrine as to title deeds going with personal property, and the reason is that till the Judicature Act policies could not be assigned. The owner of an estate can sue for the title deeds: *Harrington* v. *Price*, 3 B. & Ad. 170; and *Wright* v. *Robotham*, 34 W. R. 668, 33 Ch. D. 106.

E. Brodie Cooper, for the vendor.—A liberal construction should be placed on an enabling Act, and it should not be limited to land. "Estate" is used in a large sense in the Act, and includes personal property.

NORTH, J.—I think that the case is perfectly clear. The vendor exercises a power of sale in a mortgage deed, and the abstract of the mortgage deed makes no reference to the fact that policies are included in the mortgage security. It is stated in reply to requisitions that all the abstracted deeds will be given up. At the last moment the vendor seeks to retain the deed, because it also relates to the policies. No doubt that might have been an excellent reason for putting in a condition as to the custody of the deed. It is said that the vendor was misled by the Vendor and Purchaser Act, and that a condition was not inserted because of that Act, but the answers to requisitions show that keeping the deed was only an afterthought. It is clear that the deed must be given up. There are many cases of actions by owners of land for deeds, but there is no case in which such an action was successfully defended upon the ground that a policy was subject to the deed. With regard to the argument that the Vendor and Purchaser Act applies, "an estate" means an estate in land freehold, copyhold, or leasehold, or an interest in land of some sort. The vendor retains no interest, and the document must be given up.

Solicitors, *Leathley & Willes*; *Hatchett-Jones & Co.*

Chan. Div. Stirling, J. } April 28; June 17.

In re MACDONALD.
DICK *v.* FRASER. (*a.*)

Executor—Acknowledgment of debt by one of several—Statutes of Limitation—9 Geo. 4, c. 14, s. 1—19 & 20 Vict. c. 97, s. 14.

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

An acknowledgment within Lord Tenterden's Act of a debt of a testator by one of several executors is sufficient to take the case out of the Statutes of Limitation.

This was a summons taken out by the surviving executors of the late Mr. Macdonald (deceased) against the infant beneficiaries and Mr. Tillson, asking whether Mr. Tillson was or was not a creditor of the testator's estate, and if so, for what amount.

Mr. Tillson entered an appearance, and was willing that the question should be decided on this application.

The point raised was this, was a debt due from the testator to Mr. Tillson barred by the Statute of Limitations.

The testator died in 1894, and the will was proved by the present executors and by the testator's widow, since deceased. The widow was a beneficiary and also tenant for life of the residuary estate.

Between the years 1883 and 1888 Mr. Tillson acted as solicitor to the testator, and there were several matters in respect of which he claimed there was due to him a considerable sum of money for professional services.

On the 31st of October, 1894, the following letter was written and signed by the solicitors then acting for the testator's widow to Mr. Tillson: "Dear Sir,—*Re* Captain Macdonald, deceased. Possibly you are not aware of the death of Captain Macdonald. Amongst his papers his widow finds a memorandum that he was indebted to you for costs in respect of some proceedings as to a gold mine. We are instructed by Mrs. Macdonald to request you to furnish us with your account, that the amount may be paid. We shall be glad to receive the account at your earliest convenience."

Mr. Tillson did not send in the account at once, and before he did do so the widow died, and in consequence of her death her solicitors ceased to act, and declined to accept the account when sent.

Mr. Tillson only sent in his bill late in 1895, and it was admitted that the Statute of Limitations was a bar unless the letter of the 31st of October, 1894, constituted an acknowledgment of Mr. Tillson's rights.

George Cave, for the applicant.

H. B. Buckley, Q.C., and *Morton Smith* (*A. B. Cane* with them), for Mr. Tillson.

J. W. Greig, for the infant beneficiaries.

The following cases were cited: *Fordham* v. *Wallis*, 1 W. R. 118, 10 Hare 217; *In re Hollingshead*, *Hollingshead* v. *Webster*, 36 W. R. 660, 37 Ch. D. 651; *Tullock* v. *Dunn*, Ry. & Moo. 416; *Scholey* v. *Walton*, 12 M. & W. 510.

STIRLING, J., stated the facts, and continued: Lord Tenterden's Act requires the acknowledgment to be signed by the party to be charged, and this has been construed to mean by him personally; but by section 13 of the Mercantile Law Amendment Act such acknowledgment may be given by an agent thereunto duly authorized. [His lordship referred to the evidence as to the authority of Mrs. Macdonald's solicitors to write and sign the letter of the 31st of October, 1894, and held that she had authorized them to write and sign it; and proceeded:] That letter, therefore, must be read as if Mrs. Macdonald had written it, and in my opinion amounts to a promise to pay if the the account is sent in.

It was contended that that promise was not made by the widow in her character of executor. It was not seriously contended (and I think could not be maintained) that she made that promise in her individual capacity, for she was under no liability what-

ever in respect of this debt. It was suggested, however, that she must be taken to have made the promise as beneficial owner. On this I desire to refer to what was laid down by Turner, L.J., in a similar question in *Fordham* v. *Wallis*, 10 Hare, 217, with reference to payment of interest on a debt. He says (p. 225), "To consider the question on principle, the bar of the statute is precluded by the payment of interest, because the payment of interest is an acknowledgment of the debt, and the law implies from the acknowledgment of the debt a promise to pay it." As is said by Lord Tenterden in *Tanner* v. *Smart*, 6 B. & C. 603, at p. 609, "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied," and this implied promise rests, as I apprehend, upon the moral obligation to pay. How, then, is it to be affected by the circumstance of the party by whom it is made holding the position both of executor and devisee. . . . The question in those cases, in truth, is, by whom the promise is made, not what is the extent or effect of the promise," and he held that an executor who was also a devisee had made the promise in both capacities. This decision was referred to and followed by Chitty, L.J., in *In re Hollingshead*. In the present case it seems to me that it ought to be attributed to her in both characters. If it were necessary, which it is not, to decide in which of the two the promise was made, I should be of opinion that the evidence is most in favour of the view that the acknowledgment was made in her capacity of executrix.

Then comes the point on which most stress was laid. It was said that the acknowledgment was made by one only of several executors and therefore did not take the case out of the Statute of Limitations, but that it ought to have been made by all. In support of this the case of *Tullock* v. *Dunn* and the opinion of Baron Parke, in *Scholey* v. *Walton*, were relied on. Now, as to the decision in *Tullock* v. *Dunn*, there was an action against several executors and the statute was set up and it was held that a verbal acknowledgment by one of several executors had not the effect of preventing the operation of the Statute of Limitations. That case came to be considered by the Court of Exchequer in *Scholey* v. *Walton*, which was not a case of acknowledgment of debt. There there was a payment made by the defendant, not in his character of executor, but in his personal capacity, and the decision is founded on that. But the effect of an acknowledgment by one executor was discussed in argument and considered by the judges. In that state of the authorities I do not think that it can be said to be conclusively established that before the passing of Lord Tenterden's Act a promise to pay or an acknowledgment by one of two executors did not bind the others, but I am quite willing to accept the view that the weight of authority bears that way and to accept the cases as showing that the law as it then existed did not affect or prevent the operation of the statute.

But now I have to consider what was the effect of Lord Tenterden's Act. That Act after reciting the preamble of the English statute, 21 James 1, and the Irish statute, 10 Car. 2, proceeds to enact (section 1) "Where there shall be two or more joint contractors or executors or administrators of any contractor no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them so as to be chargeable in respect or by reason only of any written acknowledgment of a promise made or signed by any other or others of them." I pause there to remark that that does not appear to me to be applicable to the present case. It deals with the case where there are two or more executors of any contractor.

Then comes a proviso that "in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff. So that if one of several executors makes an acknowledgment or promise the creditor may recover judgment against him in an action against all the executors. It is clear, therefore, from this enactment that the effect of an acknowledgment which satisfies the provisions of Lord Tenterden's Act is totally different from the effect of a verbal acknowledgment prior to the passing of that Act. In the first place, before the Act the plaintiff, suing a single executor or administrator in respect of a promise made by him, could have been met by a plea in abatement which was deprived of its validity by the Act. And consequently it seems to me that the effect of the decision in *Tullock* v. *Dunn* and *Scholey* v. *Walton*, so far as material with respect to an acknowledgment by a single executor is done away with, and that an action may be maintained against such single executor or administrator who makes such an acknowledgment or promise, whereas previously such an action could not be brought.

It is clear, therefore, that if Mrs. Macdonald were still living an action at law might have been maintained against her in spite of the doctrine laid down in the two cases, and judgment recovered against her on account of the acknowledgment contained in the letter of the 31st of October, 1894. Such judgment would have been for payment *de bonis testatoris*, and consequently there would have been a right to reach the assets unadministered of the testator.

Now comes the question on which there is very little authority indeed—What was the result of this acknowledgment in the event which happened? Mrs. Macdonald having died, did it go for nothing? In considering this, we must have regard to the clause to which I have already referred in Lord Tenterden's Act. In the first place, I think the use of the word "only" is emphatic, and the enactment provides to this effect, that, if one of several co-executors makes an acknowledgment, and nothing more than that, then the others were not to be chargeable. It is evident from the language of the Act that they may become chargeable by reason of something more, but it is not necessary to go into the question of what would be enough to make the others chargeable.

Then comes the important question, What is the meaning of the word "chargeable"? It seems to me that that means personally chargeable so as to be a personal demand against the executors with respect to it. In support of that view I will refer to the corresponding section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) with reference to payments by an executor. Section 14 enacts that, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the enactments therein mentioned so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or

others of such co-contractors or co-debtors, executors or administrators.

This language is almost identical—and in its material portions is identical—with that contained in Lord Tenterden's Act, the effect of which was considered by Chitty, L.J., in *In re Hollingshead*. I come to the conclusion, therefore, that the words "so as to be chargeable" mean "so as to impose a personal liability on the executor." I see no reason why there should be any question as to such personal liability, and there is nothing in the present case to limit the effect of the promise as regards the assets of the testator. The general proposition is that the power of an executor, when he is one of several, does not extend so as by his contract to impose a personal liability on the others, yet his power does nevertheless extend so as to enable him to bind the assets. Therefore, as against the assets, this acknowledgment is binding against them. I think that, under these circumstances, the debt is provable against the estate, the new promise and not the old debt being the measure of the creditors' right.

Solicitors, *J. Spencer Chapman; W. M. Tillson; W. S. Greig.*

Chan. Div. } April 27; May 22.
Stirling, J. }

In re DELMAR'S TRUSTS. (*a.*)

Will—Construction—Alternative or substitutional gift—Charitable trust—Scheme.

A testator by his will bequeathed £10,000 *to his trustees upon trust to pay one-tenth of the income arising therefrom to "the Protestant Alliance,* 1851, *or some one or more kindred institutions having for their object the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty."*

Held, that the language of the will imported not a substitutional but an alternative gift, and that the testator's intention was to benefit a class of institutions of which the Protestant Alliance was a type; that a scheme for the application of the fund should be prepared, under which, primâ facie, *the Protestant Alliance would take the chief, if not the entire, benefit.*

This was an originating summons taken out by the trustees of the will of Frederick Orlando Thompson Delmar, deceased, in the matter of the Delmar Charitable Trust and the matter of the Charitable Trusts Acts, 1853 to 1894, for the construction of the testator's will so far as it directed payment of one-tenth part of the income of the Delmar Charitable Trust to the Protestant Alliance or some one or more kindred institutions having certain objects.

The respondents were the treasurer of the Protestant Alliance and the residuary legatees under the will. The Attorney-General was, by an order in chambers, made a respondent.

At the hearing counsel for the Protestant Alliance pointed out that the summons should have been taken out under order 55, and not under the Charitable Trusts Act, 1853, and the summons was duly amended.

The testator, by his will dated the 9th of October, 1895, after directing payment of certain annuities and pecuniary legacies, made the following bequest: "I give the sum of £10,000 to my trustees, to be held by them upon the trust following—that is, to invest the same in securities allowed by law for trustees' investments, and to vary such investments from time to time to time as in their discretion they may think fit, and to hold such investments as a fund to be called the Delmar Charitable Trust, and to receive the annual dividends and income thereof, and in every year to pay thereout one-tenth part thereof to the Protestant Alliance, 1851, or some one or more kindred institutions having for their object the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty against the advance of Popery, and in every year to divide the remainder of such income between such of the charitable institutions in London or in the neighbourhood of London as they may from time to time select, in such proportions as they may deem fit having regard to the relative importance and magnitude of such institution, and subject to such provisions for applying the same as they may in their discretion impose, but so that the several gifts shall enure to the benefit of, and to extend the principal objects for which the several institutions are constituted"; and the testator desired that his trustees might include in the institutions to participate in the said income to such extent as they might deem fit certain institutions having specified objects. The testator died in 1896.

The Protestant Alliance claimed to be entitled to the whole of the one-tenth part of the income arising out of the Delmar Charitable Trust. The following institutions (*inter alia*) also claimed to participate in the one-tenth part of the income—viz., the Church Association, the National Protestant League, the National Protestant Church Union, the Protestant Defence Brigade, the Calvinistic Protestant Union, and the Protestant Evangelical Mission and Electoral Union.

The trustees of the will claimed to have an absolute discretion as to the institutions, if more than one, who should participate in the income, and as to the proportions thereof respectively.

It appeared from the affidavit filed by the secretary of the Protestant Alliance that the object of that society, which was founded in 1851, was as follows: "To maintain and defend against all encroachments of Popery the Scriptural doctrines of the Reformation and the principles of religious liberty as the best security under God for the temporal and spiritual welfare of the British Empire."

Buckley, Q.C., and *Kerly*, for the trustees.

Graham Hastings, Q.C., and *Meates*, for the residuary legatee.

Dibdin, for the Protestant Alliance.—The testator's intention was to provide against lapse. The Protestant Alliance is to receive this sum as long as it exists, and if it cease to exist that money is to be paid to other charities of the same kind.

He referred to *Crafton* v. *Frith*, 20 L. J. Ch. 198; *Carey* v. *Carey*, 6 Ir. Ch. 255; and *Rymer* v. *Stanfield*, 43 W. R. 87, [1895] 1 Ch. 19.

Joyce, for the Attorney-General.—I submit that the court has to determine how this income is to be applied, and that the proper course is a scheme.

Buckley, Q.C., in reply.—I submit that the will gives a discretion to the trustees.

Cur. adv. vult.

May 22.—STIRLING, J., after stating the facts and reading the will, continued: I have read the whole of those portions of the will of the testator which relate to his charitable gifts, although the question arises only as to the institution and application of the one-tenth part to which I have already referred, because it is contended that the language of the second part, where he deals with what relates to the nine-tenths,

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

might throw light upon what was meant in the first part. The first point, however, that has to be determined is what is the position of the Protestant Alliance under the gift. On behalf of the Protestant Alliance it is contended that the society is entitled to receive the whole of the one-tenth income so long as it exists, and that the gift in favour of some one or more kindred institutions having the objects specified only arises when the Protestant Alliance shall have ceased to exist. Now, that in effect is a contention that the gift to one or more kindred institutions is in the nature of a substitutional gift in the event of the Protestant Alliance ceasing to exist, and that rests upon the proposition that a gift in a will to A. or B. is *primâ facie* to be treated as a substitutional gift to B. in case A. cannot take the benefit which is intended to him. Now, for that broad principle I am unable to find any authority. Undoubtedly there are many cases in which it has been decided that a gift to A. or B. is substitutional, and that conclusion has been arrived at more particularly in cases where the gift is in favour of "A. or his children."

A typical example is the case of *Carey* v. *Carey*, which was referred to in the argument, and which I have more fully considered since, but that case (and as it appears to me all the others which I have examined) was decided on a consideration of the whole will and all the circumstances which can be taken in consideration upon the construction of a will. Now, coming to this particular will, I think that the language of the testator read according to its natural meaning imports not a substitutional, but an alternative gift. It seems to me that what he intended to benefit was either the Protestant Alliance or some one or more kindred institutions. He selects the Protestant Alliance as the type of institution which he had meant to benefit, but I do not think he meant the benefit to be exclusively assigned to them. So understood, the gift is a perfectly good charitable gift, and I have not to face the difficulties which would arise if the gift were in favour of a private individual—difficulties which are so fully and learnedly considered in the judgment given by the Lord Chancellor in the case to which I have referred. It seems to me that this must be dealt with upon the ordinary footing of a charitable gift. It was next contended that the trustees had an absolute discretion as to what institutions were to benefit under the gift, and in what proportions and in what manner, but that contention was rested upon this, that in the gift of the nine-tenths of the income between the charitable institutions in London or the neighbourhood the testator has conferred the power upon the trustees of deciding first of all the selection; secondly, the proportions in which the institutions were to share and the provisions for applying the same which they might in their discretion propose; in fact he has given them an absolute discretion as to the distribution of the nine-tenths among the charitable institutions in London and the neighbourhood. It was said as a matter of construction those same discretions ought to be read into the previous gift. I am unable to come to that conclusion. The words, "as they may from time to time select in such proportions," and so on, stand in the middle of directions which relate exclusively to charitable institutions in London and the neighbourhood, and it seems to me that the power of exclusive selection and distribution and appointments ought not to be read into the prior gift. The result therefore is that as the Attorney-General is here and desires it there must be a scheme. That scheme ought of course to be of the simplest description, and I should think that it might well be embodied in the order which is now to be made. But *primâ facie* the Protestant Alliance would largely, if not conclusively, benefit, and if the application is to be made for the benefit of any other institutions, great weight will of course be in every way given to the views of the trustees with whom, in the absence of any interposition on the part of the Attorney-General, the right to distribute the fund exists. The costs of all parties will come out of the £10,000 bequest.

Solicitors, *Kerly, Son, & Verden; C. H. Collette; Hare & Co.*

Prob. Div. & Adm. Div. Admiralty. } April 6.

"THE CRATHIE." (*a.*)

Ship—Damages—Limitation of liability—Right of plaintiffs to claim in respect of amount of damages already paid—Adjustment of claims between defendants, some of whom have recovered damages under order of foreign tribunal—Practice—Bail for interest on amount required exclusively to answer life and personal injury claims—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.

The owners of a vessel who have obtained a decree limiting their liability under the Merchant Shipping Act, 1894, *for damage to goods, loss of life, or personal injury, are entitled to put in at the reference in the limitation suit a claim for such sums not exceeding the value of their vessel as they may have been compelled to pay under the order of a foreign court in respect of such damage, loss of life, or personal injury, and in regard to such claim to receive or have distributed to them the same dividend out of the amount in court or otherwise secured, as the plaintiffs in the foreign court would have received if execution on the judgment pronounced by the foreign court had been stayed and such plaintiffs had themselves sued here and brought in their claim in the limitation proceedings.*

Those foreign plaintiffs who have not been paid abroad the full amount which they would have received if plaintiffs here, can come against the fund in court or otherwise secured for the balance of the dividend due to them.

By the practice of the Admiralty Division the plaintiffs in a limitation of liability suit brought for the purpose of limiting their liability in respect of damage to goods, loss of life, and personal injury arising from a collision for which their vessel is to blame, are required before a decree is pronounced in their favour, in addition to paying into court the statutory amount to which their liability for damage to goods is limited, together with interest, to give bail not only for the loss of life and personal injury claims for which they are liable, but also for interest on such claims calculated from the date of the collision until payment.

This was an action of limitation of liability instituted on behalf of the owners of the British steamship *Crathie* against the owners of the cargo lately laden on board the steamship *Elbe*, the survivors of her crew and passengers, and (subject to all exceptions) the owners of the steamship *Elbe*, and the freight due in respect of the carriage of the said cargo, together with, subject to the like exceptions, the legal personal representatives of the crew and passengers who lost their lives by reason of a collision which occurred between the two vessels on the 30th of January, 1895, when *The Crathie* was on a voyage from Rotterdam to Aberdeen.

The statement of claim was verified by affidavit,

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

and alleged, *inter alia*, that in consequence of the collision the lives of a large number of persons on board *The Elbe* were lost, together with the whole of her cargo and the crew and passengers' effects; that on or about the 25th of February, 1895, *The Crathie* was arrested at Rotterdam at the instance of the North German Lloyds, the owners of *The Elbe*, and an action was instituted in the tribunal of that port against *The Crathie* for the recovery of the damages occasioned to the North German Lloyds by reason of the collision; that the said action was determined by the said tribunal in favour of the North German Lloyds, and *The Crathie* would shortly be sold by order of the court at Rotterdam, and the proceeds applied in satisfaction of the said judgment; and that the plaintiffs, the owners of *The Crathie*, were willing to pay into court or give bail for the sum of £3,668, less the amount of the net proceeds of the aforesaid sale, being £8 per ton on the registered tonnage of *The Crathie*, calculated as aforesaid, together with interest thereon, and to give bail, if so required, for the further sum of £3,209, making in all the sum of £6,877, being £15 per ton on the gross registered tonnage of *The Crathie*.

The statement of claim prayed, *inter alia*, that the plaintiffs might be allowed to give bail for the said sum of £6,877, less the net amount of such sale, together with interest thereon from the date of such collision until payment, or to pay that amount with interest as aforesaid into the registry.

On the 15th of June, 1896, the action was heard before the judge in court, and a decree was pronounced therein limiting the liability of the owners of *The Crathie* in respect of damage to goods, &c., loss of life, and personal injury arising out of the collision to the sum of £6,877, being £15 per ton of the registered tonnage of *The Crathie*, subject to the usual deduction for crew space, on the usual terms of bringing the aggregate amount of £8 per ton, together with interest, into court, and giving bail in respect of the loss of life claims in the sum of £3,209, but with a reservation of all questions as to the liability of the plaintiffs for any damages for loss of life or personal injury, and as to the appropriation of the net proceeds of the sale of *The Crathie* under an order made in an action instituted by the owners of the steamship *Elbe* at Rotterdam.

On the 12th of February, 1896, the registrar made the following report: This terrible collision between these two steamers occurred in the North Sea on the 30th of January, 1895, and *The Elbe* sank, and nearly all aboard of her were drowned. She had left Bremen with a large crew and a number of passengers, principally emigrants, and a quantity of cargo for New York. *The Crathie* was in ballast from Rotterdam for Aberdeen, and being badly damaged returned to Rotterdam. Shortly after the collision proceedings were commenced against *The Crathie* by the owners of *The Elbe* and others, and the vessel having been sold by order of the court, the proceeds of sale were eventually paid out to the claimants in that court. On the 25th of February, 1895, an action was commenced in this court by the owners of *The Crathie* with a view to limiting their liability according to English law, and on the 15th of June, 1895, a decree was pronounced fixing their statutory liability at £6,877, being £15 per ton on the tonnage of *The Crathie*, exclusive of interest. All questions, however, were reserved with respect to the plaintiffs' liability for loss of life or personal injury and with respect to the appropriation of the proceeds of sale of *The Crathie* under the order of the court at Rotterdam. On the 4th of July, 1896, a sum of £5,879 8s. was paid into court, being at the rate of £8 per ton, inclusive of interest thereon at 4 per cent. per annum from the date of the collision to the date of payment into court, and bail has been given to pay, when required, the balance of £7 per ton, amounting to £3,209. It was suggested by counsel at the reference that interest was not payable on this latter amount, at all events from the date of giving bail; but hitherto no distinction has been made by the court in regard to interest on the £8 per ton and interest on the £7 per ton; and I am opinion that interest is due on the balance of £3,209 at the rate of 4 per cent. per annum from the date of the collision until the actual date of payment, whenever that may be. All claims upon this statutory liability fund and interest were referred to the registrar and merchants for assessment, and the time allowed for filing claims having expired, the case came before us on the 5th of December, 1895.

In the court at Rotterdam there were three sets of claimants, the owners of *The Elbe* and two insurance companies, claiming for the portions of cargo insured by them.

These claims were pronounced for on the 6th of November, 1895, and were subsequently assessed, the claim of the owners of *The Elbe* at 565,000 guilders and the claims of the insurance companies at 185,186 guilders, 18 cents, and 107,522 guilders, 5 cents, being equivalent respectively (at the exchange of twelve guilders to £1) to £47,125. £15,432 3s. and £8,960 3s. 4d., and the net proceeds of *The Crathie*, amounting, after payment thereout of certain costs, to 12,061 guilders, 80 cents, were divided rateably among the claimants as follows: To the owners of *The Elbe* (8,189 guilders, 16 cents), £682 8s. 8d.; to the Atlantic Mutual Insurance Co. of New York (2,449 guilders, 80 cents), £204 3s.; to the British and Foreign Marine Insurance Co. (1,422 guilders, 54 cents), £118 10s. 10d., making a total of (12,061 guilders, 50 cents) £1,005 2s. 6d. Of these claimants it is only the first and third who are claiming in the present action. No claim has been put forward here on behalf of the Atlantic Mutual Insurance Co. At the reference Mr. Holman, counsel for the owners of *The Crathie*, contended, as I think with good reason, that his clients, being liable only for £15 per ton, were entitled to have credit for the sum of £1,005 2s. 6d., which had been already paid out of the proceeds of the vessel at Rotterdam, and to have that amount repaid to them out of the fund in court.

There is, however, a further question affecting not the owners of *The Crathie* but the apportionment among the various claimants—namely, whether the owners of *The Elbe* and the British and Foreign Marine Insurance Co. are entitled to retain the sums received by them in the Dutch Court in part satisfaction of their claims (which to that extent would be paid in full), and to rank for the balance of their claims rateably with the other claimants against the fund in court, or whether the amounts received by them at Rotterdam ought to be brought into hotchpot before apportioning the fund, in which case they would take only a proportion with the other claimants of the sums already received by them. I venture to think that the latter view is right. Although the decree of the Dutch Court was pronounced on the 6th of November, 1895, before any proceedings had been taken for limitation of the liability of the owners of *The Crathie* the claims of *The Elbe* and the insurance companies in the Dutch court were not assessed until after the commencement of the present action, and the case does not seem to differ substantially from what occasionally happens here in collision cases where one party obtains a judgment for damages which are referred to assessment, and before the assessment takes place the other party institutes an action in which he afterwards

obtains a decree limiting his liability. In such a case no preference is given to the party who has first obtained judgment. His claim is paid rateably with other claims against the limited amount.

There however are questions which were reserved at the trial, and pending the decision of the court upon them the claims have been assessed in the annexed schedule irrespectively of any apportionment or of any deductions to be made by reason of the proceeds of *The Crathie* having been distributed at Rotterdam. I would add that the value of the steamship *Elbe* has been allowed at the amount found due on the assessment at Rotterdam, which is somewhat less than the amount put forward at the reference. The claims presented for loss of life have been assessed at a total sum of £15,870, which is far more than will exhaust the £7 per ton and interest which is exclusively applicable to the payment of such claims. For the balance of their claims the life claimants are by the practice of the court entitled to share *pari passu* with the property claims on the £8 per ton and interest.

It appeared by the schedule to this report that £7,556 was allowed for loss of property to the British and Foreign Marine Insurance Co., and to the owners of *The Elbe*, in respect of their claim for the loss of *The Elbe*, her provisions, stores, and coals, £47,125; and that, whilst the total of the sums allowed by the registrar and merchants as compensation to the various claimants for the loss of life amounted as stated in the report to £15,870, the sums allowed by them as compensation for loss of property were, on the whole, £130,690. The proportions of these aggregate sums to be paid to the various claimants were not set out in the schedule.

March 22.—*Sir W. Phillimore, Q.C.*, and *Kilburn* now moved the judge in court: First, that the report of the registrar be generally confirmed, but reviewed if necessary so as to insure that the recommendation of the registrar therein be carried into effect by advising that the claim and judgment in favour of the Atlantic Mutual Insurance Co. of New York in the proceedings at Rotterdam rank as a claim against the fund in court to the full extent of the said judgment, and by a further order that the several sums of £682 8s. 8d. obtained by the owners of the steamship *Elbe*, of £204 3s. obtained by the Atlantic Mutual Insurance Co., and of £118 10s. 10d. obtained by the British and Foreign Insurance Co. at Rotterdam, be deducted from the several amounts to which the said several claimants may be entitled; and that the full amount of such deductions be forthwith paid over to the plaintiffs, or in the alternative, for an order for the payment out to them of the said sums of £682 8s. 8d., £204 3s., and £118 10d. 10d., amounting in all to the sum of £1,005 2s. 6d., the net proceeds of the wreck of *The Crathie* at Rotterdam. Secondly, that the court do order that no interest be payable upon the sum of £3,209, being £7 per ton on the gross register of *The Crathie*, in respect of which bail has been put in.

J. P. Aspinall, Q.C., and *Butler Aspinall*, for the owners of *The Elbe* and certain defendants (Nos. 71, 72, and 73), claimed costs in respect of loss of life.

J. Walton, Q.C., and *Stubbs*, for owners of a portion of the cargo on board *The Elbe*.

Baden Powell, for other owners of cargo on board *The Elbe*.

Pritchard, for other defendants, claimants in respect of loss of life (No. 1, No. 55).

The arguments of counsel sufficiently appear from the judgment.

The authorities referred to not cited in the judgment were: *The Simla*, Williams and Bruce Admiralty Practice, p. 700; *The Baron Aberdare*, 36 W. R. 616, 13 P. D. 105; *The Vera Cruz*, 33 W. R. 477, 10 App. Cas. 59; *The Orient*, 20 W. R. 6, L. R. 3 P. C. 696.

Cur. adv. vult.

April 6.—BARNES, J.—The facts of this case are as follows: On the 30th of January, 1895, a collision occurred in the North Sea between the British steamship *Crathie* and the German steamship *Elbe*, belonging to some of the defendants, and at the time of the collision bound from Bremen to New York with cargo and passengers. In consequence of the collision *The Elbe* sank and was totally lost, with her cargo and the effects of the crew and passengers, and a large number of the crew and passengers were drowned. *The Crathie* after the collision put into Rotterdam, damaged by the collision, and proceedings were taken against her there by the owners of *The Elbe*, by the Atlantic Mutual Insurance Co. of New York, and by the British and Foreign Marine Insurance Co., who were interested in portions of the cargo of *The Elbe*. In these proceedings *The Crathie* was found to blame for the collision, and sold by order of the court, and the net proceeds of the sale—viz., £1,005 2s. 6d.—were paid out to the three claimants rateably. The owners of *The Elbe* received £682 8s. 8d., the Atlantic Mutual Insurance Co. of New York £204 3s., and the British and Foreign Marine Insurance Co. £118 10s. 10d. The owners of *The Crathie*, some of whom reside in England and some in Scotland, instituted the present suit to limit their liability for the collision, which occurred without their fault or privity; and on the 15th of June, 1896, a decree was pronounced fixing their statutory liability at £6,877, being £15 per ton on the tonnage of *The Crathie*, exclusive of interest, but all questions with regard to the liability of the plaintiffs for any damages for loss of life or personal injury, and with respect to the appropriation of the proceeds of the sale of the vessel under the order of the court of Rotterdam, was reserved.

On the 4th of July, 1896, a sum of £3,879 8s. was paid into court, being at the rate of £8 per ton, inclusive of interest thereon at the rate of 4 per cent. per annum from the date of collision till the date of payment into court, and bail was given to pay when required the balance of £7 per ton, amounting to £3,209. The claims in the suit were referred to the registrar and merchants for assessment, and the registrar made his report on the 12th of February, 1897, from which it appears that the total claims for loss of life has been assessed at £15,870, and for loss of property at £130,690. This last sum includes a claim by the owners of *The Elbe* for the loss of that vessel amounting to £47,125, and a claim by the British and Foreign Marine Insurance Co. in respect of the goods for which they had claimed at Rotterdam amounting to £7,556, but the Atlantic Mutual Insurance Co. of New York made no claim in the present proceedings. Objections were taken to the report of the registrar, which were heard by me on the 22nd of March on motion, when the several parties were represented. The owners of cargo, other than the Atlantic Mutual Insurance Co. and the British and Foreign Insurance Co., objected that no claim could be made in these proceedings by the owners of *The Elbe* and these two companies, because they had elected to sue in Holland.

The claims of these claimants, however, were not satisfied in full in the proceedings in Holland, and there is no ground for excluding them from coming in as claimants in this suit. The objection was not

supported by the citation of any authority or by any valid argument. A discussion then took place as to the proper method of adjusting the claims against the sum of £3,879 in court, having regard to the payments made to the three claimants in Holland. I am of opinion that the amount to be paid to each claimant against this fund must be calculated, in the first instance, as if no payments had been made in Holland, and as if the Atlantic Insurance Co. had claimed in this suit, but that the owners of *The Elbe* and the British and Foreign Insurance Co. must respectively give credit as against the sums which such a calculation will show to be payable in respect of their claims for the sum which they have respectively received in Holland. The amount will then work out thus: If the credits to be allowed by the two last-mentioned claimants respectively are equal to or less than their respective proportions of the fund, these two claimants respectively will have the differences, if any, to receive, and the plaintiffs will take out of the fund a sum equal to the said amounts already received by these two claimants; and it follows that the plaintiffs will also take out of the fund a sum equal to the said amount received by the Atlantic Insurance Co. If, on the other hand, the credits respectively exceed their respective proportions of the fund, these two claimants will take nothing out of the fund, and the owners of *The Crathie* will only take out of the fund the proportions which the three claimants in Holland should have received out of it if no previous payments had been made to them. As the Atlantic Insurance Co. make no claim in this suit, if the sum which would have been their proportion of the fund had they been claimants exceeds what they have received, the difference will be distributed amongst the other claimants *pro rata*.

This adjustment gives proper effect to the limitation of liability to which the owners of *The Crathie* are entitled under the statute, and is in accordance with the only decision to which I have been referred on the subject—viz., the Scotch case of *Rankine* v. *Raschen* (Court of Sessions Cases, 4th series, vol. 4, p. 725). With regard to the claims for loss of life, there seems to have been some question at one time whether the claimants could make any claim in this suit, because they had not brought actions in England under Lord Campbell's Act, and these claims were filed considerably more than a year after the accident, but some of them had sued the owners of *The Crathie* in Scotland, where some of the owners resided, and it was stated to me that, except for the limitation proceedings, the claims can be made in Scotland, and that the delay has not barred them in that country. Therefore it was conceded before me that the life claimants were entitled to make their claims in these proceedings. These claims exceed the said sum of £3,209, and the life claimants seek to resort for the balance of their claims to the fund in court—namely, £3,879 8s.—*pro rata* with the other claimants. An objection to this was suggested in argument, but this objection was not raised in the notice of motion, and was abandoned, and I therefore accede to this demand of the life claimants: see Williams and Bruce Admiralty Practice, p. 382.

The only other matter in dispute was as to whether or not the plaintiffs are liable to pay interest on the said sum of £3,209, representing £7 per ton on the ship's tonnage. The life claimants contended that the plaintiffs are liable to pay interest on this sum from the date of the collision until it is brought into court for distribution in the same way as they are liable to pay interest on the sum representing £8 per ton on the ship's tonnage. The plaintiffs, on the other hand, contended that they are under no liability for interest on the said sum of £3,209. That the owners of a ship claiming to limit their liability in our courts in respect of loss or damage caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship, are liable to pay interest on the amount of their liability calculated at £8 per ton on the ship's tonnage from the date of the collision until the date of payment into court, has been determined in several cases (see *The Northumbria*, 18 W. R. 188. L. R. 3 A. & E. 6, and *Smith* v. *Kirby*, 24 W. R. 207, 1 Q. B. D. 131, and cases there cited). The practice of the Admiralty Court upon this point has been invariable. The statute limits the liability to damages beyond the statutory amount, but the interest has to be paid in addition, because the payment of the amount is delayed from the date of the loss until the payment into court. This practice has been followed with regard to the £7 fund in several instances, of which particulars have been furnished to me by the registrar when claims for loss of life has exceeded the limit of that fund, and in my opinion this is right in principle: see *The Victoria*, 37 W. R. 62, 13 P. D. 125.

I see no substantial distinction between the cases of the two funds. Interest ought to be paid for the delay in bringing in the £7 fund just as much as in the case of the other fund. This places all claimants in the position in which they would be if these claims were made and dealt with at the time when the liability in respect of them arose, avoids the inconsistency which would exist if the life claimants received no interest on the £7 fund, and yet were to share in respect of the balance of their claims *pro rata* with other claimants in the interest on the £8 fund; and removes all temptation to the wrongdoer to delay the payment as long as possible.

It was urged that one of the reasons which influenced the learned judges who decided the cases to which I have referred to allow interest on the £8 fund was that in the Admiralty Court interest is always allowed from the date of the loss on claims from loss of property, whereas the claims for loss of life are personal claims of a common law nature, to which interest should not be added. But I think it is correct to answer that there is nothing to prevent the jury in a common law action, or the registrar and merchants, if they are left to assess the claims in admiralty, from taking into account any delay in payment as part of the damages, so that interest can thus be recovered from the date of the collision (see Lord Hatherley in *Straker* v. *Hartland*, 2 H. & M. 570, 13 W. R. Ch. Dig. 52, and *The British Columbia Saw Mills. Co.* v. *Nettleship*, 16 W. R. 1046, L. R. 3 C. P. 499, and the cases collected under the title "Interest Recoverable as Damages" in Mayne on Damages, 4th ed., pp. 150-152). I understand from the registrar that his report was intended to be in accordance with the principles I have indicated; but to prevent any uncertainty in the matter I direct that the accounts be adjusted in accordance with my judgment, and subject to this direction I confirm the report and order the plaintiffs to pay into court interest on the said sum of £3,209 from the date of the collision until that sum is brought into court.

Solicitors for the plaintiffs, *Denning, Holman, & Co.*

Solicitors for the owners of *The Elbe, Clarkson & Co.*

Solicitors for the owners of the cargo of *The Elbe, Rowcliffes, Rawle, & Co.; Stokes & Stokes.*

Solicitors for the defendants interested in loss of life claims No. 1 to No. 55, *Pritchard & Sons.*

Prob. Div. and Adm. Div. Divorce. } May 20; June 4.

MOSS v. MOSS (OTHERWISE ARCHER). (a.)

Divorce—Nullity—Fraud inducing marriage.

A marriage is not rendered null and void by concealed unchastity or pregnancy on the part of the wife at the time of the marriage.

Hearing of the husband's petition for a declaration of nullity of his marriage with the respondent on the ground of her fraud in concealing from him the fact that she was pregnant by another man at the time of the marriage.

The cause was undefended, but the Queen's Proctor, at the suggestion of the Court, appeared to argue the case.

May 20.—*Bargrave Deane, Q.C., Ram,* and *Marchant,* for the petitioner.

Inderwick, Q.C., and *Guy Stephenson,* for the Queen's Proctor.

The facts proved and the arguments are fully set out in the judgment.

Cur. adv. vult.

June 4.—JEUNE, P., delivered the following considered judgment:—In this case the petitioner seeks to have his marriage with the respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her. I find that these allegations of fact were proved. It was also stated that the connection of the respondent with the father of her child was incestuous. The proof of this was not made complete. I do not know whether it could have been; but the allegation was admitted to be immaterial for the purposes of the present case. Had the connection been with a relative, within the forbidden degrees, of the petitioner, there is high authority for saying that the marriage would have been incestuous and void. On these facts, the argument before me was that there was fraud by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. It would, perhaps, be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent. The absence of English authority was, indeed, almost, if not quite, admitted on behalf of the petitioner, and the argument in his favour was mainly based on the reasoning in decisions of some of the American Courts.

But the case was argued by Mr. Deane with so much earnestness and ability that I feel bound to state my view of the English authorities to which he referred, and to indicate the difference, as I conceive it to exist, between the law as understood in England and that laid down in certain States of America on the point in question. In the case of *Swift* v. *Kelly*, 3 Knapp 257, 293, decided in 1835, the Judicial Committee of the Privy Council, Lord Brougham, Parke, B., and Shadwell, V.C., being members of the board, expressed its opinion in the following terms: "It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made."

It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England. While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their sense of its distinctive character in different language, but always to the same effect. Lord Stowell said that it was both a civil contract and a religious vow: *Turner* v. *Meyers*, 1 Hagg. Consist. 414, referring, no doubt, mainly to the incapacity of the contracting parties to dissolve it. Dr. Lushington spoke of it as more than a civil contract: *Miles* v. *Chilton*, 1 Rob. Ecc. 684. Lord Hannen said: "Very many serious difficulties arise if marriage be regarded only in the light of a contract. It is, indeed, based on contract of the parties, but it is a *status* arising out of a contract: *Sottomayer* v. *De Barros*, 27 W. R. 914, 5 P. D. 94. The late President, Sir Charles Butt, said, in the case of *Andrews* v. *Ross*, 37 W. R. 239, 14 P. D. 15, that "the principles prevailing in regard to contract of marriage differ from those prevailing in all other contracts known to the law." It is not necessary to enumerate all those differences. The most striking of them are familiar. The parties who contract a marriage cannot at their will dissolve it. Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. Incapacity to consent arising from mental weakness is a fatal objection, not only if urged by or on behalf of the person unable to consent, but if put forward by the capable party to the contract. See *Hunter* v. *Edney*, 10 P. D. 93; *Durham* v. *Durham*, *ibid*, p. 80, 33 W. R. Dig. 96. Again, if both parties to the contract knowingly and wilfully marry without compliance with the law as to publication of banns, either can have the marriage declared null: *Andrews* v. *Ross*—a state of the law which drew from the late President the observation above quoted. I do not mean that, regarding marriage as a contract, explanations more or less far-fetched might not be given of these peculiarities, in order to force the law of marriage into line with the law of ordinary civil contract, but English courts have not resorted to these expedients, and, while not taking a pedantic objection to the use of the term contract as applied to marriage, they have been content to recognize characteristic peculiarities in the nature and incidents of the marriage contract.

The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnization, so far as the law deems it essential. There must not be incapacity in the parties to marry, either as respects age and physical incapacity or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others (I omit reference to the peculiar statutory position of the descendants of George II.), renders the marriage void or voidable. It has been repeatedly laid down that a marriage may be declared null on the ground

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law

of fraud or duress. But on examination it will be found that this is only a way of amplifying the proposition long ago laid down (*Fulwood's case*, Cro. Car. 482, 488, 493) that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in *Rex.* v. *Burton-on-Trent*, 3 M. & Sel. 537, of a man assuming a name to conceal himself from the person to whom he is to be married. In *Portsmouth* v. *Portsmouth*, 1 Hagg. Eccl. Rep. 355, and *Harrod* v. *Harrod*, 1 K. & J. 4, the fraud consisted in taking advantage of a mind not absolutely insane, but weak, to induce, in the one case a man, in the other a woman, to enter into a contract which —to use the phrase of Wood, V.C., in the latter case— he or she did not understand. *Browning* v. *Reane*, 2 Phill. 69, and *Wilkinson* v. *Wilkinson*, 4 Notes of Cas. 295, are other cases of the same kind. In all these—and, I believe, in every case where fraud has been held to be the ground for declaring a marriage null—it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent. This is illustrated by the imaginary case suggested by Lord Campbell in *Reg.* v. *Millis*, 10 Cl. & F. 534, 785, of a mock marriage in a masquerade where the kind of result which fraud might have produced would be produced by mistake. In such an instance there would be no fraud, but for want of real consent the marriage would be declared void. But when there is consent no fraud inducing that consent is immaterial. Lord Stowell has at least three times expressed this in the most emphatic language. In *Wakefield* v. *Mackay*, 1 Phill. 134, 137, that learned judge said: "Error about the family or fortune of the individual, though procured by disingenuous representations, does not at all affect the validity of the marriage"; in *Ewing* v. *Wheatley*, 2 Hagg. Consist. 175, at p. 183: "It is perfectly established that no disparity of fortune or mistake as to the qualities of the person will impeach the vinculum of marriage"; and in *Sullivan* v. *Sullivan*, 2 Hagg. Consist. 238, at p. 248: "The strongest case you could establish of the most deliberate plot, leading to a marriage, the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable the court to release him from claims which, though forged by others, he has rivetted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced."

The only authorities before me which were referred to as in any degree inconsistent with these views are the case of Miss Turner's Marriage Act, and a *dictum* of the late President in *Scott* v. *Sebright*, 35 W. R. 258, 12 P. D. 21. Neither of these deals with such facts as are relied on in the present case, and this case I put forward at most as sanctioning a somewhat wider application of this doctrine of fraud as a ground for annulling marriage than the above authorities indicate. In the case of Miss Turner the marriage was annulled by Act of Parliament. It is not possible to say exactly on what ground the votes of the legislators were given; but it is suggested that the marriage was brought about, as indeed it was, by conduct into which fraud largely entered. It might be sufficient to say of this decision that, as was pointed out in *Templeton* v. *Tyree*, 21 W. R. 81, L R. 2 P. & D. 420, it was an Act of the Legislature, not necessarily, therefore, proceeding on the principles of the Ecclesiastical Courts, which, in nullity cases, are the guide of this tribunal. It is also to be remarked that, in fact, the case was never brought before the Ecclesiastical Court, though, no doubt, the omission to do so was explained by Lord Eldon in the House of Lords and Mr. Peel in the House of Commons to have been caused by the impossibility of placing the evidence of Miss Turner, as a party, before the Ecclesiastical Courts: Hansard, vol. 17, 2nd ser., pp. 787, 1134. But a stronger observation, I think, is that duress is distinctly alleged in the petition: House of Lords Journal, vol. 59, p. 308, and that the evidence in the case clearly proved that not only by fraudulent misrepresentations of fact, but by duress of threats, such apparent consent as was given was extorted from the victim of this treatment. In *Scott* v. *Sebright*, 35 W. R., at p. 259, 12 P. D., at p. 23, the late President said: "The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract." Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the court, which showed a case of deception and force acting on a weakened mind, they do not appear to me to go further than to lay down that as in the case of marriage, as in that of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all. The principles thus long and uniformly asserted by the English courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shown that authority to the contrary could be found in the canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the canon law. The canon law clearly refuses to allow a marriage to be declared null on the ground of previous unchastity of the wife, and it goes far to declare that the only fraud which vitiates marriage is that which goes to the consent. Ayliffe in his "Parergon," p. 361, says: "Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void *ipso jure*. . . . For marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. . . . I have just now observed that the principal thing required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. And though there is nothing more contrary to consent than error, yet every error does not exclude consent, wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void *ab initio*. Now, there are four species of error which are hereunto referred. The first is styled *error personæ*, as, when I have thoughts of marrying Ursula, yet, by my mistake of the person, I have married Isabella. For an error of this kind it is not only an impediment to a marriage contract, but it even dissolves the contract itself through a defect of consent in the person contracting it. For deceit is oftentimes wont to intervene in this case, which ought not to be of any advantage

to the person deceiving another. A second species is styled an error of condition; as when I think I marry a free woman, and through a mistake I have contracted wedlock with a bondwoman, and so *vice versâ;* for by the canon law such an error is an impediment to a matrimonial contract. But as there is now no such thing among Christians as persons that are truly bondmen and bondwomen (this kind of bondage or servitude being now abolished among us by the advantage of the Christian religion) I shall not long insist on this head. But if a freedman married a bondwoman, knowing her to be such, the Church did not dissolve such a marriage. And thus we read that the marriage between Abraham and Agar the handmaid was a true and valid marriage. The third species is what we call *error fortunæ*, and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. But it is otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousand pounds and the condition is not made good. The last species is styled an error of quality—viz., when a person is mistaken in respect of the other's quality with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards find her to be a person deflowered or of mean parentage. But, according to the common opinion of the doctors, this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deemed to be simply voluntary as to the nature and substance of it, though in respect of the accidents it is not voluntary."

While the above is, as I believe, the correct view of the English law, there is no doubt, not only that the law of other countries is not the same on the point in question, but also that in America the difference has been arrived at by arguments which proceed on principles embodied in the English law.

It is not, of course, necessary to examine in any detail the positive enactments of any other country, nor the law of any country whose system of jurisprudence is not the same as our own. The law of the Civil Code of France, the German Protestant ecclesiastical law, the Prussian, Austrian, and Italian Codes will be found collected in Fraser on Husband and Wife according to the Law of Scotland, vol. 1, p. 452. It is, however, curious to observe how the tribunals of some of these countries have deduced from the principle of nullity of marriage on account of error in the person (which English law treats only as a question of identity) the conclusion that concealed pregnancy, or even loss of virginity, vitiate marriage. Thus, a French court, applying the language of the Code, *erreur dans la personne* to the case of *erreur sur la personne morale* has held a marriage void on account of concealed pregnancy, a view rejected by the Commission which prepared the Italian Code, and a Prussian tribunal appears by a similar interpretation of similar (perhaps somewhat wider) words in their Code to have included the case of unchastity. There is a remarkable decision on the Roman-Dutch law in the Supreme Court of the Cape of Good Hope, to which Mr. Deane referred me, *Horak* v. *Horak*, 3 Searle, 389. The facts there were the same as those in the present case, and the court held the marriage void, following, it would seem, the authority of Voet against what Voet admits to be the authority, though he disputes the reasoning, of the canon law. I will only point out that the learned judges feel compelled to repudiate the length to which Voet carries his argument—namely, the annulment of marriage on the ground of unchastity alone, and the language of their judgment recognizes what difficult questions their decision raises and leaves for future solution. Although, however, the question of annulment of marriage by reason of concealed unchastity has been discussed by Scotch text-writers, one authority only, Bankton, appears to have given in his adhesion to the doctrine of Voet as regards antenuptial incontinence in a wife, but he courageously overcomes the objection of parity between the sexes by remarking, "A breach of chastity in a man before marriage is not so heinous or scandalous as in a woman; nor is there a presumption that the woman would have refused the man on that ground, though she had known it." Lord Stair, on the other hand, has laid down, "If one married Sempronia supposing her to be a virgin rich or well-natured, which were the inductives to his consent, though he be mistaken therein, seeing it is not in the substantials, the contract is valid" (see Fraser, vol. 1, p. 451). There is no decision, as far as I am aware, of any Scotch tribunal annulling a marriage on the ground either of concealed unchastity or concealed pregnancy, nor has any distinction between the two ever been suggested. The decisions in the American courts on which the learned counsel for the petitioner places his main reliance do, no doubt, cover the present case, and the more important of them are, I think, decisions professing to be based on the same principles as we recognize. Speaking with all respect, these courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage, but they lay down that there is one fraudulent representation, or fraudulent concealment, which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another. The leading decision to this effect was given by the Supreme Court of Massachusetts in 1861 (*Reynolds* v. *Reynolds*, 3 Allen 605), a case decided on demurrer. It is not quite clear whether the Chief Justice by whom the case was decided conceived himself to be deciding according to the principle of the ecclesiastical law of England, because he was acting under a statute of the State (Stat. 1855, c. 27, re-enacted by Gen. Stats., c. 107, s. 4), which authorized a decree of nullity "when a marriage is supposed to be void, or the validity thereof is doubted, either for fraud or any other legal cause," and he stated that "this statute was founded on the assumption that a marriage into which one of the parties was induced to enter through the fraud and deception of the other is null and void, and, like other contracts, may be annulled and set aside by the defrauded party."

The learned and eminent American text-writer, Mr. Bishop, however, considers that this statute was "merely jurisdictional" (Bishop on Marriage, ed. 1891, vol. 1, 485), and I think, therefore, that it may be assumed that this enactment was not considered to enlarge the law. The argument of the Chief Justice, as I understand it, is that fraud vitiates a marriage just as it does other contracts, but that the fraud must be "in the *essentialia* of the marriage relation," and that the fraud of a woman in concealing her pregnancy by a man other than her intended husband at the time of her marriage is such a fraud. It is, he considered, a fraud in the *essentialia* of marriage for two reasons—first, because a child may be born which, according to the presumption of law, will be the husband's, thought not really his; and, secondly

because the woman, at the time of marriage, is incapable of bearing a child to her husband. The departure, as I venture respectfully to think, from the law of England consists not only in extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold. According to English law, as I have above said, the only material circumstance, by operating on which fraud vitiates a marriage, is the reality of consent. The law of Massachusetts appears to me to add another, not, indeed, the want of chastity in the wife, but such want of chastity as results in pregnancy at the time of the marriage. But are the grounds on which this circumstance is singled out sufficient? The most effective criticism of them appears to me to be supplied by the writer, Mr. Bishop, whom I have above mentioned. He analyzes the judgment in *Reynolds* v. *Reynolds* with great minuteness, and with regard to both the points above mentioned he gives what appear to me to be conclusive answers. He points out, as to the presumption of paternity, that a man who has evidence to prove the marriage void can prove the child not to be his. It may be added that the birth of the child after makes but little difference, according to English law, in the pecuniary liability of the husband, as 4 and 5 Will. 4, c. 76, s. 57, throws on him, at least during his wife's life, the maintenance of her illegitimate children whenever born. As to the incapacity of the woman at the time to become pregnant by her husband, he replies that such incapacity (unlike the sexual incapacity for which the courts annul marriages) is temporary only. He is of opinion, therefore, that the reasoning, when looked at in all its parts, is unsatisfactory. In this opinion I respectfully agree. It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage. I could understand a broad principle that unchastity before marriage should vitiate the contract, as some States of America have, I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and unless there is to be one law for a man and another for a woman it is impossible to suppose it ever could be. But I do not understand why the accidental circumstances—first, of misconduct resulting in pregnancy; and, secondly, of that pregnancy continuing to the marriage—should constitute the momentous difference between a valid and invalid marriage. I think I ought, in fairness, to add that, although Mr. Bishop disapproves the judgment of the Court of Massachusetts when looked at in its parts, he nevertheless approves of it as a whole. "Though the reasoning," he says, p. 494, when thus examined, step by step, appears "inadequate, few in our American profession will reject its conclusion. The true view plainly is that here is a cord of several strands, no one of which has any strength to sustain the result when put upon it alone. But duly combined they do sustain it. The effect of combination pervades equally the law of nature and the law of the land. In the latter it is frequently manifest, for example, in conspiracy, both civil or criminal, and it is manifest in every part of the law where there is occasion for its presence." I will only say that metaphor and analogy in legal reasoning are apt to be dangerous guides. The above decision was followed, though under special statutes, in the cases of *Morris* v. *Morris*, Wright 630; *Ritter* v. *Ritter*, 5 Blackford Indiana Rep. 81; and *Carris* v. *Carris*, 9 C. E. Green New Jersey Rep. 516. Some of the American courts have, however, felt bound to limit the application of the principle that concealed pregnancy at the time of the marriage vitiates it. In *Scroggins* v. *Scroggins*, 3 Dev. 535, the husband would not swear that he believed his wife chaste at the time of the marriage. Both parties were white. After marriage a mulatto child was born. The marriage was, however, held to be valid, on the ground, it would appear, that the husband should have detected his wife's condition. In a later case, *Scott* v. *Shufeldt*, 5 Paige N. Y. Ch. Rep. 43, it appears to have been suggested as a reason for this decision that the woman could not be proved to have deceived her husband, as she might not, at the time of marriage, have known whether he or the negro was the father. In *Crehore* v. *Crehore*, 1 Brown, Mass., 330, and in *Foss* v. *Foss*, 12 Allen 26, the wife was pregnant at her marriage by a man other than her husband, but the husband had been guilty of antenuptial incontinence with her, and it was held that he was "put on his guard" or "put on inquiry," and so a decree in his favour was refused. On the other hand, in a case in California (*Baker* v. *Baker*, 13 Cal. Rep. 87), it would appear that the decision in *Scroggins* v. *Scroggins* was disapproved of. I refer to these cases chiefly to show that it has been felt that even the comparatively narrow principle that a marriage is voidable by the pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage or the child died? Could he many years after annul the marriage? It is difficult to see why not, if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law. My belief is that, to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and he believed to be, certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion. To show that this apprehension is not visionary, I venture to quote the experience of the American text-writer to whom I have already referred, expressed in the last edition of his work, Bishop, vol. 1, p. 452. Speaking of the subject of fraud in relation to marriage, he writes: "Such judicial utterances upon it as we have are largely conflicting, and otherwise muddled. So that, should an author discussing the subject present all the views, and those only, which have occurred to the judges and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which the practitioner could not readily discover a path." I hope that I may be pardoned for declining to take a step which, apparently, leads to such consequences. I have to express my acknowledgments to the learned counsel on both sides for the great aid which their researches have afforded to me. I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed.

Petition dismissed.

Solicitors for the petitioner, *Gedge, Kirby, & Millett.*

The Queen's Proctor.

Privy Council.

(*From the Supreme Court for Lower Canada, Province of Quebec.*)

April 7.

LAROCQUE *v.* BEAUCHEMIN. (*a.*)

Company—Shares—Payment in cash—Promoters—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Although an arrangement between promoters and a company that the former should sell property to be acquired by the latter for so much cash and so many shares is in contravention of section 25 *of the Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *still there may be an independent agreement on the part of the promoters to take so many shares presently payable in cash, and an independent agreement by the company to purchase the property for so much money down which would be perfectly legitimate, provided the shareholders are fully informed and a fair price is given.*

Anything which would be sufficient evidence to support a plea of payment would be payment in cash within section 25 *of the Companies Act*, 1867.

Spargo's case, 21 *W. R.* 306, *L. R.* 8 *Ch. App.* 407, *approved.*

This was an appeal from a decision of the Supreme Court for Lower Canada, Province of Quebec.

The facts are set out in their lordships' judgment.

E. Blake, Q.C. (of the Canadian Bar), for the appellant.

Cozens-Hardy, Q.C., Cartmell, and *Allan,* for the respondents.

The judgment of their lordships, Lords HERSCHELL, WATSON, MACNAGHTEN, MORRIS, and SHAND, was delivered by

Lord MACNAGHTEN.—The appellant is the liquidator of a company called La Compagnie de Papier de Sorel incorporated in 1886 under an Act of the Provincial Legislature of Quebec known as "The Joint Stock Companies Incorporation Act." The authorized capital stock of the company was 100,000dols. divided into 1,000 shares of 100dols. each. The subscribed capital was 55,000dols., or 550 shares.

The respondents are some of them shareholders and the rest the representatives of the deceased shareholders in the company. The shareholders, whose representatives are parties to the action, together with those of the respondents who were themselves shareholders, were the promoters of the company. From them the company bought the property upon which it carried on its business; and they held the whole of the subscribed stock with the exception of fifty shares belonging to Mr. Finlay, the manager.

The action was brought to recover from the respondents in their individual or representative capacities sums amounting in the aggregate to 25,000dols. The relief sought was based on fraud and nothing else. The declaration in the action stated that although the nominal and ostensible price of the property was 35,000dols. the real price actually paid was 10,000dols. only, and it charged that the property was in fact worth no more; the difference according to the statement in the declaration was accounted for in the books of the company by means of entries which the appellant as plaintiff alleged to be false and fictitious, making it appear that the promoters had paid up their shares in full while 25,000dols. still remained unpaid.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The facts are not in dispute. The property had belonged to a company called "The St. Lawrence Pulp and Paper Co." which failed almost immediately after it commenced operations. The liquidator put the property up for sale by auction in March, 1886. It was then bought by or on behalf of four persons interested in the old company for the sum of 9,000dols. The purchasers entered into communication with certain persons described by the respondent Beauchemin, who was one of their number, as "capitalists," with the view of forming a new company and re-establishing the business. M. Beauchemin was called as a witness by the plaintiff. He said that the four purchasers represented that the property which they had bought was worth 50,000dols., but that he would not take it at that price, and as the result of negotiations it was agreed that the property should be sold to the new company as soon as it was formed for 35,000dols., and that the difference between that sum and the auction price which, by the addition of interest and incidental expenses, was brought up to 10,000dols., should be for the benefit of the promoters of the new company, that is, for the four purchasers and M. Beauchemin and his friends.

The evidence as to value was clear and uncontradicted. A. M. Pontbriand, a manufacturer living in Sorel, who was interested in the old company, was called for the defence. His firm, he said, had made the machinery and put it up. He knew the property well. Including land, buildings, and machinery, it had cost about 80,000dols., a sum which unfortunately exhausted the whole of the capital of the company. He valued the property at the time of the liquidation of the old company at 41,150dols. At the time of the sale the machinery was in perfect order, but the buildings required some slight repairs, which might cost 1,000dols. or so. For the purpose of a paper manufactory the property was, he considered, worth 40,000dols. It would have cost the new company from 50,000 to 55,000dols. to provide itself with similar works elsewhere.

On the 5th of May, 1886, the promoters and Mr. Finlay, who had then joined the enterprize, having subscribed between them 55,000dols. towards the joint stock of the proposed undertaking, held a provisional meeting as shareholders in the new company. The meeting appointed provisional directors, and authorized them to make an immediate call on the capital subscribed and to apply for incorporation. The directors accordingly met and made a call of 75 per cent., payable on the 20th of May.

On the 26th of June, 1886, a petition for incorporation was presented on behalf of the shareholders in the new company. The petition set forth the particulars required by the Act, including the names of the shareholders and the amounts subscribed by them respectively. Letters patent incorporating the new company were duly granted on the 5th of August.

On the 3rd of September a meeting of the shareholders was held; the minutes of the former meetings were read and adopted, and directors were appointed. At a meeting of the directors held on the same day the president, M. Beauchemin was authorized to sign in the name of the company the deed of sale of the property and to acquire it from the then owners for the price of 35,000dols., and a final call was made of 25 per cent., payable on the 16th of October.

In September, 1886, the promoters were credited in the books of the company with payment in full of their shares. The amounts so credited were paid half in cash and half by receipts given to the company by the vendors to the extent of 25,000dols. on account of the purchase price of the property.

After working for about two years and a-half the company went into liquidation. In June, 1889, the appellant was appointed liquidator and in March, 1890, he was authorized to institute this action.

The action came on to be heard before the superior court on the 24th of November, 1894, when it was dismissed with costs. The court held that the plaintiff had failed to prove the material allegations of his declaration. The judgment was affirmed on appeal by the superior court sitting in review on the 31st of December, 1895.

It appears from the reasons given by the Honourable Jetté, J., that the only question argued before the Court of Review was whether the shares of the promoters were paid in full, having regard to the provisions of article 4722 of the Revised Statutes of Quebec, which formed part of the statute under which the company was incorporated. That article so far as is material to the present question is as follows:

(1.) The capital stock of all joint-stock companies shall consist of that portion of the amount authorized by the charter which shall have been *bonâ fide* subscribed for and allotted, and shall be paid in cash.

(5.) Every form and manner of fictitious capitalization of stock in any joint-stock company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented by an amount of cash paid into the treasury of the company which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void.

Jetté, J., considered that paragraph 1 of article 4722, which was originally enacted as section 1 of the Quebec statute, 47 Vict. c. 73, was a reproduction more or less exact of section 25 of the Imperial statute known as the Companies Act, 1867. Construing the expression "paid in cash" in article 4722, paragraph 1, by the light of well-known English authorities as to the meaning of the same words in section 25 of the Imperial statute of 1867, his honour held that the shares of the promoters were fully paid.

Before their lordships an attempt was made to reopen the charge of fraud which seems to have been abandoned in the Court of Review. It was urged that the price of the property was not fixed or considered by an independent board of directors, and that in this respect the transaction was improper and fraudulent. This argument seems to be based on a misconception of the decision in *Erlanger* v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218, where the facts were very different. In the present case it was not disputed that every single shareholder was perfectly aware of all the circumstances attending the formation of the company, and that nobody was or could have been deceived. Indeed, their lordships agree with the opinion of Jetté, J., who prefaced his judgment by observing that the promoters acted in perfect good faith, and that the value of the property was proved to be 35,000dols. at the least.

The learned counsel for the appellant then contended that the understanding between the parties was that the property should be sold for so much in cash and so much in shares. It was admitted that if this had been the real arrangement it would be in contravention of the statute. But the evidence is all the other way. According to the evidence there was an independent agreement on the part of the promoters to take so many shares presently payable in cash and an independent agreement by the company to purchase the property for so much money down. There was not even an attempt in cross-examination to shake the testimony on this point.

The appellant's counsel were at last driven to question the authority of *Spargo's case*, 21 W. R. 306, L. R. 8 Ch. App. 407, and the long line of decisions in which that case has been approved and followed. They pointed out that on more than one occasion *Spargo's case* has been disapproved by the present Lord Chancellor (*In re Johannesburg Hotel Co.*, 39 W. R. 260, [1891] 1 Ch. 119; *Ooregum Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125) and they asked their lordships not to follow it.

Their lordships are not prepared to dissent from the decision in *Spargo's case*. It is a decision of the highest authority. It was pronounced by James and Mellish, L.JJ., and the view which those eminent judges expressed had, as appears from their judgments, the approval of Selborne, L.C. Referring to *Fothergill's case*, 21 W. R. 301, L. R. 8 Ch. App. 270, in which section 25 of the Act of 1867 was considered, and in which judgment had been delivered only the day before by the Lord Chancellor and the Lords Justices, James, L.J., made the following observations, which are not inapplicable to the facts of the present case: "It was said by the Lord Chancellor—and we entirely concurred with him—that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be payment in cash. In truth it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision. . . . If a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's case*, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that, if the two demands are set off against each other, the shares have been paid for in cash. . . . Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham, or evasion, or trick to get rid of the effect of the Act of Parliament, but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares except as shares paid up. This seems to me to dispose of the case." "It is a general rule of law," added Mellish, L.J., "that in every case where a transaction resolves itself into paying money by A. to B. and then handing it back by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." Even if this line of argument were less convincing than it appears to their lordships to be, they would not be disposed to disturb an authority which has been accepted and acted on for more than twenty years.

It is to be observed that in the Quebec statute the expression "paid in cash" occurs in one place and "paid in cash into the treasury of the company" in another, from which it may be inferred that "payment in cash" does not necessarily and in all cases mean "payment into the treasury of the company."

In the result their lordships will humbly advise her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

It appears that during the pendency of the appeal proceedings were stayed against two of the respondents, against each of whom the claim was under the appealable limit. The order will include the dismissal of the appeal, with the usual consequences as against those two respondents.

Solicitor for the appellants, *S. V. Blake.*

Solicitor for the respondents, *Guy Ellis.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) June 15.

STONE *v.* PRESS ASSOCIATION (LIMITED). (*a.*)

Libel—Consolidation of actions—Actions against different defendants for same libel—Time for making order—Law of Libel Amendment Act, 1888 (51 & 52 *Vict. c.* 64), *s.* 5.

An order may be made under section 5 of the Law of Libel Amendment Act, 1888, *consolidating actions by the same plaintiff against different defendants in respect of the same libel before the defences in the actions have been delivered.*

Appeal from an order made at chambers.

The plaintiff brought an action for libel against the Press Association, and sixteen other actions in respect of the same libel against the proprietors of sixteen newspapers. The Press Association had sent the libel complained of to the various newspapers which published it.

The defendants, before the defences were delivered, took out a summons, under section 5 of the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), to have the actions consolidated. By section 5: "It shall be competent for a judge or the court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, to make an order for the consolidation of such actions, so that they shall be tried together. . . . In a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or against each defendant, in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last-mentioned defendants; and the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants."

It was stated at the hearing of the summons that the only defences would be payment into court.

The master ordered the actions to be consolidated directly the defences were delivered. The judge ordered the actions to be consolidated at once.

The plaintiff appealed.

Rufus Isaacs, for the plaintiff.—A consolidation order under section 5 can only be made after the defences have been delivered, or at any rate to take effect after the defences have been delivered. The effect of this order is to allow one defence to be delivered on behalf of all the defendants, and to allow the defendants to make one payment into court to cover all the actions. The section does not allow that. The words "so that they shall be tried together" show that the actions are to be consolidated for the purposes of trial only. The section contemplates separate payments into court, because the jury must find separate verdicts for or against each defendant. It would be most embarrassing to the plaintiff to have one payment into court on behalf of all defendants, because the libel is more serious on account of the head-lines inserted and the damages different in some cases than in others. The amount paid into court in each action ought to be stated, so that the plaintiff may see whether the sum paid in is sufficient. To save the cost of separate defences the plaintiff is willing to accept one defence, provided that it is specified how much each defendant pays into court.

Temple Franks (*J. E. Bankes* with him), for the defendants, was not called upon.

Lord ESHER, M.R.—In this case an apparently serious libel has been published about the plaintiff. It was published in this way: A news agency published it and communicated it to various newspapers. The plaintiff, in order, as he says, to vindicate his character, has brought seventeen actions in respect of the same libel. The Law of Libel Amendment Act, 1888, states what may then be done under those circumstances. The defendants may ask for an order under section 5 consolidating the actions. That section leaves the matter in the judge's discretion. The judge has a discretion to make the order for consolidation, so that the actions shall be tried together. There is nothing said about the time when he is to make the order. If the order were not to have been made until after defence delivered or issue joined, the section would have said so. It is insisted on behalf of the plaintiff that separate defences should be delivered, and that, unless that be done, the latter part of the section cannot be worked. I do not agree with that contention. According to the section, the jury must assess the whole amount of the damages in one sum. That is the only sum the plaintiff has to do with. A separate verdict must then be taken for or against each defendant in the same way as if the actions had been tried separately. If the jury find a verdict against the defendant in more than one action, they must apportion the amount of the damages which they shall have so found between and against such last-mentioned defendants. If, for instance, the jury assess the damages at £60, and find separate verdicts against, say, six separate defendants, they must then apportion the £60 as against the different defendants. They may apportion £10 against each, or may award £30 or £40 against the principal libeller and apportion the balance among the remaining five in equal or different sums. That apportionment cannot affect the sum payable to the plaintiff. The whole object of the Act is to prevent multiplicity of defences and multiplicity of costs. It is said that this view will create a difficulty about costs; but I cannot think so, because the judge at the trial has

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

full power under the section to apportion the costs as he deems just between and against the defendants. The appeal must be dismissed.

A. L. SMITH, L.J.—This Act was passed for the purpose of relieving defendants from a multiplicity of actions. The Press Association published the libel by sending it to various newspapers and the various newspapers copied it, and the plaintiff, in order to clear his character, sued the Press Association and sixteen newspapers. That is exactly the state of things which the Act was passed to put an end to. The seventeen libels being substantially the same the defendants took out a summons to have the actions consolidated. It must be taken that all the defendants are merely going to pay money into court as a defence. The master ordered the actions to be consolidated after the defences were delivered. The result would be that there would be seventeen different statements of defence and seventeen separate payments into court. The judge varied this order by directing the consolidation to take place at once. It is said that the judge had no power to do that under the Act. The Act does not specify any time when the order is to be made. It is said that the words, "so that they shall be tried together," mean that the order is not to be made until after the defences have been delivered. I cannot find that in the section. It seems to me that the judge may at any time order the actions to be consolidated. The order of the learned judge was therefore right.

RIGBY, L.J.—This Act was passed with the object of diminishing costs where more than one action was brought in respect of the same libel. Section 5 gives a discretion to the judge. It contemplates that the defendants may put in different defences, and that a verdict may be found against some of the defendants and in favour of others. What is a judge to do when he is asked to consolidate actions under this section? He will naturally ask what the defences are going to be. If he is told, as he was here, that the defendants are all going to pay money into court, he sees at once that separate defences are not necessary. The only question in such a case would be whether the sum paid into court was enough. If the jury, by their verdict, find that it is enough, the judge will then tell the jury to find a verdict for all the defendants. In these circumstances I think that the order is right. I do not say that the judge ought to make an order which will have the effect of excluding separate defences. He has jurisdiction to make the order at once, but if he finds that separate defences are going to be put in he ought to make his order in such a form as not to prevent the defendants from raising separate defences.

Appeal dismissed.

Solicitors for the plaintiff, *C. J. Smith, & Hudson.*

Solicitors for the defendants, *Lewis & Lewis.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — May 31.

THE HUDDERSFIELD CORPORATION v. THE RAVENSTHORPE URBAN DISTRICT COUNCIL. (a.)

Water supply — Local Government — Alteration of boundaries — Construction of waterworks — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 52—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 59—*Local Government Act,* 1894 (56 & 57 *Vict. c.* 73), *s.* 36 (2).

Where an area has been added to the district of a local authority by an order of the county council, the local authority acquire a right to supply the added area with water under section 51 *of the Public Health Act,* 1875. *But this right is controlled by section* 52 *of the same Act, and, therefore, before "constructing" waterworks within the added area, notice must be given to every existing water company whose limits of supply include the added area. And laying pipes to extend the local authority's existing water system into the added area is "constructing" waterworks within section* 52.

Cleveland Water Co. *v.* Redcar Local Board, 43 *W. R.* 90, [1895] 1 *Ch.* 168, *approved but distinguished.*

Decision of North, J. (ante, *p.* 436), *reversed.*

This was an appeal by the plaintiffs from a decision of North, J. (reported *ante*, p. 436, [1897] 1 Ch. 652), and raised the questions—first, what rights an order of a county council adding a district to the jurisdiction of a local authority gave the local authority with regard to the water supply of the district so added; and secondly, whether the laying pipes by the local authority within the added district as an extension of the water supply in their old district was "constructing waterworks" within section 52 of the Public Health Act, 1875.

The facts are fully reported in the report of the case in the court below, and can be shortly stated here as follows: The plaintiffs were the Huddersfield Corporation suing as a local authority having limits of supply extending beyond their municipal area. The defendant council were an urban district authority who take water in bulk from Dewsbury and distribute it to customers in their own district. Their predecessors were many years ago the Ravensthorpe Local Board, having a district which formed part of the township and parish of Mirfield, the parish and township being conterminous. The rest of the township of Mirfield also became an urban district, governed by the Mirfield Local Board. By an Act of 1871 the limits of the water supply of the Huddersfield Corporation were enlarged so as to include the township of Mirfield. The Huddersfield Corporation did not actually supply with water any part of the Ravensthorpe district, which was supplied by its own local authority; but the Huddersfield Corporation did supply the other part of the Mirfield township, including a small piece of about 20 acres, the subject of this action.

By an order of the West Riding County Council, made in March, 1895, and duly confirmed by the Local Government Board under the Local Government Act, 1888, the 20 acres of Mirfield mentioned above, and another somewhat larger piece, were transferred from the district of the Mirfield Urban Council to that of the Ravensthorpe Urban Council. The order transferred to the defendant council "all the rights, liabilities, and obligations which are attaching to the Mirfield Council, wholly in respect of the added area, and all property within such area, vested in" the same council.

The Ravensthorpe authority had lately taken steps to lay pipes in the 20 acres for the purpose of supplying water to that part of the added district. The plaintiffs applied by motion in this action for an injunction to restrain the defendants from constructing waterworks in this part of their added district without having given the notice required by section 52 of the Public Health Act, 1875, to the plaintiffs as being the water authority actually supplying the district.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Section 51 of the Public Health Act, 1875, empowers urban local authorities to construct waterworks for the supply of water in their district. Section 52 provides that "before commencing to construct waterworks within the limits of supply of any water company empowered to supply water they shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water; and it shall not be lawful for the local authority to construct any waterworks within such limits, if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority."

North, J., held that the defendants were not bound to give any previous statutory notice to the plaintiffs of the defendants' intended extension of their waterworks into the added area; and that such extension was not "constructing waterworks" within the meaning of section 52.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *A. Glen*, for the appellants.—The defendants by extending their mains into a new area are constructing waterworks within a new district. They are bound to give us notice under section 52 of the Public Health Act. We submit that they had waterworks in their old district, and they are now constructing them in a new district. The alteration of the boundaries is immaterial. Sections 57 and 59 of the Local Government Act, 1888, do not authorize the county councils to take away any rights. If they have the power to deprive us of our monopoly at all it must be under section 59 and there is nothing in that section to authorize them.

They also referred to *Cleveland Water Co.* v. *Redcar Local Board*, 43 W. R. 90, [1895] 1 Ch. 168; *West Surrey Water Co.* v. *Chertsey Union*, 43 W. R. 6, [1894] 3 Ch. 513; and to the Public Health Act, 1875, ss. 51, 55, 64.

Vernon Smith, Q.C., and *R. C. Glen, contra.*—The defendants have a concurrent right with the plaintiffs to supply water. This case comes within the decision in the *Redcar case*. If we were extending our mains within the old district we should be exactly within that case, and the position here is similar. Sections 57 and 59 of the Local Government Act are important. First, there has to be an inquiry, and then the county council can make an order. Then the Act provides for the extension of the jurisdiction of any local authority. [LINDLEY, L.J.—Is this jurisdiction?] Yes, it is jurisdiction as regards the water supply under the Public Health Act. [RIGBY, L.J.—Assuming your contention is right, did the order provide any jurisdiction?] We submit it did. The added portions are to be in exactly the same position as the old district. Section 51 of the Public Health Act does not apply here at all. When the area is added we become the authority entitled to supply water. We are only contending for concurrent powers. Putting in these mains would not have been a construction of waterworks within the old district, and we submit it is not a construction of waterworks within the added district. Even if this is a construction of waterworks the injunction should be limited to prevent us supplying water to third parties: *West Surrey Water Co.* v. *Chertsey Union.*

No reply was called for.

LINDLEY, L.J.—We are all of opinion that North, J.'s, view cannot be supported. In order to make my own opinion clear, I will state very shortly how the point arises. [His lordship stated the facts, and continued:] Now we have to consider this, whether the effect of the order of the county council in 1895 rectifying the boundaries of Mirfield parish — because that is really what it was—and putting this little added bit into the Ravensthorpe district has extended the power of the Ravensthorpe district council to supply that added bit with water. Now, to a certain extent it appears to me that it has, because by the addition of that added piece to Ravensthorpe section 51 of the Public Health Act, 1875, comes into operation. But section 51 is followed by section 52, which is in the nature of a proviso, and what the plaintiffs say is this: "There is nothing in the order of the county council which has deprived us of our right to supply this added piece with water, and although you (the defendants) have got a right to supply water to this added piece by reason of the transfer of that piece to your district that right of yours is controlled by section 52 of the Act of 1875, and, in short, you cannot supply that added piece unless we are unable or unwilling to supply it ourselves." Now, that must depend not only upon section 52 of the Public Health Act, but upon the terms of the order of the county council and upon the authority under which that order was made. If you look at the order itself one is struck by the circumstance that there is nothing whatever in it about water. Whether the county council in making that order contemplated such a discussion as this I do not know, but so far as words go there is not a word to lead one to suppose that their attention was drawn to it at all.

Now, turning from the terms of that order to the authority under which it is made, it is to be found in the Local Government Act of 1888, sections 57 and 59; our attention has been called to them. I do not wish to express a decided opinion upon them, but I doubt very much whether the county council had power to do anything of the sort. There are some general words which might possibly warrant it, but I confess I have very grave doubts about it, and even if they had the power there is not a word in the order to show that they have exercised it. Therefore it appears to me that the order of the county council, so far as the authority goes and so far as the terms go, does not decide the question at all, and does not help us to decide it. All that the order does is to transfer this added piece from that part of the parish of Mirfield in which it was before into the Ravensthorpe district so as to enlarge the Ravensthorpe district.

That brings us back to section 52 of the Act of 1875. [The Lord Justice read the section.] One sees perfectly well what the object of that was. I am not now criticizing the language; the object was this, that if you find an established water company you are not to deprive them of the power of supplying water under their powers without giving them notice; and the object of giving them notice is obviously in order that they may consider whether they will exercise their power—if they are able and willing to do it, and if they are able and willing to do it then they are to be at liberty to exercise their powers. That is the general object of it.

Now comes this question, which, so far as I know, is a new one. Can it be said here with truth that the Ravensthorpe authority are constructing waterworks within this added area, or are they to be regarded as merely extending their old waterworks which they had constructed and laid down and possessed in their old district of Ravensthorpe? Now, I must say, having regard to the interpretation of the section, it seems to me to be a very strong thing indeed to say that they are not about to construct—I do not understand that they have actually done it—a waterworks within this added piece, laying down pipes and con-

structing waterworks. Then it is said: "No, that is not so; it is only extending their old waterworks"; and reliance is placed upon the decision of Chitty, J., in the *Cleveland case*. That decision appears to me to be perfectly right, and if it had been the other way the learned judge would have attributed to section 52 an operation which he saw, and which I think everybody else sees, was never contemplated by the Legislature at all. He had not to deal with what we have got—the extension of waterworks into a new district; he had not that problem before him at all. He had before him the question of whether an established waterworks company in a particular district were prohibited from extending those waterworks within that same district. He said: "No; that is not what the Act of Parliament means." There is a difficulty about the language there, because, in a sense, the extension of such waterworks as the Redcar people were making was a serious matter. It was not putting down an extra pipe or a pump; it was almost doubling their supply, increasing their reservoirs to a very large extent, and it was a construction of waterworks. If you look at it apart from the Act of Parliament nobody could say they were not constructing waterworks. Of course they were; but he said: "That is not what the section is aiming at. You had these rights before, and you are not deprived by the section of your rights." I follow that, and I think it is right. North, J., appears to have been misled by not observing that Chitty, J., was dealing with a totally different case. When you come to look at the language of the Act, I cannot see that putting pipes into a district where the Ravensthorpe authority had no right whatever to put them before the Order in Council was made, is not constructing waterworks within that area. I think it is. I think, therefore, the appeal must be allowed.

A little care must be taken about the injunction, and the injunction ought to be confined to the added area. I say added area, because that is an expression understood; it is used in the order of the county council, and the notice of appeal is so worded that I do not think it is quite right. It must be confined to the added area, and be expressed in the language of the 52nd section.

LOPES, L.J.—What has created the difficulty here is this, that in 1895 a piece of Mirfield was added to Ravensthorpe district by the county council—about twenty acres. Whether the county council had power to make such an order or not I do not say, but they have made it, and it has been acted upon. Previously to that the Ravensthorpe water authority could not supply Mirfield with water, but the Huddersfield Corporation could, and did. The question which arises is this. Does the fact that a piece of Mirfield has been added to the Ravensthorpe district give them a power to supply water which they had not before. In other words, does the alteration of the boundary—because it was nothing more—enable Ravensthorpe to supply this added piece with water? In order to determine that, the important section is section 52, and that section is so important that I shall venture to read part of it: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which and (as far as may be practicable) the extent to which water is required by the local authority." It seems to me the object of that is to enable the company, by being informed of the quantity of water and the purpose, to make up their minds how far they are willing to supply the water. Then it goes on—and these words are imperative: "It shall not be lawful for the local authority to construct any waterworks within such limits"—that is, within the limits of the supply of the company—"if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority." No notice has been given here, and that section has not been complied with. Putting it broadly, what is the object of that section? The object of that section appears to me to be this, that companies already in existence are to be protected against new companies or new authorities invading their district and erecting new works where such company is willing and able to supply water proper and sufficient for all purposes. I think that is the object of that section.

The question then which arises here is this: Are the defendants constructing waterworks in Mirfield, or are they merely adding to and improving existing waterworks? In my judgment the laying down of mains in a district not before supplied by the local authority, and where the local authority had no jurisdiction to lay down mains is a construction of waterworks in the fair and reasonable sense of the term. I use the words "fair and reasonable sense of the term," because those are the words that are used by Chitty, J., in the *Cleveland case*. I think that North, J., decided this case in the way he has, relying upon the *Cleveland case*; but when the *Cleveland case* is carefully looked at, it appears to me that it has no application to the present. In that case there was no invasion of any new district. It was there the improvement of, and addition to, existing waterworks. Therefore in my judgment it was entirely different from this case. If all the defendants here were doing was adding to or improving their waterworks within their district, I should have been prepared to say that was within that case.

The present case is entirely different. It is an invasion of a new district by them where they had not supplied water before, and in which they are laying down pipes and mains necessary to enable them to supply water. I cannot come to any other conclusion but that that is a construction of waterworks within the meaning of the Act of Parliament.

RIGBY, L.J.—The Public Health Act of 1875, when conferring by section 51 upon local authorities the power, and imposing in a certain sense the duty, of supplying their district with water, took notice of the fact that all over the country there are existing, or were existing, or might at the time exist, waterworks companies which had the right of supplying water within certain definite limits. Those limits might be coincident with the district of the local authority, or might cover part only of such district; but in any case section 52 clearly intended to give some measure of protection to the existing waterworks company. Before commencing their waterworks the local authorities were to give notice, and then they were not to construct waterworks within the limits of the existing waterworks company if that waterworks company were in a condition to supply the water as provided by the Act. Therefore manifestly in the first instance, the section contemplated a dealing with waterworks companies that were in existence before the local authority began to supply. Did it depend upon the mere accident as to where the local authority began their works? I think not. In the case where the limits of the local waterworks company were co-extensive with the limits of the local authority, no difficulty would arise; but could it be the intention that, if the local authority took half only, they might

begin outside the half which was included within the limits of the water company, and, having commenced there, might go extending onwards within the limits of the water company? I think not. I am inclined to think that commencing waterworks means commencing waterworks within those limits for, at any rate, the supply of those limits. Before going within those limits they are to give the notice; having given the notice, nevertheless they are not to come within the limits by constructing waterworks if the waterworks company could make a proper supply.

Now, Chitty, J., had before him in the *Cleveland case* the case of the local authority having had the right to supply the entire area, and having in fact supplied that area so far as there had been any supply, or, as far as I can see, any demand for the water, before ever the water company was in existence, before the water company had any right to supply there at all. Now the position of things is altogether reversed in substance. The question is no longer what protection should be given to a water company that has had an unlimited right to supply before the local authority comes to interfere; but do the words of this Act necessarily give to a new company a position against the old local authority? I think Chitty, J., found some difficulty in dealing with the case because the words of section 52 appear to be rather strong. But there can be no doubt, I think, that to such a case as that section 52 was never intended to extend, and I for my part find no reason to criticize unfavourably the way in which that learned judge arrived at the conclusion that in that particular case and under those circumstances there was no construction of waterworks within the meaning of section 52 of the Act of 1875.

Now, we have really got the old problem, not a new one. We have got a case in which the Huddersfield Corporation had the right of supplying water within the added area at a time when there had been no waterworks of any kind in that area introduced by any local authority. So that it is the old problem that we have to deal with and not a new one. Did the county council when, acting as it appears to me quite within its jurisdiction, it took away part of the district of Mirfield and added that to the district of Ravensthorpe, in any way affect the rights of the Huddersfield Corporation to supply with water that transferred area which is called the "added area" or the "disputed area"? That is really what we have to consider now. Now, undoubtedly when that happened and before that happened the Ravensthorpe district council had, I think, constructed waterworks within their original district. All that they had done, it is true, was to lay down mains, and to take in water at a particular point or points where they bordered upon the Dewsbury district and by means of the mains and service pipes under their control in their own district to supply water there. It appears to me that that was not only within the popular meaning of the word, but within the parliamentary meaning, constructing waterworks. They did that before the Huddersfield Corporation had ever come there at all. So the situation with respect to the Ravensthorpe original district was the same as that in the *Cleveland case*. But in the added area the Ravensthore Council had never done anything at all.

Now, then, the question is, did they construct or would they be constructing waterworks if they did in that added area exactly the same thing that they had done in their old original district? For my part I can entertain no doubt that they would be, and that they would be doing so within the meaning of section 52 of the Act of 1875. We were asked, and I think that is really the substance of the argument on the side of the local authority, to say that we ought not to go behind the fact that at the present time by reason of the order of 1895 the district of Ravensthorpe includes the added area. I think, on the contrary, we are obliged to go behind. I do not know that the county council had any authority to interfere in any way with the water supply in any of these districts. I feel reasonably confident that if they had any such authority they did not exercise it here. They did not purport to exercise it here in any way. Therefore I think the order of 1895 has left the rights as they were before, subject only to this, that *de novo* a power has been given to the Ravensthorpe local authority to supply water in that added area subject to the restriction of section 52.

In my judgment what they propose to do would be constructing waterworks within this new added area included within the limits of supply of the Huddersfield Corporation, and they can only do it by complying with the terms of the section.

Appeal allowed.

Solicitors, *Riddell, Vaizey, & Smith*, for *F. C. Lloyd*, Huddersfield; *Jaques & Co.*, for *Watts & Son*, Dewsbury.

High Court of Justice.

Chan. Div. Kekewich, J. } June 15.

In re MARGETSON. (*a*.)

Solicitor—Costs—Lien—Compromise by plaintiffs and defendant behind solicitor's back—Collusion.

Where the plaintiffs in proceedings for taxing a bill of costs had, without the knowledge of their solicitor, come to an agreement with the defendant to stay the proceedings, the defendant paying them the sum of £25 "towards their costs" in the proceedings, and stating that he did so gratuitously because "they had been clients of his for some time, and appeared then to have spent all their money," and the plaintiffs had withdrawn their retainer to their solicitor,

Held, on the facts, that the inevitable result of such agreement must be to deprive the plaintiffs' solicitor of his rightful costs; that the plaintiffs and the defendant must have been aware that this would be the consequence of their agreement; and that, consequently, it was a collusive agreement bringing the parties within the decision of Price *v.* Crouch, 35 SOLICITORS' JOURNAL 610, 60 *L. J. Q. B.* 767, 40 *W. R. Dig.* 248, *and that the plaintiffs' solicitor was entitled to an order that his costs should be taxed as between solicitor and client and paid to him by the defendant.*

Summons.

This was an application by L. C. Margetson, as solicitor for a Mr. and Mrs. Pugh, plaintiffs in proceedings relating to taxation of a bill of costs alleged to have been incurred on their behalf by the respondent, S.-J., their former solicitor, asking that the applicants' costs in the proceedings might be ordered to be taxed and paid by the respondent, or, in the alternative, that it might be ordered that the applicant be at liberty to continue the proceedings for the purpose of recovering and obtaining his costs from the respondent.

Mr. and Mrs. Pugh had, behind the back of the

(*a*.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

present applicant, come to an agreement with Mr. S.-J. to stay all further proceedings, Mr. S.-J., on account of their necessitous circumstances, paying them a sum of £25 towards the cost of the proceedings. Mr. and Mrs. Pugh had withdrawn their retainer to Mr. Margetson, and had not paid anything due to him for costs.

Mr. S.-J. by his affidavit stated that he had given "the said sum of £25 gratuitously to Mr. and Mrs. Pugh because they had been his clients for some time and appeared to have spent all their money."

Warrington, Q.C., E. S. Ford, and *H. Courthorpe-Monroe*, for the applicant.—This was a collusive bargain for the purpose of preventing the applicant Margetson getting his costs. The applicant is therefore entitled to an order against the defendant, or, in the alternative, leave to continue the proceedings: *Price* v. *Crouch*, 35 SOLICITORS' JOURNAL, 610, 60 L. J. Q. B. 767, 40 W. R. Dig. 248.

Ribton, for the respondent.—In order that the applicant may succeed it is clear on the cases that he must prove one of two things—either that he has given express notice of his lien, as was the case in *Price* v. *Crouch*, and *Ross* v. *Buxton*, 38 W. R. 71, 42 Ch. D. 190, or he must prove collusion between the parties for the purpose of defeating his rights. The affidavits filed on his behalf do not prove this, and he is not entitled in order to prove his case to read the affidavits filed in answer by his opponent.

KEKEWICH, J., said: It is a professional rule that when parties to a dispute are represented by solicitors, neither of those solicitors should communicate with the principal of the other touching the matters in question.

That is a binding rule in the profession, and is strictly consonant with good sense and convenience, because it is impossible that solicitors can really do their duty unless they have the full confidence of their clients and are enabled to communicate the one with the other. But the courts have uniformly held, without in the slightest degree impeaching the propriety and advantage of that rule, that if the parties have solicitors, and the solicitor for one party meets the principal on the other side, and a bargain is made, that bargain is good. It cannot be said that the authority of the principal is gone when he employs a solicitor because such a thing as that is impossible, and therefore, whether there is litigation or not, if the solicitor for the plaintiff meets the defendant and makes a compromise with him that compromise is binding on the defendant or the plaintiff, as the case may be, notwithstanding that up to that time he was represented by a solicitor; that is as much common sense as the rule itself. But what the court has also said is that, if that is not done honestly in a straightforward way, and merely with a view to get rid of litigation, but also with a view of defeating the solicitor's lien, that compromise shall not prevail. If the one solicitor meets the party on the other side, or if the two parties compromise, knowing of the lien of the solicitor, and are intending to defeat it, then that shall not be allowed, and the only question is whether that was the intention. That rule runs through all these cases. Lindley, L.J., refers to it in the case of *The Hope*, where he says at p. 146 of 8 P. D.: "There is no rule that the parties may not compromise an action without the intervention of their solicitors. They must, however, do so honestly, and not intend to cheat the solicitors of their proper charges." I recognize the rule. Did they not cheat here? The word is not at all too strong, and I recognize the propriety of the use of it. The question is whether in this case I have such evidence as satisfied the court in the case of *Price* v. *Crouch*.

Here comes in the point urged by the counsel for the respondent. He says that if the applicant does not make out his case on the affidavits which he files in support of it, and if the respondent is ill-advised enough to answer those affidavits—which in the view put forward he need not have answered—then the applicant cannot read that affidavit which has been filed against him, and which presumably covers his opponent's case, but is bound to read his own affidavit independently and thus give the respondent the opportunity of showing that no case has been made out. I challenged the counsel for the respondent to find any authority for that proposition, and he says that it is the ordinary practice, and there is no authority for it. It is strange that such a practice has never come under my notice during the years in which I have been engaged in the Chancery Division. The rule affecting the proper conduct of the case is, that if your opponent does not make out a case, you must have the courage to say so, and not file affidavits at all. If you think his case requires an answer, you must take your chance by your answer of covering your opponent's case.

I will not pause to inquire whether the affidavits of the applicant made out any case. It was a weak one no doubt. I will assume that the applicant has not made any case in his affidavit, but I am clear that the affidavit in answer does. I must read the evidence of Mr. S.-J. himself in connection with that which he incorporated with it, and which was an affidavit not made at the same time, but only referred to as S.-J.; but then he says that the substance of what passed is incorporated in that affidavit. Then what passed? Mr. S.-J. had an interview with Mr. and Mrs. Pugh, and the result of it was that, knowing they were in necessitous circumstances, he paid them £25, not as a kind of bargain to stop the taxation, of which he said he was not afraid, but nevertheless having that inevitable result, which they both knew; and be the bargain a bargain or no bargain, as it may be in the legal sense of the words, both parties perfectly well knew that once the £25 was paid the taxation would be dropped, and Mr. S.-J. would be free from any anxiety caused by the order for taxation. It is said, indeed, that the money was paid with a view of satisfying part of the costs of the proceedings. Mr. and Mrs. Pugh say in their affidavit that Mr. S.-J. had "offered to contribute a sum of £25 towards our costs of these proceedings." What Mr. and Mrs. Pugh knew I do not know. It is evident they were in poor circumstances, and were probably over-persuaded by Mr. S.-J. But I must take them to know what were the ordinary consequences of their acts, and that they were accepting £25, as they say themselves, towards their costs, without the slightest intention of its being applied towards the payment of their costs. Mr. S.-J., on the other hand, knew of their difficulty, and although he stated that he paid the money towards their costs he must be taken to have known as a solicitor, and, being well acquainted with this particular old client, that the money would not find its way into Mr. Margetson's pocket in reduction of his costs. It seems to me that, without any such cross-examination as the counsel for the respondent invites, the opponent was well advised enough. I think that what was done on Mr. S.-Js.' part was intended to deprive Mr. Margetson of his costs. I cannot quite acquit Mr. and Mrs. Pugh, but I have no doubt that they did not realize the impropriety of what they were doing. The case seems to me to come distinctly within the authority of *Price* v. *Crouch*. As for the particular order which the applicant

wants I did not want authority, but I was impressed with the idea that the court could not do what was right. Here, however, I have a case which is an authority in point. The only question is what the form of order should be. As I propose to make an order in a more extended way, it will include the sum of £25, which will only be allowed towards the costs as a whole. The summons in the case of *Price v. Crouch* asked that the costs of the action might be taxed, and paid to the applicant, or, in the alternative, that the applicant might be at liberty to continue the proceedings in order to recover the costs. Where a plaintiff and defendant compromise an action with the knowledge that they are so acting as to deprive the plaintiff's solicitor of his costs, such solicitor is entitled to an order for the payment of his taxed costs of the action by the defendant, or for continuance of the action for the recovery of such costs. Reading there "taxation" for "action," the present summons asks exactly the same thing. The Divisional Court sustained the order of the judge in that case. I am at liberty to consider that either of the alternatives would be right. It seems to me that the first alternative is right. There is an apparent anomaly in allowing proceedings to be continued which cannot be continued in the name of the client who has withdrawn his retainer. There is also this objection, that if the order to continue the proceedings is made new costs must be incurred; and Margetson has no right to incur costs except with the view of recovering those already incurred; so that ought to be avoided if it can be done consistently with the judgment.

The first alternative seems not to be open to objection. I therefore make an order that the costs incurred by Mr. Margetson up to the receipt of the letter of the 9th of September, 1896, be taxed and paid by the defendant to the applicant.

I am directing such taxation as is necessary for ascertaining those costs, and no further costs need be incurred; and in addition I direct that Mr. S.-J. do pay the costs of this application.

Solicitors, *L. C. Margetson; H. S.-J.*

Chan. Div.
Romer, J. } June 18; July 6.

In re WALKER.
WALKER *v.* LUTYENS. (*a.*)

Will—Gift to "issue"—Illegitimate children.

A testatrix gave shares of income of her residuary estate to certain named nephews and nieces with a gift over to the respective issue of any who should die during the lifetime of two other named persons.

M. A., one of the nieces named, had married F. A., her deceased sister's husband, and had by him a daughter G. and a son F. M. A. was called in the will by her married name, was described as the wife of F. A., and G. was described as their daughter. M. A. died within the period mentioned.

Held, that, under the circumstances, G., though illegitimate, could, under the gift to issue, claim her mother's share of income.

Megson *v.* Hindle, 28 *W. R.* 866, 15 *Ch. D.* 198, *commented upon.*

Adjourned summons.

This was a case raising the question of the meaning of the word "issue."

The testatrix Elizabeth Walker by her will dated the 18th of July, 1879, directed as follows:

"I direct that my trustees shall invest the ultimate residue of the said moneys, &c., &c., and shall stand possessed of the said residuary, trust moneys, and the investments for the time being representing the same, and the real estate of or to which I shall die possessed or entitled, and my said leasehold house, in trust to pay one moiety of the net investments, dividends, rents, and annual interest thereof . . . to my brother Richard Fryer during his life; and the remaining moiety thereof to my sister, Susanna Thacker, during her life for her separate use free from all marital rights. And upon the death of either of them to pay the moiety previously payable to the deceased equally between my nephews and nieces, Dorothea Wyld, Richard Fryer Morson, Anne Thacker, Mary Addams, William Fryer, Thacker, and Dorothea Elizabeth Fryer, and my great-nieces, the said Caroline Hope Pieters, and Marian Osler, or such of them as shall be living at the death of the deceased, during the life of the survivor of my said brother or sister, if they shall respectively so long live. Provided that if any of my said last-named nephews and nieces and great-nieces shall die during my lifetime or during the lifetimes of my said brother or sister leaving issue him or her surviving such issue shall take, and if more than one equally between them, the share of income which his, her, or their parent would have taken if living at the time of the decease of either of my said brother or sister, and from and after the decease of the survivor of my said brother and sister then as in the said will mentioned." The will also directed the trustees to stand possessed of certain sums upon "trust to pay to or permit my niece Mary, the wife of Francis Holland Addams, to receive the rents, investments, dividends, and annual income thereof for her life, for her sole and separate use, free from the control of her present or any future husband, or of his debts or engagements, and from and after her decease then as to the said capital sums and interest and the said hereditaments and the rents thereof, in trust for her daughter Gertrude Susannah Addams if living absolutely and if dead then as therein mentioned."

The niece referred to by the testatrix as "Mary Addams, wife of Francis Holland Addams," was not legally married to the said F. H. Addams, who was in fact her deceased sister's husband. Mary Addams by the said F. H. Addams had two children—viz., Gertrude Susannah Addams (now Gertrude Susannah Lutyens) and Francis Robert Addams.

The testatrix died in 1881. Her brother Richard Fryer died in 1882, and the income of his moiety was thereupon distributed as provided for in the will, Mary Addams receiving her proportion of such income. Mary Addams died in 1896, and upon her decease her share of such income was claimed by the defendant Dorothea Wyld, a niece of the testatrix, and by Caroline Hope Pieters, a grand-niece, as residuary legatees on the ground that the word "issue" in the will did not include either the defendant Gertrude Susannah Lutyens or the defendant Francis Robert Addams, and that consequently Mary Addams died without issue her surviving within the meaning of the will.

All questions as between Gertrude Susannah Lutyens and her brother having been waived by her, the real point for decision was whether under the terms of the will she could make any claim to her mother's share of income in the residuary estate.

Mulligan, Q.C., and *Hatfield Greene*, for the trustees of Elizabeth Walker's will, stated the facts.

Crossfield, for Francis Robert Addams.—Under the

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

circumstances here the word "issue" can and does include illegitimate children: *Per* Lord Selborne in *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265; Bowen, L.J., in *In re Haseldine*, 34 W. R. 327, 31 Ch. D. 511; *In re Horner*, 36 W. R. 348, 37 Ch. D. 695; *In re Harrison*, [1894] 1 Ch. 561.

Compton Smith, for Gertrude Susannah Lutyens.

Childers, for the residuary legatees.—*Hill* v. *Crook* can be distinguished; there there was a distinct expression of intention to include the particular illegitimate children. There is merely a substitutionary gift to issue here. *Bagley* v. *Mollard*, 1 Russ. & My. 581, followed in *Megson* v. *Hindle*, 28 W. R. 866, 15 Ch. D. 198, and *In re Hall*, 35 Ch. D. 551, are authorities against the claim of Mary Addams' children, who are illegitimate. [ROMER, J., expressed his opinion that some circumstance was probably omitted from the report of *Megson* v. *Hindle* which would have explained the statement made there by Jessel, M.R., that the testator knew the grandson about whom the question arose, was illegitimate.]

ROMER, J.—With regard to the clause on which the question before me depends, I agree that the word "issue" (which, having regard to the text, here means children) must be taken (at any rate *primâ facie*) to mean legitimate children. But it appears to me that for the purposes of the will, so far as concerns the niece Mary Addams, the testatrix has declared that the daughter Gertrude is to be regarded and taken as legitimate. The testatrix describes the niece Mary as the wife of Mr. Addams, and refers to Gertrude as the daughter of the niece, and (in a codicil) as the grand-niece of the testatrix. And as Gertrude survived her mother I think I ought not to hold that for the purposes of the clause in question the share of the niece Mary Addams is to be dealt with on the footing that she died without leaving issue.

I need not consider the question as to the other child of Mary Addams, for the daughter Gertrude has expressed her desire to allow that child to share with her. I know of no case precisely like the present, but I do not think that in giving this decision, I am extending the principle governing the numerous cases cited before me in which illegitimate children have been allowed to take. Of course, if the principle stated by Sir John Leach, M.R., in *Bagley* v. *Mollard* had been still law that whenever the general description of children will include legitimate children it cannot also be extended to illegitimate children, then my decision must have been the other way. But that principle is clearly not now law. I do not think it necessary for me to go through the numerous cases cited. If the gift in this will had been to Mary Addams for life, with remainder to her children, then there is ample authority for holding that, having regard to the statements in this will (though in a different part of it), the daughter Gertrude must have been held a child for the purposes of the gift. See, for example, *Hill* v. *Crook*, and especially the observations of Lord Cairns at p. 285, *In re Haseldine*, and *In re Horner*, and I cannot see any difference in principle, for the purpose I am now considering, between the above supposed case and a simple gift to Mary Addams, with a substitutionary gift to her children in case she died before a certain period. Nor do I see why the principle should not be applied to the precise case before me where the substitutionary gift is not confined to the case of the gift to Mary Addams, but is a general substitutionary gift applying to gifts to other named persons as well as to the gift to Mary Addams.

I will only add a few words with regard to two cases cited before me. As to *Megson* v. *Hindle*, when the circumstances of that case are considered it will be seen that the testator had treated the illegitimate child separately from the other or legitimate children, and had not shown any intention to regard him as legitimate for the purposes of his will or to include him in the general term "children." And in the case of *In re Hall* there was nothing in the will to show that the testator regarded the illegitimate son of his sister as legitimate or intended to include him in a gift to that sister's children beyond the description of him as a nephew, which description standing alone was not sufficient. In my opinion, therefore, the two children of Mary Addams are entitled to her share of income.

Solicitors, *Shelton, Walker, & Tayler; Deacon & Co.; A. D. Wilde.*

Chan. Div. } Romer, J. } May 29, June 30.

In re BOYD.
KELLY *v.* BOYD. (*a.*)

Will—Power of appointment—Appointment for all purposes—Lapse.

The question whether a general power of appointment has been so exercised by the donee as to take the fund subject to the power away from the persons entitled in default of appointment for all purposes, is one of intention to be gathered from the dispositions of the fund made by the donee.

J. K., a donee of a general power of appointment by will of a sum of £5,000 (as to which, in default of appointment, there was a gift over to other persons by the donor of the power), exercised the power by appointing the fund directly in equal shares between eight nephews and nieces, to whom she also gave legacies out of her own estate which, both in her will and codicil, she distinguished from the £5,000. She appointed an executor; but her own estate was more than sufficient to pay all her debts and legacies. A nephew and a niece died in her lifetime.

Held, following In re Davies' Trusts, 20 *W. R.* 165, *L. R.* 13 *Eq.* 163, *that J. K. had not indicated an intention to make the £5,000 her own for all purposes; and that the persons entitled in default of appointment under the limitation in the instrument creating the power took the shares appointed to the nephew and niece who had died in the donee's lifetime.*

Petition.

This was a petition for the distribution of a fund in court.

The question in the case was whether a general testamentary power of appointment over a sum of £5,000 had been fully exercised by the donee, or exercised only for the limited purpose of giving effect to the particular dispositions expressed in her will and codicils.

By the will of William Boyd, who died in 1855, one-fourth of the proceeds of sale of his residuary real and personal estate was settled on trust for his daughter, Juliana Kelly, and her husband for life, remainder to their children, with a gift over in default of children taking a vested interest. The testator further empowered the trustees of his will notwithstanding the trusts thereinbefore contained "out of the said one-fourth share of the residue of my said estate to raise the sum of £5,000 sterling, and pay the same to such person or persons as my said daughter Juliana shall by her last will and

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

testament or any codicil or codicils thereto, and whether covert or sole, direct and appoint or give and bequeath the same."

Juliana Kelly made her will in September, 1869, in which, after a recital as to the power of appointment over the £5,000, were the following words: "Now, in exercise of such power I give and bequeath the said sum of £5,000, and also all the residue of my real and personal estate and effects not otherwise disposed of by me equally between and amongst my several nephews and nieces following" (the testatrix here named eight nephews and nieces) "as tenants in common and not as joint tenants." The testatrix further directed that if any of the nephews and nieces whom she had named should die in her lifetime leaving a child or children such child or children were to be entitled to his, her, or their parent's share. She appointed Joseph Anderson executor.

The will contained no charge or direction for the payment of debts.

The testatrix made a codicil to her will in May, 1878. By this she appointed another executor in the place of Joseph Anderson, who had died, and gave to each of the before-mentioned nephews and nieces £1,000 sterling "out of my own moneys." She directed that all legacy duty should be paid "out of my general residue which I bequeath unto and between my said nephews and nieces as directed by my will."

By another codicil of January, 1886, the testatrix recited that she had appointed "a certain fund therein named and also the residue of my estate" equally between the nephews and nieces named in the will, and that she had also given to each of them legacies of £1,000 "out of her own moneys." One of these legacies she revoked, and in other respects immaterial to the question of the case, she altered her former dispositions of her property.

The testatrix died on the 4th of December, 1896, having had no children. Her personal estate was sworn at £45,913, which was more than sufficient to pay all her debts and legacies. Two of the appointees, a nephew and a niece, had died in her lifetime neither having had any children, and the question now arose whether of the £5,000 appointed as aforesaid two eighth parts, being those intended for the nephew and niece who had died, had not lapsed, and passed as unappointed by Juliana Kelly under the will of her father, the original testator William Boyd.

Levett, Q.C., and *Dunham*, for the petitioners, who claimed to be entitled to the two eighths under the will of William Boyd.—The question is one of intention. The testatrix has not intended to make the £5,000 part of her estate for all purposes, and the two eighth parts are unappointed and pass under the will of William Boyd. *In re Davies' Trusts*, [1871] 20 W. R. 165, L. R. 13 Eq. 163, governs the present case.

They also referred to Theobald on Wills, 4th ed., pp. 200-202.

Farwell, Q.C., and *Davenport*, for the respondent.—The testatrix intended to make the £5,000 her own for all purposes, and take it out of the trusts of her father's will. This fund would have been available for payment of her debts, and the executor whom she appointed could have given a discharge for the whole fund: *In re Hoskin's Trusts* [1876] 5 Ch. D. 229, 6 *Ibid.* 281. *In re Davies' Trusts* is inconsistent with *In re Pinède's Settlement*, [1879] 28 W. R. 178, 12 Ch. D. 667; *In re Ickeringill's Estate*, [1881] 29 W. R. 500, 17 Ch. D. 151; *Coxen* v. *Rowland*, [1894] 42 W. R. 568, [1894] 1 Ch. 406. The two eighth shares should go to the next-of-kin of Juliana Kelly.

Levett, in reply.—Only six-eighths of the £5,000 would be available for Juliana Kelly's debts. The appointment to the nephew and niece who predeceased her was no appointment. An executor only takes what is validly appointed: *In re Thurston*, [1885] 34 W. R. 528, 32 Ch. D. 508.

ROMER, J.—In the present state of the authorities the question I have to decide is by no means an easy one. The principle which has to be applied to all cases of this class is clear. I have to ascertain whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular dispositions expressed. The difficulty lies in the application of the principle. The conclusion I have come to in the present case is that the testatrix has not by her will and codicils sufficiently indicated an intention to make the £5,000 the subject of the power, hers for all purposes, and that so far as concerns the lapsed shares they go as in default of appointment. My reasons are as follows: In the first place this is not a case of an appointment of the £5,000 to trustees for purposes, some of which lapse. The appointment is direct to beneficiaries, so that authorities like *In re Van Hagan*, 29 W. R. 84, 16 Ch. D. 18, which depend upon a question of resulting trust, are not in point, and I have to decide the case having regard to the authorities which deal with direct appointments to beneficiaries. Now, the testatrix has herself drawn a distinction between the £5,000 and her own property. She has given certain legacies by her codicils expressly payable "out of her own moneys," by which I understand her to mean that in no case was the £5,000 (which was not her own) to aid in case of deficiency of her own property in paying those legacies, and she does not anywhere treat or describe the £5,000 as part of her own residue or as her own moneys. In the will she gives the £5,000 and also all the residue of her property not otherwise disposed of by her, by which latter phrase I understand she meant all her own property not disposed of by any codicil or codicils or in payment of her debts; and in one codicil she states that by her will she has appointed and given "a certain fund therein named," and also the residue of her estate. So that, looking at the will and codicils together, it appears to me she had shown that she treats the £5,000 not as her own, but as something distinct from her own property and not merging in her own residuary estate. Again, for what it is worth, there is here no express charge of debts. It is true she appoints an executor, and if her own estate had been insufficient to pay her debts and the legacies which are not expressly payable only out of her own property, then no doubt the £5,000 would have been applicable to make good the deficiency, and to that extent the executor might have had recourse to it. But her own property was more than sufficient to pay all her debts and legacies, and the fact that an executor might for a limited purpose have had a right to reach the fund would not in itself be sufficient to take the fund for all purposes away from the persons entitled in default of appointment. See for example *Laing* v. *Cowan*, 24 Beav. 112, 6 W. R. Ch. Dig. 56, where it was held that an express direction to pay debts, coupled with the appointment of an executor, took the fund from the persons entitled in default of appointment, but only so far as it was required to pay the debts; and see further *In re Thurston*, *Thurston* v. *Evans*.

But there is another authority which, if rightly decided, completely covers the case before me; that is *In re Davies' Trusts*. Indeed that case had not the element in the case before me of the testatrix ex-

pressly distinguishing between the appointed, and her own, property; and so the case before me is stronger in favour of those claiming in default of appointment, but in all other respects the two cases are substantially identical. That case was decided in 1871 by Wickens, V.C., and though often referred to since, has never been dissented from or disapproved, nor can I find any authority which would justify me in declining to follow it after this lapse of time. Indeed it has been expressly followed in Ireland in *In re De Lusi's Trusts*, 3 L. R. Ir. Ch. 232, 27 W. R. Dig. 9.

Certain cases have been referred to in argument before me which it is suggested are inconsistent with, or cast doubts upon *In re Davies' Trusts*, but I think the suggestion is unfounded, and I will shortly refer to the chief of them in order to show this.

In re Pinède's Settlement was a case where Jessel, M.R., under the circumstances referred to by him in his judgment, was able to ascertain that the testatrix intended to include in the gift of her residue both the residue of the appointed fund and any savings of her own property she might possess as one blended fund, and treated the appointed property as her own and made it her own for all purposes. The case of *In re Davies' Trusts* was cited and in no way disapproved of by the Master of the Rolls; on the contrary, he refers with approval to *In re De Lusi's Trusts*, which followed *In re Davies' Trusts*, as stating accurately the principle on which each case ultimately falls to be decided. *In re Ickeringill's Estate*, decided by Hall, V.C., was a peculiar case, and, I think, turned upon this, that the Vice-Chancellor thought, under the circumstances concerning the devise of real estate to which he refers in his judgment, that the gift in the testatrix's will in that case was equivalent to an appointment and devise to her two sisters in trust so as to make the question one of resulting trust, as in *In re Van Hagan;* at least, that is what I gather from the judgment, especially from the observations at the bottom of p. 156 and top of p. 157 (17 Ch. D.), but whether I am right in this or not it is clear that the Vice-Chancellor distinguished the case before him from *In re Davies' Trusts*, and cast no doubt upon the decision in the latter case. Lastly, in *Coxen* v. *Rowland* the decision of Stirling, J., turned upon the words used by the testatrix, which indicated sufficiently her intention that the appointed property should be deemed hers for all purposes. As pointed out in that case, it is not essential in order that an appointed fund may be for all purposes taken out of the instrument creating the power, that there should be, in the first instance, an appointment to a trustee; nor did Wickens, V.C., in *In re Davies' Trusts* express a contrary view, and the suggestion that the reasoning on which he decided that case has been since decided to be unsound appears to me unfounded.

Solicitors, *Tarry, Shirlock, & King*, for *Griffiths & Co.*, Newcastle-upon-Tyne; *Phelps, Sidgwick & Biddle.*

Chan. Div. } Byrne, J. } July 9.

In re HOLT.
HOLT *v.* HOLT. (*a.*)

Trustee—Practice—Breach of trust—Married woman restrained from anticipation—Indemnity—Pleading—Third-party notice—Liberty to apply—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 45—*R. S. C., ord.* 16, *r.* 55.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

In an action for breach of trust in which the trustees of a settlement and the tenant for life a married woman restrained from anticipation, were defendants, the defendant trustees in their defence alleged that the breach was committed at the request of the defendant tenant for life, and that her interest ought to be impounded by way of indemnity; but they did not raise this point either by way of third-party notice under ord. 16, *r.* 55, *or by way of counter-claim.*

Held, that upon the allegations respectively contained in the statement of claim of the plaintiff, and in the defence of the defendant trustees, the court had jurisdiction to give the defendant trustees liberty to apply in chambers in the action, to enforce any right of indemnity they might have against the tenant for life; and that under section 45 *of the Trustee Act*, 1893, *the court could make an order impounding the life interest of a married woman restrained from anticipation, by way of indemnity.*

This was an action brought on the part of certain infants by their next friend claiming as beneficiaries under the trusts of a settlement made on the marriage of the defendant Helen Eliza Gossell with John Oakes Holt, and dated the 16th of January, 1878, to make good a breach of trust. The facts of the case were as follows:—

Under the settlement it was declared that the sum of £1,500 paid to the trustees thereof, T. H. Rollason and S. F. Rollason, by Otto J. T. Gossell, should be held upon trust, to invest in the manner therein directed, and to pay the interest to the defendant Helen E. Holt for her life for her separate use without power of anticipation, and after her death to the said John O. Holt (but only if he should not have been a bankrupt, or other the events therein mentioned should not have happened) during his life, or other the period therein mentioned, and subject thereto in trust for the children of the said marriage, who, being sons, should attain the age of twenty-one years, or being daughters, should attain that age or marry.

By a settlement known as the settlement of 1887, and made between the said Otto J. T. Gossell of the one part, and the said T. H. Rollaston and S. F. Rollaston of the other part, it was declared that a further sum of £1,000 paid by the said Otto J. T. Gossell to the said T. H. Rollason and S. F. Rollason should be held on like trusts as those declared in the marriage settlement of 1878, and the trustees were empowered to advance the sum of £1,000 to John O. Holt on interest, the same being secured by the bond of John O. Holt, with one or more sureties. This sum was subsequently advanced to John O. Holt, and secured by the joint bond of John Oakes Holt, J. A. Dorsib, G. Holt, and S. F. Rollason.

On the 19th of December, 1892, T. H. Rollason retired from the trusteeship, and G. Holt was appointed trustee in his place. In January, 1893, G. Holt and S. F. Rollason advanced to J. O. Holt and the said Helen E. Holt the sum of £1,500, which represented the whole of the trust funds of the settlement of 1878. The advance was made on the security of the joint and several promissory note of John O. Holt and Helen E. Holt and on their joint and several covenant to repay and on the security of a policy upon their joint lives, and of an assignment by John O. Holt of certain letters patent for making metallic ship berths.

G. Holt died in 1894 and S. F. Rollason in 1897. J. O. Holt was adjudged a bankrupt in 1894. The defendants, the executors of G. Holt and the executrix of Samuel F. Rollason, put in separate defences. They alike alleged that the breaches of trust were

made at the instigation and request and with the consent in writing of Helen E. Holt. Mrs. Holt did not put in a defence, but she was subpœnaed as a witness by some of the other defendants. The statement of claim asked, *inter alia*, for a declaration of the liability of the trustees' estates to make good the loss, and for the administration of the trusts of the settlements.

MacSwinney, for the plaintiffs.

Wilkinson, for the defendant tenant for life.—The question of the liability of the tenant for life cannot be gone into on the present occasion. No proper proceedings whatever have been taken by the other defendants to raise the issue. They have not done so either by a third-party notice under R.S.C., ord. 16, r. 55, or by a counter-claim. It is possible that in these ways the issue might have been raised; but even that is not altogether clear. Practically the other defendants have taken no proceedings whatever against the tenant for life. What they are trying to do is to raise the issue in an indirect way. Further, there is no evidence whatever that the tenant for life in any way instigated, requested, or consented in writing to the breach of trust. There is no evidence to entitle the court to order an inquiry. If the question is to be raised at all, it must be raised by the representatives of the trustees bringing an action against her.

Badcock, for the representatives of G. Holt.—If the trustees are not technically in the right in the way they have proceeded, the court has jurisdiction to permit them to amend. There can be no possible injustice in this course to any party, and there is no reason why the tenant for life should not be examined *vivâ voce* in court. An injustice, however, would be done if the trustees were forced to bring a fresh action.

R. J. Parker, for the executrix of S. F. Rollason.—There is no question but that under the old practice the court had jurisdiction to dispose in such an action of the defendants' claim to be indemnified by the tenant for life. Such a point could either have been raised in the bill or taken in the answer. If it had been taken in the answer an inquiry would have been directed. The jurisdiction by which the court executes trusts is the same as formerly. This is an administration action, and in an administration action all equities can be enforced. The proper course in this case is to direct an inquiry as to whether the tenant for life concurred in the breach of trust: *Sawyer* v. *Sawyer*, 33 W. R. 403, 28 Ch. D. 595, was referred to.

Wilkinson, in reply.—*Sawyer* v. *Sawyer* does not come within section 45 of the Trustee Act, 1893, and in that case, which was prior to the Married Women's Property Act, 1883, Mrs. Sawyer, the tenant for life, was not restrained from anticipation. The old practice is unimportant in this connection. In deciding the question whether a married woman has instigated, requested, or given consent in writing to a breach of trust, the law relies on the exercise of judicial discretion which must be properly exercised. It is not a matter in which an inquiry can be directed.

BYRNE, J.—The action is brought by an infant remainderman for the purpose of obtaining a declaration that the estates of certain deceased trustees are liable to make good certain moneys, some of which they had become liable for, to a limited amount, by reason of having concurred in giving security for bonds, which limit their liability each to £334. The second breach of trust is in respect of a sum of £1,500. The action asks, so far as necessary, to have the trusts of the settlement executed. Amongst the defendants are the executors of George Holt, one of the persons whose estate is sought to be made liable. In the defence put in on their behalf there is the following paragraph: "If in fact the advance by the said George Holt and Saml. Fredk. Rollason of the said sum of £1,500 to the said John Oakes Holt and the defendant Helen Eliza Holt was a breach of trust, the same was made at the instigation or request or with the consent in writing of the defendant Helen Eliza Holt, and with full knowledge on her part that such advance constituted a breach of trust, and the defendant Helen Eliza Holt took the benefit of such breach of trust, and these defendants claimed that, under the circumstances aforesaid, all the life interest of the defendant H. E. Holt under the said settlements of the 16th day of January, 1878, and the 17th day of March, 1887, ought to be impounded by way of indemnity to the executors of the said Geo. Holt, deceased." And in the defence put in on behalf of the other executors they plead to a similar effect. Both the defendants say in their defence that they will rely, as against the tenant for life who is co-defendant, upon the provisions of section 45 of the Trustee Act, 1893.

Now, the co-defendant, the tenant for life, says that this matter cannot be disposed of, because the question has not been raised either by way of counter-claim or by third-party notice under rule 55 of order 16, and that it is impossible for the court in this action to allow this question to be raised, but that the parties desiring to raise it ought to commence a new action for the purpose. At one time I was disposed to think that the tenant for life might be justified in saying: "If it is to be raised, there should be a third-party notice; let this stand over for that purpose and let the costs be reserved"; but the position is this at the present moment, that counsel for both parties—for the tenant for life and for the trustees—are agreed that in their view it is very doubtful whether rule 55 of order 16 would permit of such a thing being done. In point of fact, the argument on behalf of the tenant for life reduces itself to this: That, inasmuch as the claim for indemnity against the defendant tenant for life is only raised in the defence of the co-defendants, the only way in which the thing can now be properly tried is by bringing a new action, with, I suppose, new pleadings, delay and all the necessary expense attendant upon such a proceeding. I should have been sorry to have been driven to such a conclusion, and I do not think I am so driven. This being an action for the execution of the trusts, and this being an equity arising by reason of the position of the parties as well as by virtue, in this particular case, of the section of the Act of Parliament, I am of opinion that it is within the competence of the court, on such a point being suggested by the trustees, who admittedly are liable, either to direct an inquiry, properly framed, or to give leave to apply as to enforcing such a claim against the tenant for life, although she be a married woman.

There is some force in what was said by Mr. Wilkinson, that it is one of those cases in which the court has to exercise a careful discretionary jurisdiction.

The court has under the section of the Act to find it just to do so, and no doubt will in every case inquire very carefully into the circumstances, having full regard to the fact that the equity is sought to be raised against a married woman restrained from anticipation; but that is a point which can be perfectly well considered by and safely left to the judge who has to determine the form of the inquiry and the way in which the matter should be raised by the court. It may be that he will think, on the

suggestion of the lady, that it ought to be raised by means of an adjournment into court in the first instance and hearing evidence *vivâ voce*. I do not think any injustice will be done by that, and I think gross injustice would be done if I were to hold that this point could not be raised except by bringing a new action, with all the consequent expense. It was said that I have no jurisdiction to make such an order, and for some time there was a little difficulty in finding any very near precedent for what I propose to do; but there is the case *Sawyer* v. *Sawyer*. It appears from the statement of the case that that action was commenced in November, 1878, by the children of Edward Sawyer and Betsy, his wife, against John Sawyer, the surviving trustee, and James Allwright, the executor of the deceased trustee of the marriage settlement of Mr. and Mrs. Sawyer, for the purpose of making the trustee liable for certain money, subject to the trusts of the settlement, which had been lost. Mr. and Mrs. Sawyer were made parties as defendants. In point of fact it was a case extremely like the present, one of those cases where the tenant for life is not joined for sufficiently obvious reasons with the infant plaintiff in bringing the action, but is made a defendant. When that case came on for trial Chitty, J., gave judgment that the trustees were jointly and severally liable to replace the sum which had been sold by the trustees and advanced to Mr. Sawyer, and an inquiry was directed to ascertain at whose request and under what circumstances the money had been sold out and advanced. Mr. Wilkinson says that this was not a case in which a married woman was restrained from anticipation, nor was it a case coming within section 45. The principle, however, appears to me to be exactly the same. If such an inquiry could be granted against a married woman who was not restrained from anticipation, such inquiry can be granted now, having regard to the provisions of section 45, sub-section 1, of the Trustee Act of 1893, against a married woman or in reference to a married woman, restrained from anticipation.

One other point was taken. It was said that no such inquiry or liberty to apply ought to be given unless there was some evidence upon which the court could act as making a foundation for an inquiry. I am not sure that the allegation of a defendant trustee made liable for a breach of trust, that the breach was committed at the instigation and with the consent of the tenant for life, would not be sufficient to create jurisdiction, provided, of course, that as to costs care was taken that any such inquiry should be held at the risk of the person requesting or seeking it; but in this case we have in paragraph 9 of the statement of claim this allegation: "The plaintiffs have recently ascertained that in the month of January, 1893, the said George Holt and Samuel F. Rollason wrongfully advanced the sum of £1,500, which then represented the whole of the trust funds of settlement of 1878, to the said John O. Holt and to the defendant Helen E. Holt upon the security of their joint and several promissory note and of their joint and several covenant to repay, and of a policy upon their joint lives and of an assignment by the said John O. Holt of certain letters patent for making metallic ship berths. The said security is wholly insufficient, and the said advance was a breach of trust." That allegation is admitted by the defendants, and I think there is a sufficient allegation there and therefore sufficient evidence that there was some consent in writing or instigation or request on the part of the tenant for life. It is not evidence that it was so, but it is evidence which enables the court to see that it is not a mere imaginary matter, but that it is a case in which some evidence will be forthcoming to show request on the part of the person who herself joins in giving the promissory note and in the covenant and security for the breach of trust which has been committed. If it stood there alone the court would not be able to make a married lady liable; but if there is a sufficient ground for the suggestion on the part of the defendants that there may be a case, it is sufficient, I think, to entitle me to do what I propose to do in respect to this matter—viz., to give to the representatives of the deceased trustees liberty to apply in chambers with reference to enforcing such right, if any, as they may have against the tenant for life, and as to the method of determining such matter or words to that effect (the precise form may perhaps be the subject of an application hereafter), and that may be prefaced by the words "and at the request of the trustees' representatives give them liberty to apply," I do not think that it will make much difference, but I will put those words in.

Solicitors, *T. G. Bullen; Crowders & Vizard*, for *Stratton & Son*, Wolverhampton; *Sharpe, Parker, Pritchards, & Barham*, for *Ryland, Martineau, & Co.*, Birmingham.

Chan. Div. } June 1.
Byrne, J. }

WAINWRIGHT *v.* MILLER. (*a.*)

Power of appointment—Life interest—Forfeiture clause—Fraud on power—Lapse—Remoteness.

Property was vested in trustees of a marriage settlement "to pay the income thereof to the wife for her life, and after her death in trust for all and every or such one or more exclusively of the other or others of the child or children of the marriage at such ages, days, or times, for such estates or interest, and if more than one in such shares and proportions, and with, under, and subject to such powers, provisions, conditions, and limitations as the said wife should by deed or will appoint." There was issue of the marriage three daughters, and the wife by deed-poll appointed two thirds in trust for two daughters absolutely; "And as to the remaining one equal third part thereof upon trust to pay the said income thereof to the" remaining daughter H. E. S., "if not at my death a member of the Roman Catholic Church or of any sisterhood, during her life, or until she shall become a member of the Roman Catholic Church or of any sisterhood, without power of anticipation during any coverture; and subject as aforesaid, as to the capital and income thereof, for the" other two sisters in equal shares.

After the death of her mother H. E. S. became a member of an Anglican sisterhood.

Held, (1) *that the appointment was not a fraud on the power;* (2) *that the appointment was not void for remoteness, and that the gift over took effect.*

Trial of action.

This was an action brought by the trustees to determine whether a trust contained in a deed-poll dated the 19th of April, 1890, and made by Tryphosa Sutton in exercise of a power of appointment vested in her by a marriage settlement, for payment of one equal third part of certain trust funds to the defendant Harriet E. Sutton had or had not determined, and if so from what date it had determined.

The facts of the case were as follows:

By an indenture dated the 13th of April, 1847, being

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

a settlement executed on the marriage of the said Tryphosa Sutton, then Tryphosa Wainwright, with John Sutton, certain real and personal estate belonging to Miss Wainwright were conveyed to the trustees thereof upon trust to pay the income thereof to herself during her life, and after her decease in trust for all and every other such one or more exclusively of the other or others of the child or children of the marriage, at such ages, days, or times, for such estates or interests, and if more than one in such shares and proportions, and with, under, and subject to such powers, provisions, conditions, and limitations as the said Tryphosa Wainwright should by deed or will appoint.

The issue of the marriage consisted of three daughters, Tryphosa Mary, Jane, and Harriet Ellen.

Mrs. Sutton survived her husband and executed the power by a deed-poll bearing date the 19th of April, 1890, appointing that the settled property and the income thereof should be held as to one-third on trust for Tryphosa Mary, as to one-third on trust for Jane, "and as to the remaining equal one-third part thereof upon trust to pay the same to the said Harriet E. Sutton, if not at my death a member of the Roman Catholic Church or of any sisterhood, during her life or until she shall become a member of the Roman Catholic Church or of any sisterhood, without power of anticipation during any coverture; and subject as aforesaid as to the capital and income thereof, for the said Tryphosa Mary and Jane in equal shares."

Mrs. Sutton died in October, 1893, and a third of the income was paid to Harriet until the end of 1895, when she became a member of an Anglican sisterhood.

The trustees then instituted the present proceedings and Harriet and her sisters were made defendants.

Vaughan Hawkins, for the trustees, stated the facts.

J. G. Wood, for Harriet E. Sutton.—The execution of the power contained in the deed poll was not a valid exercise of the power, and if it was, it was void for remoteness: *D'Abbadie* v. *Bizoin*, Ir. Rep. 5 Eq. 205, 19 W. R. Ch. Dig. 137; ; *Hodgson* v. *Halford*, 27 W. R. 545, 11 Ch. D. 959; Farwell on Powers, p. 421. The condition attached to the appointment to Harriet is one which may not operate until a time subsequent to that which the law has prescribed. It may be said that the decision in *Hodgson* v. *Halford* is against me; but it is not so on the point as to remoteness. Further, the rule in that case is too broadly expressed. *D'Abbadie* v. *Bizoin* is not altogether consistent with it, and the court should follow the last-mentioned case.

Dibdin, for the other sisters.—The object of the appointor was to prevent the money going to the sisterhood: *Allcard* v. *Skinner*, 36 W. R. 251, 36 Ch. D. 145.

The appointment is not open to objection on the ground that it is a fraud on the power: *Hodgson* v. *Halford*; *Duke of Portland* v. *Topham*, 12 W. R. 697, 11 H. L. Cas. 32. Nor is it bad on the ground of remoteness. It is not necessary to ascertain the persons taking on a condition until the forfeiture has taken place: *Stuart* v. *Cockerell*, L. R. 7 Eq. 363, 17 W. R. Ch. Dig. 191; *dicta* of Knight-Bruce, V.C., in *Boughton* v. *James*, at 1 Coll. Ch. Cas., p. 46; *Evans* v. *Walker*, 25 W. R. 7, 3 Ch. D. 211; *In re Roberts*, *Repington* v. *Roberts*, 19 Ch. D. 520. The remoteness against which the rule for prevention of perpetuities is directed is remoteness in the commencement or first taking effect of limitations, and not in the cessor or determination of them. A life estate determinable on an event, and a remainder vested on that life estate is a vested remainder if the person to take is ascertained. This is the case here.

He referred to Lewis on Perpetuities, p. 173; Challis Law of Real Property, 2nd ed., p. 64.

J. G. Wood, in reply.—It cannot be said that an estate is determined if it depends on a contingency or an uncertainty. It cannot be said that at the time of the death of Mrs. Sutton the estates of the persons to take in the event of the estate of Harriet lapsing were clearly marked out and determined: *Hodgson* v. *Halford*.

BYRNE, J., after stating the facts: Two points have been taken on behalf of Harriet Sutton. One point is this. It is said that it is a fraud on the power to appoint in this form; and a case of *D'Abbadie* v. *Bizoin*, has been cited in support of that view. On the other hand it is admitted that the case of *Hodgson* v. *Halford*, before Hall, V.C., is an authority which is undistinguishable in principle from the present case. It is said that the general rule laid down by the Vice-Chancellor in that case is too broadly expressed. Whether that be so or not, the case in question is one which, in its facts, comes so closely to the present that the principle applied in that case must apply in the one I have before me. I am asked to say that it is inconsistent with the authority of *D'Abbadie* v. *Bizoin*, which was cited before Hall, V.C., in *Hodgson* v. *Halford*, although he does not expressly deal with it in his judgment. It is sufficient for me to say that the circumstances in *D'Abbadie* v. *Bizoin* were very much more removed from the circumstances in the present case than the case of *Hodgson* v. *Halford*; and I consider that the latter case is an authority binding on me. Accordingly, I hold that this is not a case of a fraud on the power. On that point the contention fails.

Then a second point is raised, which is this. It is said that the appointment is void on the ground of remoteness. It is said that the appointment of one equal third part to pay the income to Harriet Sutton—who was not alive at the time when the deed of settlement creating the power of appointment was made—being given to her in the first place on the condition that she should not be a member of the Roman Catholic Church, and, secondly, on the condition that she should not become a member of a sisterhood, is void, because, it is said, the event of entering a sisterhood might not happen within a life in being at the date of the settlement or within twenty-one years afterwards.

I am of opinion that the gift is not void for remoteness. In the first place I would refer to what was decided by Malins, V.C., in *Stuart* v. *Cockerell*, and afterwards referred to in *Evans* v. *Walker*. In the latter case, at p. 213 (3 Ch. D.), the Vice-Chancellor says: "The first point is whether the gift to the nephew and two nieces of the testator is void for remoteness, and it is quite clear to my mind that it is not, because there is no objection to a gift to unborn children for life and then to an ascertained person, provided the vesting is not postponed. That point I commented on in *Stuart* v. *Cockerell*." The point so far is conceded by counsel on behalf of Harriet Sutton, but it is said that the uncertainty introduced by reason of the estate for life given to Harriet Sutton being made determinable upon her entering into a sisterhood or becoming a member of the Roman Catholic Church is such as to render the gift void, which, if the estate was not thus limited, would be perfectly good. Now, it appears to me in the first place that *Hodgson* v. *Halford* is not an authority in favour of Harriet Sutton on this point, and among other things for the reason which alone

would be quite sufficient, that in that case the persons who were to take were not to be ascertained till after the happening of the event. It is clear in the present case that if this were a gift to her for life, and subject thereto the capital and income were to go to the persons named, it would be perfectly good.

It is said that a contingency is introduced on an uncertainty after the event on which the persons who are to take will take. In my opinion the gift is the gift of one estate to Harriet Sutton, and just as much a gift of one estate as if it were a gift to her *simpliciter* for her life. It is true that that estate may be determined prior to her death on the happening of a certain event. This also, I think, is clear, that the gift in favour of Tryphosa Miller and Jane Sutton is a vested gift, and there is no uncertainty on the persons who are to take on the determination of the prior estate.

Two or three other cases have been referred to, and I will mention one as showing the opinion of Knight-Bruce, L.J., when Vice-Chancellor, on this matter, although it was not necessary in the circumstances of that case for him to decide the point. I refer to *Boughton* v. *James*, 1 Coll. C. C. 44, where at p. 46 the Vice-Chancellor says: "Undoubtedly, as estates in fee may be well given, so life interests may be well given by will to the children of a living person who is a bachelor at the testator's death. But as an estate in fee to be devised validly must be so devised as to vest within the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of them, so I conceive, must be a life interest. That it is limited in its duration can, I apprehend, make no difference. It may be true that a life estate, devised to a person not in existence at a testator's death, may be made by his will to cease before its natural termination at any time or upon any event; but that is a very different question," by which the learned judge means a very different question from that which he had to determine in the case before him. I read that as determining that just as his lordship thought that an estate in fee might be given so life estates might be given, and that life estates might be given although made to cease before the natural determination at any time or in any event. Then I was also referred to Lewis on Perpetuities, p. 173, where the learned author says: "The remoteness against which the rule for the prevention of perpetuities is directed is remoteness in the commencement or first taking effect of limitations, and not in the cessor or determination of them. An estate that is to arise within the prescribed period may be so limited as to determine on the happening of any event however remote, as for example the indefinite failure of issue of a person, which we shall presently see is too remote a contingency for the commencement of limitations. But an estate can only be made to determine upon an event thus remote, and when by its original form and limitation it will regularly cease by the happening of the contingency as the term of the duration of the estate, for as will hereafter be seen a power reserved to a person to determine the limitation upon such remote event would be void."

The view of the learned author, which agrees with the view taken by Knight-Bruce, L.J., I think states the rule correctly.

The result is that I hold, in the first place, that there is no fraud on the power; and secondly, that the gift over in this case is good, and upon the admissions made by the parties I hold that it has taken effect.

Solicitors, *Wainwright, Pollock, & Co.; Leefe & Leefe; Sandilands & Co.*

Q. B. Div.
(Hawkins and Wright, JJ.) July 3.

JAMES v. EVANS & CO. (*a*.)

Master and servant—Justices—Summary jurisdiction—Dispute—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.

Section 4 *of the Employers and Workmen Act,* 1875, *gives jurisdiction to courts of summary jurisdiction to hear and determine disputes under the Act provided that the amount claimed does not exceed* £10.

On the 16*th of November,* 1896, *a workman wrongfully left the employment of his employers, intimating that he did not intend to return. On the* 16*th of December the employers brought an action in a court of summary jurisdiction to recover* £10 *damages in respect of the absence of the workman from his work from the* 16*th of November to the* 28*th of November. They recovered the amount claimed. Subsequently the employers brought a second action against the workman to recover* £10 *damages in respect of his absence from work between the* 30*th of November and the* 12*th of December.*

Held, that the court of summary jurisdiction had no jurisdiction to hear and determine the second action.

Case stated by the stipendiary magistrate for the city of Birmingham.

Section 4 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), provides as follows:

A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and, in a proceeding in relation to any such dispute, the court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court: provided that, in any proceeding in relation to any such dispute, the court of summary jurisdiction—

(1) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds; and

(2) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the costs incurred in the case; and

(3) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties.

The appellant was, in October and November, 1896, in the employment of the defendants, who were tube manufacturers, under an agreement dated the 22nd of October, 1896, by which the respondents agreed to engage, and the appellant agreed to serve the respondents in the capacity of working foreman for the term of fifty-two weeks for the sum of 38s. per week and a bonus, payable every Saturday.

On the 16th of November, 1896, the appellant left the respondents' service, and never afterwards returned to it.

On the 16th of December, 1896, the respondents commenced an action in the City of Birmingham Police Court under the Employers and Workmen Act, 1875, to recover £10 damages. The particulars of claim were as follows: "The claim is for damages for the defendant absenting himself from work from the 16th of November, 1896, to the 28th of November, 1896. Amount claimed £10." The magistrate, after hearing the evidence, found that the appellant had wrongfully absented himself from his work, and gave judgment for the respondents for the amount claimed.

On the 29th of December, 1896, the respondents commenced a second action in the same court, the

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

particulars of claim in which were as follows: "The claim is for damages for the defendant absenting himself from work from the 30th of November, 1896, to the 12th of December, 1896. Amount claimed £10." In this action it was admitted that the appellant, when he left work on the 16th of November, intended finally to determine his employment, and that that intention was not assented to by the respondents. The magistrate gave judgment for the respondents for the amount claimed. The appellant appealed from this judgment.

Asquith, Q.C. (*Roskill* and *McCardie* with him), for the appellant.—The judgment appealed against was wrong. The jurisdiction of the magistrates, being limited by section 4 of the Act to £10, was exhausted by the judgment in the first case. Further, the claims in both proceedings were for one and the same cause of action. The respondents could have brought one action in the High Court or in the county court to recover the damages caused by the breach of the agreement, and it was not competent for them to bring a series of actions in the police court to recover damages for abstention from work during different periods of time covered by the same agreement.

Carson, Q.C. (*Hugo Young* with him), for the respondents.—The cause of action was a continuing one, and an action could be brought at any time after damage had accrued. The respondents had therefore the option of suing in a court of summary jurisdiction when damage to the extent of £10 had accrued, or of getting the whole damage assessed in the county court or High Court: *Ex parte Baker*, 5 W. R. 623, 7 E. & B. 697; *Youle* v. *Mappin*, 9 W. R. 637, 30 L. J. M. C. 234; *Unwin* v. *Clarke*, 14 W. R. 688, L. R. 1 Q. B. 417, at pp. 421-424, *per* Blackburn and Mellor, JJ.; *Cutler* v. *Turner*, 22 W. R. 840, L. R. 9 Q. B. 502; *Barnsley* v. *Taylor*, 37 L. J. Q. B. 39; *Hochster* v. *De la Tour*, 1 W. R. 469, 2 E. & B. 678; *Brunsden* v. *Humphrey*, 32 W. R. 944, 14 Q. B. D. 141; *Cutter* v. *Powell*, 2 Smith's L. C., 10th ed., p. 1, and cases therein cited. The cause of action being a continuing one the magistrate's jurisdiction was not exhausted by the first action, for when fresh damage accrued a fresh "dispute" arose which might be heard and determined by the magistrate.

The judgment of the COURT was delivered by

HAWKINS, J.—[After reciting the facts and arguments, his lordship proceeded:] I am of opinion that the first of the objections raised on behalf of the appellant must prevail.

The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), is entitled "An Act to enlarge the powers of county courts in respect of disputes between employers and workmen, and to give other courts a limited civil jurisdiction in respect of such disputes." Section 3 is that which relates to the jurisdiction of county courts. It defines a dispute under that Act to be a "dispute between an employer and a workman arising out of or incidental to their relation as such." It preserves to the county court its then existing jurisdiction, and in addition thereto, by sub-section 1, confers upon it powers to adjust and set off, the one against the other, all claims, whether liquidated or unliquidated, and for wages, damages, or otherwise, on the part either of the employer or the workman. By sub-section 2 power is given to the county court to rescind any contract between the employer and the workman upon such terms as it thinks just.

Section 4 refers to the jurisdiction over such disputes, of a court of summary jurisdiction. It enacts that such court, for the purposes of that Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages or damages, and may exercise all or any of the powers by that Act conferred on a county court, provided that in any proceeding in relation to such dispute the court of summary jurisdiction shall not exercise any jurisdiction where the amount claimed exceeds £10.

The case of *Clemson* v. *Hubbard*, 24 W. R. 312, 1 Ex. D. 179, expressly decides that claims such as those now before us are disputes within the meaning of the statute. In dealing with the first objection it is essential to consider what was the character and extent of the dispute between the parties to the first proceeding on the 16th of December, 1896, when that action was commenced. Now, it is clear that both the periods of absence, in respect of which the two proceedings were commenced, had expired on the last-mentioned day, and the whole of the damages in those two proceedings, to which Evans & Co. claimed to be entitled, might have been recovered in one action, and as one cause of action, whether brought in the High Court or a county court, or in the police court (if Evans & Co. had been willing to reduce their claim so as to bring it within the limited jurisdiction of such a court). I am of opinion, therefore, that the whole claim for damages in respect of such continuous absence formed, at the expiration of that continuous period of absence, in fact and in law, one dispute only, and ought to have been so treated, and I do not think it was competent for Evans & Co. to divide that one continuous period of absence into two periods of about a fortnight each for the mere purpose of making it appear that there were two separate disputes between the parties, and thus harrassing the workman with two proceedings.

The one dispute on the day of the commencement of the first proceeding was, as to the right of the workman to absent himself since the 16th of November, and, if he had no such right, as he clearly had not, what damage had been sustained by his employers. There was no suggestion that there was any difference between any one day of the twenty-eight days of absence and the others.

I look upon the course pursued by the employers as a mere device and endeavour to give jurisdiction over a claim for £20, by splitting it into two of £10 each. I think we are enabled to defeat this device, and ought to do so.

I know it has been argued that the particulars in the first action were confined to the first half of the period of absence. To my mind they ought not to have been so, unless the employers intended to abandon the rest of their claim, and at all events they could not affect the workman's right to say, in answer to the second proceeding, that the jurisdiction of the magistrate was exhausted by his judgment in the first.

It may be, and I will assume (for the purposes of this case) the law to be, that each day's absence from his work in breach of his contract might, standing alone, be treated as a separate cause of action, but where there are a number of consecutive days of absence intervening between the first of those days and the bringing of the action for breach of contract, it is only one continuing breach of the one contract, which day by day becomes more extensive and of greater magnitude; each succeeding day of wrongful absence becomes incorporated with those which have preceded it, and so the breach assumes a more important aspect; but where, as in this case, the workman from the first by his conduct intimated his intention finally and absolutely to break his contract, and does so by leaving his service, it is but one breach, though each day's additional absence may add to the damages recoverable against him.

The case of *Grimbly* v. *Aykroyd*, 1 Ex. 479, may be usefully referred to upon this part of the case, as elucidating the principle upon which I have come to the conclusion at which I have arrived.

For the reasons I have given I think the appellant is entitled to judgment. And it has become unnecessary to enter upon any discussion as to what the employers might have done had they sued in the High Court or the county court, nor is it necessary to look into futurity, or to offer any opinion as to what course is open to either of the parties so long as the agreement remains an existing undetermined contract. It would be useless, therefore, to discuss the various cases cited with reference to the second objection.

There must be judgment for the appellant, with costs.

Judgment for the appellant; leave to appeal refused.

Solicitors for the appellant, *Harrison & Davies*, for *Hooper & Ryland*, Birmingham.

Solicitors for the respondents, *Unett, Moore, Bayley, & Co.*, Birmingham.

Prob. Div. & Adm. Div. Divorce. } March 8.

GOODWIN v. GOODWIN AND ARNOLD. (*a*.)

Divorce—Order for costs—More than six years' delay in issuing execution—Application to the court—Rules of the Supreme Court, ord. 42, *r.* 23.

Where on a husband's petition for dissolution of his marriage a decree nisi *is granted with costs against the co-respondent, and the husband does not issue execution for more than six years, application should be made to the court for leave to issue execution.*

Motion for leave to issue execution against the co-respondent, although more than six years had elapsed since the decree *nisi*.

On the 1st of July, 1886, the husband obtained a decree *nisi* for the dissolution of his marriage with the respondent, together with an order for payment of the costs by the co-respondent. At that time the co-respondent had no means, and the husband did not proceed further against him, but the co-respondent recently acquired means, and the husband thereupon carried in for taxation his bills of costs against the co-respondent, and on the 15th of February, 1897, the bill was taxed at £299 3s. 11d., and the registrar's certificate of costs signed.

Priestley, for the petitioner, applied, *ex parte*, in support of the motion.—Rule 178 provides that on the signing of the registrar's certificate he shall at once issue an order of the court for payment within seven days; there is no limitation of time in the rule, and even if the Statute of Limitations (37 & 38 Vict. c. 57, s. 8) applied, the twelve years there required has not expired. All we want is the order under rule 178 in order that we may serve it under, and as required by, rule 179, when, if not paid within the seven days, a writ of execution must be issued under that rule. In the Queen's Bench and Chancery Divisions before execution can issue after a lapse of six years the leave of a judge must be obtained (ord. 42, r. 23).

JEUNE, P.—You may have the order for service on the solicitor; but I think, considering the lapse of time and the residence abroad of the co-respondent, it is only reasonable that execution should not issue for three months.

Motion allowed.

Solicitors for the petitioner, *Freeman & Bothamley*.

(*a*.) Reported by J. GERARD LAING, Esq. Barrister-at-Law.

Prob. Div. & Adm. Div. Divorce. } Feb. 22.

In the Petition of TUCKER. (*a*.)

Divorce—Restitution of conjugal rights—Written demand for cohabitation—Substituted service—Rule 175.

Where a wife posted a written demand for restitution of conjugal rights to the husband addressed to him at his business and private address, and both letters were returned unopened through his solicitors, who refused all information about him, but it was believed he had left the country, the court allowed substituted service of the demand on the husband's solicitors.

Motion on behalf of the wife for leave to serve on the husband's solicitors the written demand for cohabitation and restitution of conjugal rights, required by rule 175 to be made on the party cited.

The affidavits showed that the wife had posted two registered letters to the husband, one addressed to his last known place of residence, the other to his place of business. Both letters were returned by the husband's solicitors to the wife's solicitors unopened.

The husband had left the country, and his solicitors refused to give any information about him.

Newsom, in support of the motion, asked the court to follow in *In re The Petition of Sheehy*, L. R. 1 P. D. 423, 25 W. R. Dig. 123.

He also cited *Waters* v. *Waters*, 24 W. R. 190, and *McArthur* v. *McArthur*, 58 L. J. P. D. & A. 70, 38 W. R. Dig. 87.

BARNES, J.—You may take the order. It is only a question of its form probably; it should be to dispense with the rule so far as it requires service on the husband.

Order, that personal service on the husband of the demand for restitution of conjugal rights be dispensed with, and that the said demand be personally served on the husband's solicitors.

Solicitors for the applicant, *Rose-Innes, Son, & Crick*.

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) July 21.

ATTORNEY-GENERAL v. DODINGTON. (a.)

Inland revenue—Estate duty—Exemption—Property settled by will or disposition—Property on which probate duty has been paid—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 21 (1).

By a marriage settlement personal property belonging to the wife was vested in trustees upon trust for the wife for life, and after her death for the husband for life, and after the death of the survivor upon trust for such persons as the wife should by deed or will appoint. The wife died before the commencement of the Finance Act, 1894, *having by her will exercised the power of appointment in favour of certain beneficiaries. Probate duty was paid by her executors upon the value of the trust fund after deducting the value of the husband's life estate. On the death of the husband after the commencement of the Finance Act, estate duty was claimed by the Crown on the value of the trust fund.*

Held, that the case came within the exemption from estate duty conferred by section 21, *sub-section* 1, *of the Finance Act, and that the Crown was not entitled to estate duty in respect of the value on which probate duty had been paid.*

Judgment of Vaughan Williams *and* Wright, JJ., ante, *p.* 476, *affirmed.*

Appeal from the judgment of a Divisional Court (Vaughan Williams and Wright, JJ.) on an information by the Attorney-General claiming estate duty, *ante*, p. 476.

The information prayed that it might be declared that upon the death of William Popham estate duty became payable, under the provisions of the Finance Act, 1894, upon the principal value of a certain trust fund which passed on his death.

The fund in question formed part of a fund which was brought into settlement by Mrs. Popham on her marriage with William Popham, and which was vested in trustees upon trust for Mrs. Popham for life, then for William Popham for life, and on the death of the survivor upon trust for such persons as Mrs. Popham should by deed or will appoint.

Mrs. Popham by her will appointed the fund now in question upon trust, subject to the life interest of William Popham, for her children by a former marriage.

Mrs. Popham died on the 10th of August, 1883. William Popham died on the 28th of August, 1894.

The question was whether, on the death of William Popham, the fund was exempt from estate duty by reason of the fact that the executors of Mrs. Popham had paid probate duty on the value of the fund after deducting the value of William Popham's life interest.

The Divisional Court held that the Crown was not entitled to estate duty except in respect of the value on which probate duty had not been paid.

The Crown appealed.

Sir R. E. Webster, A.G., Sir R. B. Finlay, S.G., and *Vaughan Hawkins*, for the Crown.

Haldane, Q.C., and *Danckwerts*, for the defendant.

Lord ESHER, M.R.—It seems to me that I can deal with this case by simply construing the language of the statute in its ordinary and grammatical sense and applying it to the case in point. The case in point is this, that Mrs. Popham made a settlement, and that settlement was to be carried into effect for the benefit of particular persons to be determined by an appointment made by will. Does that come within section 21 of the Finance Act? The section says that "estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of the Act, in respect of which property" probate duty has been paid. Was the money with which we are now dealing settled by a disposition? I can see no reason, according to the ordinary construction of statutes, to confine the disposition mentioned in this section to any particular disposition, and to say that it applies only to some dispositions, and not to all. It seems to me that this is money settled by a disposition. The settlement is a disposition; but it is a peculiar kind of settlement. It is a settlement by appointment under a will to particular persons, and it is because it is in that peculiar form that probate duty became payable when the will appointing the settled money to those persons came into effect. I can see no sufficient reason for saying that this peculiar disposition is not one of the many dispositions which might bring the case within the section; and this disposition, made by the settlement and the will together, was made by a person who died before the commencement of the Act. And it is a disposition of money in respect of which probate duty has been paid. Therefore it seems to me that the case is brought within the very terms of the section, and that this is an attempt to make the defendant pay estate duty in respect of money after probate duty has already been paid in respect of that money.

I agree with the judgment of the Divisional Court, and I think that the appeal should be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. Section 21, sub-section 1, of the Finance Act is a saving clause in favour of the subject. It seems to me that counsel for the Crown are attempting to whittle it down till it is made of no effect in favour of the subject. They are attempting to make one and the same property pay probate duty and then estate duty. The express purpose of section 21 is that the same settled property should not bear the burden of first paying probate duty and then paying estate duty. The facts of the case are these: A lady on her marriage brought certain money into settlement. It was settled on herself for life, remainder to her husband for life, and subject thereto as she might appoint by will, and, in default of appointment, remainder to her own separate use. She exercised her power of appointment by will, and she died in 1883, about ten years before the coming into operation of the Finance Act. At her death the trust funds were £3,791. Her husband's life interest was worth £936. Her executors paid probate duty on £2,855. The Crown now claim that they are entitled to estate duty not only on £936, but also on the £2,855 in respect of which probate duty has already been paid. The case came before my brothers, Vaughan Williams and Wright, who held that the Crown were wrong. I also think that the Crown are wrong. The question turns on this, whether section 21, sub-section 1, applies to this case. I agree with my brother Vaughan Williams in thinking that the disposition here consists of the settlement *plus* the will. I read the word "disposition" in this section as not limited to a testamentary or quasi-testamentary disposition. I read it in the largest possible sense in favour of the subject; and in my

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

opinion if there be personal property settled by a disposition made by a person dying before the commencement of the Act, in respect of which property —that is the property settled by the disposition—probate duty has been paid, such property is exempt from estate duty. I think that this case falls within the words of the section, and that the appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. The scheme of the Finance Act, as appears from sections 1 and 2, is to sweep in almost everything that can in any sense be said to pass on a person's death. But that is made expressly subject to exemptions. Here the defendant claims to be exempt under section 21. This section does not deal with property in general, but with property that is settled. "Settled property" means, according to the interpretation clause, and to my mind necessarily means the same thing as property comprised in a settlement. The section provides that if it shall so chance that, in respect of property settled by a will or disposition made by any person dying before the commencement of the Act, probate duty or account duty has been paid or is payable, in that state of things either payment of such duty or the fact that it remains payable, is to exclude the Crown from claiming estate duty. It appears to me that the only words in this section requiring an interpretation are the words "settled by a will or disposition." Counsel for the Crown seek to cut down the meaning of these words. They leave the word "will" to stand by itself, and say, as indeed is true, that in this case there is no settlement made by the will standing alone, and they want to deal with the word "disposition" separately, which they say in effect means such a disposition as would make account duty payable under section 38 of the Customs and Inland Revenue Act, 1881. What right have we so to cut down the meaning of the word "disposition"? It is suggested that its association with the word "will" is a reason for doing so, but I think that the fact that the word "will" includes probably the great majority of the cases that will arise where probate duty is payable is a sufficient explanation why that word is used, and that its use does not afford a ground for cutting down the very general word "disposition" which follows. In the present case I think there cannot be any doubt that taking the settlement and the testamentary appointment together there is a disposition made by the lady who was the settlor, and by virtue of that disposition probate duty became payable, and was paid to the Crown. That which became subject to probate duty was the settled property, not a part of it only, but the whole of it. As a matter of fact probate duty was not paid on the whole of the property, for the simple reason that it was a reversionary interest which did not fall into possession at once. But this is plainly not a case in which a partial interest under the settlement has been charged with duty; everything that was in settlement was so charged. My conclusion is that the defendant brings himself plainly within the words of the section, and also within the intention of it. That intention broadly is that, where there is a settlement, and probate duty has been paid in respect of the interest of the settlor in the settled property, that shall exempt the settled property from estate duty just as, under section 5, sub-section 2, one payment of estate duty exempts from liability to make a second payment of estate duty. It follows that in my opinion estate duty is not payable on any part of this property; but as there is no cross-appeal we cannot deal with that point.

Appeal dismissed.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendant, *Flower, Missey, & Fellowes.*

From Q. B. Div. (Lindley and Chitty, L.JJ.) — June 29.

STEVENS v. GRIFFIN. (a.)

Practice—Costs—Taxation—Taxation in district registry—Jurisdiction of judge—Order for retaxation before taxing-master in London—Grounds for making such an order—Question of principle.

Where costs have been taxed in a district registry, a judge in chambers, if satisfied that the registrar, whether or not he has gone wrong on any question of principle, has taken an exaggerated or erroneous view of the case, has jurisdiction to order that the bill, or part of it, be referred for retaxation to some other person of greater skill and experience (e.g., *to one of the taxing masters in London*).

Appeal from Bruce, J., in chambers.

The plaintiff brought an action against the defendant in the Chancery Division in respect of a nuisance. The action was afterwards transferred to the Queen's Bench Division and was tried at Birmingham. Judgment was given for the defendant with costs, and thereupon the defendant's costs were taxed, in ordinary course in the district registry. The plaintiff carried in objections in writing to the registrar's certificate. The registrar considered the objections and answered them. The plaintiff then appealed to Bruce, J., in chambers, contending that the registrar's allowance was so excessive that, though not wrong in any matter of principle, the certificate must be varied.

The learned judge ordered that the items objected to in the defendant's bill of costs should be referred to Master Butler for re-taxation, and that the costs of the application should be reserved.

The defendant appealed.

Willoughby Williams (*Jelf, Q.C.*, with him), for the appeal.—There can be no retaxation except before the district registrar.

He referred to R. S. C., ord 25, r. 4; ord 65, r. 27, sub-rules 39, 40, 41, 42; and *Shrapnel* v. *Laing*, 36 W. R. 297, 20 Q. B. D. 334.

Crump, Q.C., and *C. Montague Lush*, for the plaintiff.—The district registrar took an unreasonable view, and allowed a plainly excessive amount. Bruce, J., was therefore justified, in the exercise of his discretion, in directing a retaxation. The words of ord. 35, r. 4, and of ord. 65, r. 27, sub-rule 41, are clearly wide enough to authorize the order which has been made.

They cited *Smith* v. *Buller*, 23 W. R. 332, L. R. 19 Eq. 473, and *Worsley* v. *Labouchere*, 28 L. J. Notes of Cases, 879.

Willoughby Williams, in reply.—The discretion which the judge has assumed to exercise really belongs to the taxing officer: ord. 65, r. 27 (38).

LINDLEY, L.J., stated the facts and continued: Thereupon the defendant appeals, upon the ground that the judge had no jurisdiction to make that order. It appears to me that we cannot go the length of saying that the judge had no jurisdiction to do what he has done; and of course, if it is a matter of discretion, we should not interfere with the exercise of

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

his discretion. There are only two rules to which I think it is necessary for me to refer. The first is ord. 35, r. 4, which says: "Where final judgment is entered in the district registry, costs shall be taxed in such registry unless the court or a judge shall otherwise order." Therefore an order may be made to tax elsewhere even those costs which as a rule will be taxed in a district registry. Mr. Willoughby Williams contends that that rule must be construed rather narrowly, and that we cannot uphold an order for a retaxation of part of the costs where the whole has already been taxed in a district registry. I am not disposed to put so narrow a construction upon the words I have read: and I do not see why under that rule, even if there were nothing else, the learned judge had not jurisdiction to do what he has done. He has "otherwise ordered" as to the costs objected to. But then there is another rule even wider in its terms. That is ord. 65, r. 27, sub-rule 41: "Any party who may be dissatisfied with the certificate or allocatur of the taxing officer as to any item or part of an item which may have been objected to as aforesaid, may, within fourteen days from the date of the certificate or allocatur, or such other time as the court or a judge or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a judge at chambers for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just." Well now, looking at that rule I cannot have any doubt that Bruce, J., was justified in saying that, having regard to what he saw of the taxation by the district registrar, he was not satisfied with it; and that he was not disposed to send the matter back to the same taxing officer. He was quite justified in saying that, in the exercise of his discretion, he should refer the taxation to a person whom he considered to have greater experience and greater skill in such business. We should not be warranted in saying that a judge cannot do that.

It appears to me, therefore, that under either of those two rules, or at any rate, certainly under ord. 65, r. 27 (41), the learned judge had ample discretion to make the order he has made. That being so, I am not disposed to examine the mode in which he has exercised his discretion. We ought not to tie the learned judge's hands too tightly, though no doubt the general rule is that he should not interfere except on questions of principle. But if he sees that the taxing-master has taken an exaggerated and erroneous view of the case, without being able to put his finger on any matter of principle in which he has gone wrong, that may be a case for exercising his discretion and making the order which will do justice. We must not tie him too tight. Here he says he is not satisfied with the taxation, and he therefore refers certain items for retaxation to a person of more skill and more experience. The jurisdiction being in the learned judge, it is impossible for us to review the mode in which he has exercised it. The appeal must therefore be dismissed with costs.

CHITTY, L.J.—I am of the same opinion. I think, in view of rule 4, of order 35, that the learned judge had jurisdiction to make this order. I do not read the words at the end of that rule to mean that the order must be made at the trial, or before any taxation has taken place. I think the order may be made subsequently. Therefore, in such a case as the present, the order may be made after judgment and after the taxation has commenced, because I do not agree with the argument that the taxation which has taken place is final. Final it is as to certain items; but as to the items referred to Master Butler, the matter is still *sub judice*. Then I turn to ord. 65, r. 27, clause 41. We should not be justified in cutting down the meaning of clear words. On the face of the rule, does not clause 41 enable a judge to make such an order as the judge may think just? I conceive it would be a misreading of that rule to say that the judge had not jurisdiction to make such an order as this. One reason for making such an order is that it is a matter of taxation, and though judges may be learned in the law, they are not highly skilled in questions of taxation. I could conceive the learned judge saying: "I cannot decide as to some of these items. I see they are more than ought to be allowed, but I cannot say how much more. I will send for a taxing-master, and have him to sit in chambers with me." In that way a very long time would be occupied. Or, again, the judge might say that he would give some of his private time to the business, and ask the taxing-master to come and sit with him after four o'clock.

All this seems to show that we must read the words as they stand. The learned judge has made, after careful consideration, such an order as he thinks just. I agree the general rule is that the objections brought before the judge must be objections on principle, but I conceive we ought not to bind the hands of the judge by saying that he cannot entertain any other kind of objection. It is an ordinary rule of convenience that the judge should not interfere except on a question of principle; but, where there are grounds —and I think there are here—for saying that the allowance of the taxation is excessive, the judge may either take the taxation into his own hands or do what Bruce, J., has done, to get such assistance as he would derive from a skilful and experienced taxing officer. The taxation will, of course, proceed with regard only to the objections already raised.

Appeal dismissed.

Solicitors, *Frith Needham*, for *James Clark*, West Bromwich; *Charles Robinson & Co.*, for *William Waldron*, Brierley Hill.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) June 28.

HOPE v. BRASH AND ANOTHER. (a.)

Practice—Discovery—Production of documents—Libel in newspaper—Original manuscript—Ord. 31, *r.* 18.

In an action for libel in a newspaper the defendants in their defence admitted the publication, and pleaded an apology, and paid a sum of money into court. In their affidavit of documents the defendants stated that they had in their possession certain documents relating to the matters in question in the suit, among them being a manuscript which they objected to produce on the ground that it was the original contribution to them, and was that which was published by them.

Held, that the plaintiff was not entitled to production of the manuscript.

Hennessy *v.* Wright, 36 *W. R.* 879, 24 *Q. B. D.* 445, *followed.*

Appeal from an order made at chambers.

The action was for libel, the alleged libel having appeared in the Christmas number of a newspaper called the *West Cumberland Times*, belonging to the defendants.

The defendants, in their statement of defence, admitted the publication, and pleaded that the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

alleged libel was inserted in the newspaper without actual malice and without gross negligence, and that before the commencement of the action they inserted in the newspaper a full apology for the libel according to the statute 6 & 7 Vict. c. 96, s. 2; and they brought into court a sum of money and said that the same was sufficient to satisfy the plaintiffs' claim.

The defendants made an affidavit of documents in which they said that they had in their possession or power the documents relating to the matters in question in this suit set forth in the schedule, among which was "a manuscript of the story published in the Christmas number of the *West Cumberland Times*," but they objected to produce this document on the ground that it was the original contribution to them, and was that which was published by them as admitted in the first paragraph of the statement of defence and as to which they admitted responsibility.

The plaintiff gave the defendants notice to produce the manuscript, which the defendants refused to do.

Bruce, J., ordered the manuscript to be produced.

The defendants appealed.

J. E. Bankes (*Norman Craig* with him), for the defendants.—The defendants have admitted the publication of the libel, and the settled practice at common law is not to order the name of the writer to be given or the manuscript to be produced: *Hennessey* v. *Wright*, 36 W. R. 879, 24 Q. B. D. 445; *Parnell* v. *Walter*, 38 W. R. 270, 24 Q. B. D. 441. The court, therefore, will not order this manuscript to be produced, as it is not relevant to any issue in the action.

Montague Lush, for the plaintiff.—In *Hennessey* v. *Wright* the document was not set out in the affidavit of documents. In the present case the defendants have set out the manuscript as a document "relating to the matters in question in this suit." The defendants have admitted that the document is relevant, and the plaintiff is entitled to have it produced: *Bustros* v. *White*, 24 W. R. 721, 1 Q. B. D. 423. If ord. 31, r. 18, gives a discretion in the matter, the judge has exercised his discretion, and this court will not interfere.

J. E. Bankes, in reply.—The decision in *Bustros* v. *White* was upon the old rule 11 of order 31 (now rule 14). The present application is under rule 18 (1), and the last clause (which was added in November, 1893) of that rule now gives the court a discretion as to ordering production.

Lord ESHER, M.R.—In my opinion it is a matter within our discretion as to whether we shall order production of this document. This is an action for a libel published in a newspaper. The defendants admit the publication and do not deny that the matter is libellous, but put in a statutory plea which, if proved, is an answer to the action, and verdict and judgment will be entered for them. The plaintiff has asked for an order for production of a document which is not the document which contains the libel complained of. The document containing the libel is the newspaper. He has asked for production of the manuscript which was contributed to the newspaper for publication. As regards the plea, I cannot have a doubt that the burden of proving it lies on the defendants, and if they cannot prove it the jury must consider the case as if that plea were not on the record. The question before us is whether the plaintiff can have the manuscript produced for inspection. I take it that in *Hennessey* v. *Wright* the question was whether the defendant in an action for libel is bound to disclose the name of the person who gave him the materials upon which the libel was written, or to produce the manuscript. The judgment which I delivered in that case stated that the common law judges had always refused to compel a defendant to say who gave him the information or to produce the manuscript. Lindley, L.J., upon that statement of the common law practice said that he adopted that rule. Therefore this court recognized the rule that this information should not be given to a plaintiff in an action of libel. The court did not say that they would never do so. But unless there is something special in the case the court will not make the order. The objection which the defendants take to the production of the manuscript in this case is founded upon the ruling in *Hennessey* v. *Wright*. In exercising his discretion the judge ought to have exercised it in accordance with the rule so laid down, there being no special circumstances in the case. We must now act upon that rule and say that the plaintiff is not entitled to production of this manuscript. The appeal must therefore be allowed.

A. L. SMITH, L.J.—I am of the same opinion. The action is for libel, and the defendants admit the publication and set up what I may call a statutory defence. There cannot be a doubt that the plaintiff has nothing to do with the proof of that defence. The defendants stated in their affidavit of documents that they had in their possession the manuscript of the story from which the libel was published, and objected to produce it. It is argued that, as the defendants have admitted the relevancy of the document, the court is bound in accordance with the decision in *Bustros* v. *White* to order its production. That case, however, was decided under rule 11 (now r. 14) of order 31. Therefore I say nothing about it, for since that decision an addition has been made to the rules for the express purpose of rendering it not obligatory on the court to order production and inspection of documents under rules 12 and 18. In my opinion it is not obligatory upon the court to order inspection of this document, and according to the rule laid down in *Hennessey* v. *Wright*, and especially the judgment of Lindley, L.J., in that case, the plaintiff will not get production of such a document as this in an action of libel. There must be something special in a case to take it out of that rule. For these reasons I think that the order of Bruce, J., was wrong.

RIGBY, L.J.—I am of the same opinion. In *Bustros* v. *White* the document in question was plainly relevant, and it was held that the document must be produced. But that case is not applicable here, because in *Hennessey* v. *Wright* an exception to the rule was made in the case of libel actions. I also think that the alterations made in the rules since *Bustros* v. *White* was decided show that discovery is not a matter of right, but a matter of discretion. The court is not bound *ex debito justitiæ* to grant discovery. Where the contents of a document are known, as in this case, it is not a sufficient ground for ordering production and inspection that the applicant wishes to see it upon the chance that it may contain something favourable to his case.

Appeal allowed.

Solicitors for the plaintiff, *Harrison & Powell*, for *Brown & Auld*, Whitehaven.

Solicitors for the defendants, *Speechly, Mumford, Landon, & Rodgers.*

High Court of Justice.

Chan. Div. } Stirling, J. } May 25, 27.

In re LAMBERT.
MOORE *v.* MIDDLETON. (*a.*)

Will—Hotchpot clause—Advanced child—Period of distribution—Interest on advance—Rate of interest.

A testator bequeathed £30,000 to his trustees upon trust to pay the income thereof to his wife during her life, and after her death to transfer one-fourth to his son and permit the remaining three-fourths to fall into residue; and he bequeathed the residue (comprising all his real estate and his residuary personalty) to his trustees upon trusts for conversion and division among his three daughters. There was a provision that any advance made to any daughter should go towards satisfying the portion under the residuary gift, and it was expressly directed that this provision should apply to a sum of £6,000 payable under a covenant by the testator to the trustees of the marriage settlement of one of the daughters. The testator died in 1878, leaving personalty to the amount of £3,700 and real estate valued at £62,000. The trustees, in the exercise of their discretion, did not realize the real estate at once, but sold portions from time to time. The testator's debts, including the £6,000, amounted to £13,000, and of this sum a considerable portion (including the £6,000) was raised on mortgage. Interest on the £30,000 legacy was paid by the trustees to the widow out of the income of the real estate till 1894, when a sufficient amount of real estate had been sold to answer the legacy. After payment of all interest on the mortgage and the legacy there remained a surplus income of £200 a year, which was divided between the two unadvanced daughters. On the death of the widow in 1895 the £30,000 became divisible.

Held, that the advanced daughter must bring the £6,000 into hotchpot and also pay the interest thereon at the rate of 3 per cent. per annum from the date on which the payment of the £6,000 was actually made, but that the period of distribution was the death of the testator.

In re Rees, Rees *v.* George, 29 *W. R.* 301, 17 *Ch. D.* 701, *followed.*

In re Dallmeyer, 44 *W. R.* 375, [1896] 1 *Ch.* 372, *discussed.*

This was a summons raising the question whether on an adjustment of accounts interest was to be charged on a sum of £6,000 advanced to one of the testator's daughters in pursuance of a covenant made by the testator in his lifetime.

The will of the testator was this: He gave to his trustees, therein named, a sum of £30,000, with interest thereon at the rate of £4 per cent. per annum to be computed from his death, in trust to invest the money and to pay the income to his wife for her life, "and from and after the decease of my said wife shall divide the said legacy and the investments thereof into four equal parts, and shall pay or transfer one of such fourth parts to my said son John Wilmot Lambert for his own absolute use and benefit, and shall permit the three remaining fourth parts thereof to sink into my residuary estate." Then he devised his real estate and his residuary personal estate to trustees upon trust to sell, call in, and convert, and to stand possessed of the proceeds of such sale and conversion upon trust "to pay my funeral and testamentary expenses and debts (including debts owing by me upon mortgage, for payment whereof it is my will that my residuary estate shall be the proper and primary fund in exoneration of the respective mortgaged estates) and the legacies other than specific legacies bequeathed by this my will or any codicil hereto, and to divide the residue of the said moneys, but subject to the provisions hereinafter contained, into three equal shares, and shall stand possessed of one of such shares in trust for each of my three daughters, Edith Moore, Helen Marion Lambert, and Beatrice Lambert respectively." Then the shares so appropriated to each of such daughters were to be held in trust to invest, and during the life of each daughter to pay the income of the appropriated share to his daughters for their separate use without power of anticipation, and after death to stand possessed thereof in trust for the children. Then followed this proviso, on which the question turned: "Provided also, and I hereby declare that if I shall in my lifetime advance, or give or covenant or agree to advance or give to or with any of my said children any sum or sums of money on his or her marriage or otherwise, then (unless I shall in writing direct the contrary) any such sum shall be taken in or towards satisfaction (*pro tanto*) of the provision intended to be hereby made in favour of the child to or with whom such sum shall be advanced or given or covenanted or agreed to be advanced or given, or in favour of his or her issue, and I expressly declare that this provision shall extend and be applicable to a sum of £6,000 which in and by the settlement executed on the marriage of my said daughter Edith Moore I covenanted to pay to the trustees of the same settlement as a marriage portion for my last-named daughter."

The testator died in 1878. At the time of his death he was only entitled to a comparatively small amount of personalty—namely, £3,700. He was entitled to real estate of considerable value, which was valued at the time of his death at £62,000. It consisted of building land near Banstead, and the trustees in exercise of their discretion postponed realization and only sold parts of it from time to time. They had at the date of the summons sold a considerable part producing as much as the value of the whole real estate at the time of the testator's death, while a portion was left unsold which was likely to produce a large additional sum. The debts and funeral and testamentary expenses of the testator, including the £6,000 which had been covenanted to be paid to the trustees of Mrs. Moore's marriage settlement, amounted to £13,000, and of that sum a considerable portion was raised by mortgage. The £30,000 legacy was not at first raised, but the trustees paid interest on it to the widow out of the income of the real estate till in 1894 they had realized enough of the real estate to provide for that sum by means of investing a sufficient amount to answer it. After keeping down the interest on the mortgage and providing interest on the legacy, there remained a surplus income of £200 a year, and that was divided equally between the testator's two other daughters—Mrs. Hopgood and Miss Lambert. Recently Mrs. Lambert, the widow, died, and the £30,000, as well as other sums, became divisible.

G. Henderson, for the trustees.

A. áB. Terrell, for the legal personal representatives of the widow.

Rowden, for Mrs. Moore.—I contend that no interest is payable here at all; but in any case it is payable only from the period of distribution, which in this case is the death of the widow: *In re Dallmeyer*, 44 W. R. 375, [1896] 1 Ch. 372; *In re Rees, Rees* v. *George*, 29 W. R. 301, 17 Ch. D. 701.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Paice, for Mrs. Moore's children.—The principle is that the share of the advanced child of the income actually earned shall bear the same *ratio* to his share of the whole income as does his share of the actual capital to the whole capital: *In re Dallmeyer*.

Cartmell, for Mrs. Hopgood and Miss Lambert.—*In re Dallmeyer* really decides that no interest is payable after the period of distribution, but that interest is payable till the period. Each of the two unadvanced daughters should receive out of the residue a sum equal to the interest on the £6,000. The balance of the income should be paid to my clients till they have received what Mrs. Moore received. The proper period of distribution is the death of the testator. *In re Dallmeyer* did not overrule *In re Rees*.

He also referred to *Hilton* v. *Hilton*, L. R. 14 Eq. 468, 21 W. R. Dig. 281; *Andrewes* v. *George*, 3 Sim. 393.

STIRLING, J., stated the facts, and continued: The question is whether Mrs. Moore and her children are, on the adjustment of accounts in the division of what is now divisible, to be charged with any and what interest on the £6,000 for the purpose of equalizing the various residuary legatees, and how the adjustment is to be effected? Now, the case on behalf of Mrs. Moore was opened with a reference to the recent case of *In re Dallmeyer*, and it was contended that, as there was no express mention of interest in the will, Mrs. Moore ought not to be charged with interest at all. I observe, however, that that case relates only to interest which was chargeable before the period of distribution of the estate. In that case accumulation for a certain time was directed, and the estate did not become distributable till the period of accumulation had expired. The testator gave a power to his trustees to make advances during the period of accumulation. The trustees exercised the power, and the question arose when the period of accumulation expired, whether the children to whom advances had been made were to be charged with any and what interest in respect of those advances. It was held by Kekewich, J., and a majority of the Court of Appeal, consisting of Lord Herschell and Smith, L.J., Rigby, L.J., dissenting, that no interest was to be charged, but it is to be observed that that case is no authority with reference to what is to be done after the period of distribution, for this reason, that (I suppose by inadvertence) the decision in the court below was that no interest at all should be charged; but it appears from the judgment of Rigby, L.J., though it does not appear very clearly from the statement of facts in the report, that to that extent the order made in the court below was varied. The lord justice says this: "It was conceded on the appeal that interest on all the sums must be brought into account as from the date when the residuary estate ought to have been distributed—that is to say, from the date of the youngest child attaining twenty-one, and that the order appealed against must to that extent be varied." So *In re Dallmeyer* is an authority that interest is chargeable after the period of distribution whenever that may be. The leading case prior to *In re Dallmeyer* is *In re Rees*, before Jessel, M.R. It is to be observed that in the judgment of Lord Herschell and Smith, L.J., there is not a word about overruling *In re Rees*, and in fact Lord Hershell distinguishes *In re Rees* from the case before him and says: [His lordship read the judgment, [1896] 1 Ch., at p. 385: "No case was cited in which any rule was laid down governing the present case . . . supports the appellants contention," and continued:] So that he in no way departed from what was laid down by the Master of the Rolls in *In re Rees*.

That being so, before deciding what the period of distribution is—which, no doubt, is the important question—I have to consider what was laid down in *In re Rees*, and the grounds on which that decision was based. In that case the testator gave his residuary estate to his widow for life with remainder to his children equally, with a proviso in the common form for bringing into hotchpot all sums advanced to any of them by him during his life. He did make advances to some of them, and it was held: "In distributing the residuary estate among the children after the death of the widow, the advanced children must bring their advances into hotchpot with interest at 4 per cent. per annum up to the distribution of the estate, such interest to be computed from the death of the widow and not from the date of the respective advances or from the death of the testator." It appears from the report that an action had been brought for administration and the estate had been to some extent paid into court because it was on a petition for payment out that the question arose from what date the advanced children were to be charged with interest. It was contended no doubt, there that the period from which interest was to be charged was the date from which the advances were made, but the Master of the Rolls deals with it in this way: [His lordship read the judgment (17 Ch. D., at p. 704): "In this case several of the children had received large advances in the testator's lifetime . . . in calculating the interest in that way the children get the same shares as if there had been no advances," and continued:] Then I should point out also this: the Master of the Rolls deals with the case of *Field* v. *Seward*, 5 Ch. D. 538, 25 W. R. Dig. 311, which came before Bacon, V.C. He says: [His lordship read the judgment (17 Ch. D., at p. 706): "There the question was whether interest on a sum of £2,550 . . . you must in the account charge interest on the advance from the time when it would have produced interest as part of the common fund," and continued:] It is clear that the Master of the Rolls approved the reasoning of Bacon, V.C., in that case. Now, the rule adopted down to *In re Rees* was that for securing equality in the account as between the persons interested in the estate—because of course there is no question of any absolute payment being made by the advanced party—you charged the person advanced with interest at the rate of 4 per cent. on the advance. That is the mode which has been adopted in every case which has come before the court so far as those cases have been brought to my attention and so far as I know.

In *In re Dallmeyer* Rigby, L.J., threw out what is said to be a suggestion for a new mode of dealing with the case. It is to be observed, as I have already pointed out, that in that case the period of distribution did not arise till the close of the period of accumulation. The advances were made at various times, and, indeed, were made to each child from time to time, and not all at the same time. In dealing with the mode in which the advances were to be treated as satisfying the shares of the various children who had been advanced, the lord justice says: [His lordship read the judgment ([1897] 1 Ch., at pp. 395-6): "The strict rights of the children in this view of the will . . . as the accumulations of residue have still continued, 4 per cent. interest might be charged."] There, no doubt, in working out what the lord justice considered the rights of the parties, he made a suggestion that accounts should be taken with yearly rests, but it is observable that he says that after the time of distribution a charge of interest on the advances will have to be taken, showing that his

lordship was of opinion that *primâ facie*, at all events, after the period of distribution whatever it might be, the ordinary mode would be to charge interest on the advances.

Now we come to the question, What is the period of distribution here? What is the will? The will says that the estate is to be converted, and directs payment of the debts and legacies and division of the residue amongst the three residuary legatees. The period of distribution therefore is, *primâ facie*, the death of the testator, but I can understand a state of circumstances in which the period of distribution would not really be that period. If, for example, after paying debts and legacies, there had been only enough to pay the £30,000 in which the widow had a life interest, no real division could take place till the death of the widow, when the £30,000, or at any rate three-quarters of it, fell into the residue; and if the state of the testator's assets had been such as not to leave a surplus beyond what was required for payment of debts and legacies, I should have been prepared to hold that the period of distribution did not arise till the death of the widow. But the facts do not bear this out.

It is agreed that after paying debts and legacies there was a clear surplus of £22,000, which left an ample margin for division amongst the parties, after, in the first instance, paying the sum of £6,000 each to Mrs. Hopgood and Miss Lambert, so as to put them on the same footing as Mrs. Moore. What Mrs. Moore suggested is based on the judgment of Rigby, L.J., in *In re Dallmeyer*, namely, that the proper way to deal with the case is to treat each party as having an interest in the estate to the extent of this sum in the first instance, Mrs. Moore bringing her £6,000 into hotchpot, then divide the rest between them equally, and ascertain from this point of view the interest of each in the *corpus*, and divide the income between them in proportion to this interest. For example (I put the case for simplicity of calculation), if the net surplus after paying the debts and legacies, including the sum of £6,000, was £18,000, in distributing that, this £6,000 would be brought into hotchpot, and you would have, before you distributed anything else, to pay this amount both to Mrs. Hopgood and to Miss Lambert; then there would remain, after deducting £12,000 paid away in this way, £6,000, payable among the three, giving £2,000 to each. Therefore the distribution of this balance of £18,000 would be that Mrs. Hopgood and Miss Lambert would take £8,000 each and Mrs. Moore £2,000. It was said that the real estate ought to be treated as representing those sums of £8,000, £8,000, and £2,000, and the income ought to be divided between them in the proportion of those sums, that is to say, in the proportion of 8, 8, and 2, or 4, 4, and 1; or, putting it shortly, Mrs. Hopgood and Miss Lambert take four-ninths each, and Mrs. Moore takes one-ninth of the income, whatever it was which was produced. I confess I was struck with this argument; but on consideration it seems to me that this course does not produce equality in the sense in which that term is used in the judgment in *In re Rees*. What you should do is to provide that all the children shall, at the widow's death, take the same shares as they would have taken if no advance had been made. Now, in this case, if no advance had been made, the sum which it was necessary to raise by mortgage would have been less by £6,000. Therefore so much of the income of the real estate as was necessary for the payment of interest on the mortgage would have been available for division among the three residuary legatees, and to the extent that that income was applied in payment of the interest on the mortgage the other residuary legatees, Mrs. Hopgood and Mrs. Lambert, were in a less favourable position than Mrs. Moore. It seems to me, therefore, it would not be right to divide the income in the ratios which I have supposed of 4, 4, and 1; but it is necessary to bring in something additional which would represent the income which would have been available for equal distribution among the three if the £6,000 had not been raised and paid out of the estate.

Having had the opportunity since the case was discussed before me of thinking it over, I have come to the conclusion that that is not a fair mode of producing equality according to the rule laid down in *In re Rees*, and I think, having regard to what Rigby, L.J., says in the latter part of his judgment, to which I have called attention, I must adhere to the rule laid down in all cases till *In re Dallmeyer*. I only depart from it to this extent: *In re Rees* the rate of interest charged was at 4 per cent. Now, at the time of the decision of *In re Rees* that rate of interest had been at all events adopted by the Court of Chancery as representing the average rate of interest payable in respect of investments such as trustees were authorized by the court to invest in; it is also the rate of interest which is charged according to the rules of court on debts which are provable in administrations, and as to which there is no special provision as to their bearing interest. The rule as to the rate of interest payable on debts has not yet been altered, and that remains the rate at which interest is charged on debts; but as regards other applications of the rule charging 4 per cent., it has in recent times been thought that that rate is excessive inasmuch as in these days trust investments do not yield anything like 4 per cent. and several judges, I think North and Kekewich, JJ., particularly in the number, have under circumstances such as these, been in the habit of saying or have said that only 3 per cent. is to be charged. I understand on the present occasion the other residuary legatees, for whom Mr. Cartmell appears, do not desire that anything more should be charged, and I think, therefore, in the present case the rate which ought to be charged in respect of the advances ought to be 3 per cent. and not 4 per cent. In this case there was no advance during the testator's lifetime and the date at which interest would begin to be charged would be that at which the advance was actually made.

Judgment accordingly.

Solicitors, *Bird & Hamer; Paice & Cross; Fladgate & Co.*

Q. B. Div. (Vaughan Williams and Wright, JJ.) — March 31; April 5; May 27.

THE ATTORNEY-GENERAL v. WOOD AND OTHERS. (*a.*)

Inland revenue—Estate duty—Settlement—Contingent life interest—Subsequent subsisting limitations—Property passing on death—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5.

By a marriage settlement the share of the wife in a certain trust fund, created by the will of her deceased father, was brought into settlement upon trusts to pay the income to the wife during the joint lives of herself and her husband, and after the death of either of them, then to pay the income to the survivor for life, and if the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

wife should survive her husband, and there should be no issue of the marriage, then upon trust for the wife, her executors, administrators, and assigns. There was no issue of the marriage, and the wife survived her husband, who died in 1895.

Held, that on the death of the husband no estate duty was payable under sections 1 *and* 2 *of the Finance Act,* 1894, *for that "subsequent limitations under the settlement continued to subsist" within section* 5, *sub-section* 3, *and therefore no property passed on the husband's death.*

Information by the Attorney-General. By a deed of settlement dated the 8th day of January, 1877, on the marriage of the Rev. Charles Lyndhurst Vaughan and Henrietta Barbara Goschen, a fund representing a trust legacy of £85,000 to which the said Henrietta B. Goschen had become absolutely entitled under the will, dated the 12th of July, 1865, of her father, William Henry Goschen, deceased, was brought into settlement and assigned unto the defendants Robert Wood, Charles H. Goschen, and Alexander H. Goschen, in trust to pay the income thereof to the said Henrietta Barbara Goschen, for her sole and separate use during the joint lives of herself and her intended husband, and after the death of such one of them as should first die, to the survivor of them for life, and after the death of such survivor, to the issue of the marriage. There then followed a declaration that if there should be no issue, the defendants, the trustees of the settlement, should stand possessed of the trust fund, if the wife should survive the husband in trust for the said wife, her executors, administrators, and assigns.

The said marriage was duly solemnized shortly after the execution of the said indenture. The Rev. Charles L. Vaughan died on the 8th of August, 1895. There was no issue of the marriage, and the said Henrietta Barbara Vaughan consequently became absolutely entitled on his death to the property settled by her.

The Crown thereupon claimed a declaration that upon the death of the said Charles L. Vaughan estate duty became payable under the provisions of the Finance Act, 1894, upon the capital value of the trust fund comprised in the said settlement of the 8th of January, 1877, less the value at the time of his death of the life interest of the said Henrietta Barbara Vaughan in such funds.

Sir Richard Webster, A.G. (*Sir R. T. Reid. S.G.*, and *Vaughan Hawkins* with him) for the Crown.

Sir Robert Reid, Q.C., and *Austen Cartmell* for the defendants.

The arguments of counsel appear in the following written judgments.

Cur. adv. vult.

VAUGHAN WILLIAMS, J.—In my opinion our judgment in this case should be for the defendants.

The material facts of the case are that by the settlement made on the marriage of Mr. Charles Lyndhurst Vaughan and Miss Henrietta Barbara Goschen, a fund representing a trust legacy of £85,000 under the will of her father to which she had become absolutely entitled was brought into settlement in trust to pay the income to Mrs. Vaughan for her sole and separate use during the joint lives of herself and her husband, and after the death of such one of them as should first die to the survivor for life. Then follows a trust in favour of the issue of the marriage, and then a declaration that after the death of the husband, and in default of appointment or on failure of children the trustees should stand possessed of the trust fund if Mrs. Vaughan should survive her husband, in trust for Mrs. Vaughan, her executors, administrators, and assigns. So in popular language and in the events which have happened, that is to say failure of issue and death of Mr. Vaughan in his wife's lifetime, and the death of all other persons entitled to any interest under the will of Mrs. Vaughan's father, Mrs. Vaughan has now become the absolute owner of the trust fund in possession. The Crown contends that in this state of circumstances estate duty has become payable under the provisions of the Finance Act, 1894, upon the capital value of the trust fund comprised in the said settlement, less the value at the time of Mr. Vaughan's death of the life interest of Mrs. Vaughan in the trust fund. The estate duty, if leviable at all, must be so leviable under the provisions of sections 1 and 2 of the Finance Act, 1894. Section 1 enacts as follows: In the case of every person dying after the commencement of this part of this Act there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called "estate duty," at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty. Section 2, sub-section 1: "Property passing on the death of the deceased shall be deemed to include the property following—that is to say, (*a*) property of which the deceased was at the time of his death competent to dispose; (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole." The other two clauses are not material.

Now, the first question is whether any property passed to Mrs. Vaughan on the death of her husband. It is clear that no property passed within the meaning of section 2, sub-section 1 (*a*)—that is to say, no property passed of which the deceased at the time of his death was competent to dispose. If property passed at all it must be by virtue of the definition in section 2 (1) (*b*)—that is to say, property in which the deceased, Mr. Vaughan, had an interest ceasing on his death to the extent to which a benefit accrues or arises by cesser of such interest.

Now, if the words at the beginning of section 2, sub-section 1 (*b*), are taken alone, they seem clearly wide enough to include the present case, because the £85,000 fund was property in which the deceased, Mr. Vaughan, had an interest (it is true not an interest in possession) which ceased on his death, and that a benefit (it is true not a benefit in income) accrued by the cesser of such interest—that is to say, a benefit accrued by the cesser of the husband's contingent interest to Mrs. Vaughan; for upon the cesser of her husband's interest she would have been able to get a larger price if she had sold her own interest, and from a pecuniary point of view her husband's interest would, during his lifetime, have been worth something to her if she had desired to purchase it.

Now, this being so, it remains to be seen whether there is anything, either in the residue of the section or in the other sections of the Act, to cut down "the interest of the deceased" to mean "an interest of the deceased in possession," or to cut down the meaning of "benefit accruing" to "benefit accruing in income."

Now, it is said that the words at the end of section 2, sub-section 1 (*b*), "as holder of an office or reci-

pient of the benefits of a charity or corporation sole," indicates that clause (*b*) only applies to interests in possession, because the words "holder," "recipient," and "corporation sole" are inapplicable except to an interest in possession. It is very difficult to conceive a concrete case in which there should be a contingent right to receive the benefits of a charity, but it would certainly seem as if the death of such person, and the consequent cesser of the contingent interest might cause a benefit to someone taking an absolute interest in remainder, and that such a case would be outside the words of this exception, and that consequently estate duty would be payable unless "interest" in this section is construed to mean "interest in possession," and it is, of course, inconceivable that the Legislature intended estate duty to be paid in a case where the deceased was not a recipient through the interest not having fallen into possession, and not to be payable in the case where the deceased was a recipient and had an interest in possession. But I do not think that these considerations are sufficient by themselves to cut down the natural meaning of the words in the earlier part of the section; I think the more proper view is to regard these words as a piece of imperfect drafting.

Now, the next ground upon which it is said that the words of section 2 (1) (*b*) ought to be limited in the way suggested is that section 7, sub-section 7 (1), which prescribes the measure of the value of the benefit accruing from the cesser of an interest ceasing on the death of the deceased, prescribes a measure based upon the assumption that the interest ceasing is an interest in possession, because it speaks of the interest extending to the whole income of the property, or to less than the whole income of the property, and deals only with those two cases, and it is said that "income" is a term applicable only to an estate in possession, and that the deceased, who was not in possession, had no interest in the income, and that, even if it is said that he had a contingent interest in the prospective income, the prospective income is not necessarily the same as the income at the time of his death, but might after the interest fell into possession, be greater or less than the income produced by the property at the time of his death. It is to be observed on this argument that although estate duty under section 2 (1) (*b*) is only leviable in respect of property in which the deceased had an interest ceasing on death, to the extent to which benefit accrues by the cesser, and although section 7, sub-section 7, purports to prescribe a measure of the value of that benefit, the measure actually prescribed seems to be the value of the property out of which the income flows, and not the value of the benefit. I wish here to say with reference to any observations that follow upon the meaning of section 7 that it is not necessary for the judgment which I have arrived at to construe section 7, and I must not be taken by this judgment to be construing section 7. I am only taking a hypothetical construction of that section and showing how that hypothetical construction upon which certain arguments were based would operate upon the conclusions that we have arrived at.

The suggested departure of section 7, sub-section 7, from section (2) (1) (*b*) by the substitution as the subject of taxation of the property in which the deceased had an interest for the interest which he had to the extent to which benefit accrues by the cesser of that interest, and the apparent injustice and inconsistency of this substitution properly lead to such a construction of the Act as might minimise its operation; but I cannot bring myself to the conclusion that it was intended by the Legislature to limit section 2 (1) (b), to interests in possession, and exclude from taxation benefits arising from cesser of a contingent life estate which had not fallen into possession. It is obvious that the benefit arising from such cesser might be of most substantial pecuniary value, and it seems to me that the scheme of the Act is intended to include not only every case of property passing by death, but that section (2) (1) (*b*) shows that the scheme also includes every benefit accruing by death even although the property from which the benefit is derived does not itself pass. No one, I think, would hesitate to come to this conclusion if the Legislature had limited the duty by the value of the benefit accruing, and I do not think that we are entitled to refrain from coming to that conclusion because the Legislature has adopted what seems to be an irrational measure of that benefit. I am quite aware that those who argued on behalf of the Crown attempted to avoid the inconsistency between section 7, sub-section 7, and section 2 (1) (*b*) by saying that the words "extent of the benefit" means "extent in proportion of the income or profit of the property receivable by the deceased in respect of his interest." I do not agree in this view; but, even supposing that the apparent inconsistency between section 2 (1) (*b*) and section 7, sub-section 7, can be avoided by this construction, another difficulty remains which the Crown itself has recognized in the information, and that is, that if the construction of the Crown is right and the inconsistency between the two sections is thus got rid of, it is difficult to understand why the Crown has deducted in their claim the value of the life interest of Mrs. Vaughan; for so to do is clearly to recognize that the quantum of estate of the deceased must be taken into consideration.

Holding therefore, as I do, that there was in this case, within the meaning of section 2 (1) (*b*), a cesser of interest on Mr. Vaughan's death, and a benefit accruing therefrom, it remains to consider what is the value of that benefit, and lastly, whether there is anything in the facts of this case to exempt the defendants from paying duty. Now, first, what is the measure? Can you apply section 7, sub-section 7? To apply the measure given by this section according to the contention of the Crown would seem to be the application of an obviously unjust measure. It is this, no doubt, which accounts for the moderation of the claim of the Crown. The Attorney-General seemed in his argument disposed to get out of the application of the section by accepting the suggestion that it could not apply, and saying that the section was not exhaustive, that is, that the measure was not of universal application. I dissent from this, and I think that in cases where the measure cannot be applied no duty can be levied, and it seems clear that the only ground upon which the section can be held not to apply would be that the words it contains relative to income limit its application to estates not in possession. In my opinion, therefore, section 7, sub-section 7, does supply the measure. If, however, section 7, sub-section 7, does not supply the measure, and interests passing other than those in possession are property taxable with estate duty, I think that the measure would be, not that suggested by the Crown, but the increase in value of the absolute property in reversion having regard to the outstanding life estate of Mrs. Vaughan by the cesser by death of Mr. Vaughan's contingent interest. This is the result which one would expect from the general scheme of the Act, but unfortunately the Legislature has not said so. The mistake seems to have arisen from the desire of the draughtsman for uniformity, leading him in the case of cesser by death of an interest, to make the property and not the benefit the measure of the value

for the purposes of taxation, because it happens to be so in the Act generally.

I wish once more to say that nothing I have said here about section 7 must be taken as a judgment on my part as to the meaning of section 7. I have only put a meaning upon it which was suggested in the argument on behalf of the Crown for the purpose of testing that argument.

It remains only to consider the exemptions. Two are suggested—namely, those contained in section 5, sub-section 3, and section 21, sub-section 5. The property in question seems to be settled property within the meaning of section 22, sub-section 1 (*h*), of the Act. It will be observed that in the case of settled property a further estate duty, called settlement estate duty, on the principal value of the settled property is payable as soon as the property passes, unless the passing be to the wife or husband of the deceased, but the settlement estate duty is only once payable during the continuance of the settlement. These are the exemptions regarding settlement estate duty. Then sub-sections 2 and 3 of section 5 provide exemptions also in the case of estate duty. Sub-section 2 provides that if estate duty has been paid in respect of settled property, estate duty shall not be payable in respect thereof until the death of some person competent to dispose of the property; and then sub-section 3 provides that in the case of settled property, where an interest of a person fails before it becomes an interest in possession, the property shall not be deemed to pass on his death if subsequent limitations (which, I take it, means one or more) under the settlement continue to subsist. Now, did subsequent limitations under the settlement continue to subsist at the death of Mr. Vaughan? I think they did, notwithstanding the fact that Mrs. Vaughan thereupon became absolutely entitled to this property, and could have demanded a transfer of it from the trustees. I think that "subsist" properly describes any estate created by the settlement which has not come to an end. I do not think that such an estate is the less a limitation because there is no estate limited beyond it. In other words, I think that limitations under the settlement continue until the death of a person who was at the time of his death during the continuance of the settlement competent to dispose of such property. It is said that these sub-sections assume that estate duty and settlement estate duty have each of them been paid in respect of this property. I can only say that although no doubt the sub-sections were passed in contemplation of that state of things, the Legislature has not seen fit so to limit them, and no injustice seems to be done, because the death of Mrs. Vaughan will be the first occasion on which the property settled by the marriage settlement will pass by reason of death, except in the case of the death of Mr. Vaughan, on the happening of which, section 5 (1) (*a*) expressly prevents settlement estate duty from becoming payable, and, so far as regards property passing under the will of Mrs. Vaughan's father, the existing duties at that time seem to have been paid. In my judgment section 5, sub-section 3 prevents either settlement estate duty or estate duty becoming payable. I wish to add that I do not think that the fact that section 14 of the Finance Act of 1896 (59 & 60 Vict. c. 28) contains an enactment in the sense of the construction which I am now putting on section 5, sub-section 3 shows that that construction is wrong because, if it were right, the amending Act might be said to be useless. The amending Act may be merely declaratory to clear up doubts, and even if not so intended, the presence of the section in the later Act cannot determine the construction of the earlier Act.

The other exemption suggested is under section 21 (5). I do not think that this exemption has any operation. The words are as follows: "Where a husband or wife is entitled either solely or jointly with the other to the income of any property settled by the other under a disposition which has taken effect before the commencement of this part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor." Mrs. Vaughan did not on Mr. Vaughan's death become entitled to the income of the property settled by herself. That income was already hers in possession at the time of the death; and moreover, Mrs. Vaughan did not, as survivor, become entitled to income of any property settled by her on her husband either solely or jointly. I have only to add that I do not think that *The Attorney-General* v. *Robertson*, 41 W. R. 241, [1893] 1 Q. B. 293, which is a decision under the Succession Duty Act, 1853, has any application, nor the observation of Lindley, L.J., to which we were referred. In my opinion our judgment should be for the defendant.

WRIGHT, J.—I agree on the ground that in my opinion section 5, sub-section 3 applies to this case.

As to section 7, sub-section 7, I have no definite idea what it means. I am rather inclined to think that it is not exhaustive nor co-extensive with section 2 (1) (*b*), but applies only where the deceased has an interest in possession; but I do not express that as any judicial opinion.

Judgment for defendant.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for defendants, *Druces & Attlee.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Wright, JJ.) — April 6, 29.

In re RAATZ.
Ex parte RAATZ. (*a*.)

Bankruptcy — Receiving order — Petitioning creditor's debt—Bills of exchange—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6 (1) (b).

When a creditor has taken bills from a debtor in lieu of payment, and that debtor commits an act of bankruptcy, the creditor is thereupon entitled to treat the bills as dishonoured, and may present a petition in bankruptcy upon the original debt.

Appeal against a receiving order made by the registrar of the county court at Swansea.

Meager, for the debtor.—There are two objections against this order—firstly, the petition was founded on a debt due for goods sold and delivered, for which the debtor has given his acceptances which have not yet matured. The petition might have been founded on the bills on maturity, but could not rightly be founded on a debt for which conditional payment has been given: *Ex parte Mathew, Re Mathew*, 32 W. R. 813, 12 Q. B. D. 506. Secondly, there was not sufficient evidence that the bills were held by the petitioning creditor at the date of the petition. The petition did not set them forth, nor were they stated to be held by him in the affidavit in support of the petition.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Muir Mackenzie, for the petitioning creditor.—It is true that bills held by the petitioning creditor are usually set forth in the petition as securities, but it is not necessary to set them forth, because they are not securities on the property of the debtor, but merely obligations. Further, in this case they were produced by the petitioning creditor at the hearing. For the purposes of a bankruptcy petition a bill of exchange is the same thing as a bond, and that was held to be a sufficient petitioning creditor's debt in *Ex parte Griffith, Re Mostyn*, 1 W. R. 236, 3 De G. M. & G. 174.

Meager replied.

Cur. adv. vult.

April 29.—VAUGHAN WILLIAMS, J.—In my judgment the decision of the registrar here must be affirmed. Two objections have been taken to it—firstly, that although the bills of exchange accepted by the debtor were produced there was no proof that, at the time of the presentation of the petition, the petitioning creditor was the holder of these acceptances; and it was said rightly that if he was not the holder the debt represented by the acceptances would be *pro tanto* paid. The affidavit does not in terms state that the petitioning creditor is the holder of the bills, but the bills were produced by him at the hearing, and the affidavit swore to the existence of the original debt, which would have been untrue if the bills had been parted with. I do not think the petition was in proper form here, it ought to have mentioned the existence of the bills, and if any suggestion had been made at the hearing of the petition that the petitioning creditor was not at that date the holder of the bills, the debtor ought to have had an opportunity of going into the matter, but it has hardly been contended, in the face of the fact that the bills were produced, that the petitioning creditor was not the holder at the date of the petition.

Secondly, it was objected that the holding of these acceptances rendered it impossible to petition on goods sold and delivered during the currency of the bills given for such goods. This objection is altogether inconsistent with bankruptcy practice. Section 6 (1)(*b*) of the Bankruptcy Act, 1883, enacts that the petitioning creditor's debt must be "a liquidated sum, payable either immediately or at some certain future time." In this case the original debt was for a liquidated sum, but was suspended by the taking of the bills. Such suspension was, however, determined by the commission of an act of bankruptcy by the debtor. I do not say that the creditor could have sued on these bills, I do not think he could; but I do say that the debtor's insolvency determines the period of credit given by implication by the law merchant when bills are taken in lieu of present payment. The credit is given on the assumption of solvency, it ceases on the debtor becoming insolvent, and the creditor is entitled to found a bankruptcy petition on the original debt.

WRIGHT, J.—I agree. I think that where a creditor holds the acceptance of a debtor, and that debtor commits an act of bankruptcy, the creditor can treat the acceptance as dishonoured for the purposes of presenting a petition in bankruptcy, as the debtor has thereby put it into the power of his other creditors to force him to dishonour the bill.

Appeal dismissed.

Solicitor for the appellant, *Ivor Evans*, Swansea.

Solicitor for the respondent, *A. J. Benjamin*.

House of Lords.

From C. A. (England). April 8.

"THE MECCA." (*a*.)

Appropriation of payments—Debtor and creditor—Rule in Clayton's case—*Right to appropriate.*

The rule in Clayton's case, 1 *Mer.* 572, *does not apply where there is no account current between the parties, nor where, from the nature of the transactions or other circumstances, it is clear that the creditor intended that it should not.*

Where there has been no appropriation by the debtor the creditor has the right of election up to the last moment.

Decision of the Court of Appeal *reversed.*

This was an appeal by the plaintiffs in the action from a decision of the Court of Appeal affirming a judgment of Bruce, J.

The facts are taken from the judgments:

The action was brought by Cory & Co. against the owners (Hamidieh Steamship Co.) of the steamship *Mecca* (formerly called *The State of Nevada*) for necessaries supplied to that vessel in Alexandria, on two occasions, in March, 1894. The owners of *The Mecca* were also the owners of a vessel called *The Medina* (formerly called *The State of Pennsylvania*) to which necessaries had also been supplied by the plaintiffs. Bills were drawn by the captains of the vessels on the owners and accepted, but dishonoured, and after some correspondence the owners offered to pay £900, which was due to them from some underwriters, if plaintiffs were prepared to hand over the bills to an equivalent amount.

The plaintiffs agreed to give a receipt on account of the bills owing, though they could not hand over the bills themselves, as they were in Egypt, but they gave a receipt in the following form:

"Received from Messrs. H. E. Moss & Co., £900 (nine hundred pounds), on account of moneys owing us by the Hamidieh Steamship Co. of Constantinople. The drafts embodying this amount being in Egypt we cannot now return them, but herewith agree to take no further action in connection therewith during the period agreed upon between us.

"*Per pro* Cory Brothers & Co., Lim.
W. Ganslandt.

"August 15, 1894."

The correspondence and account raised the question which their lordships were called upon to determine. *The Mecca* was arrested for the amount alleged to be due, and in this action, if the amount for necessaries supplied to *The Mecca* had been paid, the plaintiffs must fail, notwithstanding that the amount of £401 2s. 9d. was still due to them. The question accordingly was whether there had been an appropriation of the sum of £900 by the parties, or whether by law there was any rule by which it could be determined in respect of what indebtedness that £900 was paid.

The correspondence and the account, so far as they were material to the case, were as follows:

"June 22, 1894.

"Messrs. Theodoridi & Co., Constantinople.

"Dear Sirs,—In reply to your favour of 15th instant, we now beg to inform you that we have arranged with Messrs. H. E. Moss & Co. to withhold from arresting any of your steamers for the next three months, provided that the full amount due to ourselves and our friends be paid us out of the moneys

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Messrs. H. E. Moss & Co. hope to get from the underwriters.

"Yours truly,
"Cory Brothers & Co., Lim.
W. Ganslandt.
"August 22, 1894.

"C. A. Theodoridi, Esq., Constantinople.

"Dear Mr. Theodoridi,—We were pleased at receiving the £900 from Messrs. H. E. Moss & Co. on account of the money due to us from the Hamidieh Steamship Co., and thank you for your good offices in the matter.

"We hope it is the company's intention to at once remit us the balance due—namely, £401 2s. 9d., as *per* statement herewith, for I think you will agree with me that when the company is finding some thousands a month for financing *The Mecca*, paying canal dues, coals in cash, &c., it is absurd to let the above amount be outstanding, and I hope therefore you will at once make a settlement with us, and thus obviate the necessity of our taking further steps to secure it.

"With kind regards, and hoping you have not suffered by the recent earthquake,

"Yours faithfully,
"E. Moxey."

"3, Fenchurch-avenue, London, E.C.,
"August 22, 1894.

"Messrs. The Hamidieh Steamship Co., Constantinople.

"In account with Cory Brothers & Co., Lim.

—	—	Days	Interest at 5 per cent.			—		
			£	s.	d.	£	s.	d.
April 7	To draft p. ss. *State of Pennsylvania*, at Genoa, £267 14s. due, and notarial exp. £3	137	5	1	8	270	14	0
,, 26	To draft p. ss. *State of Nevada*, at Alexandria, £176 5s. due, and notarial exp. 17s.	118	2	17	2	177	2	0
,, 27	To draft p. ss. *State of Nevada*, at Port Said, £194 8s., and notarial exp. 15s.	117	3	2	6	195	3	0
,, 27	To draft p. ss. *State of Pennsylvania*, at Port Said, £630, and notarial exp. 15s.	117	10	2	3	650	15	0
Aug. 22	To telegrams to and from Constantinople	—				7	2	5
Aug. 15	To interest to date at 5 per cent	—				20	6	4
		£	21	3	7	1,321	2	9
	By amount received from H. E. Moss & Co.	7		17	3	900	0	0
,, 22	By balance of interest	—	20	6	4			
,, 22	By balance	—				401	2	9
		£	21	3	7	1,301	2	9
	To balance					£ 401	2	9

The first item in this account was for *The Medina*, the second was for *The Mecca*, the third was for *The Mecca*, and the fourth for *The Medina*.

The period of grace having expired, the present action was brought by the appellants against *The Mecca*, which was found and arrested at Cardiff in the beginning of October, 1894.

Gainsford Bruce, J., held that the payment was by law appropriated to the earlier items in the account, and gave judgment for the defendants. The judgment was affirmed on appeal.

Sir W. Phillimore (*Bucknill, Q.C.*, and *Gerard Ince* with him), for the appellants.

Pyke, Q.C. (*A. E. Nelson*, and *H. S. Q. Henriques* with him), for the respondents.

Bucknill, Q.C., replied.

The House took time for consideration.

Lord HALSBURY, L.C., after stating the facts, continued: It is said that the account last referred to brings the question within the authority of *Clayton's case*, 1 Mer. 572; and, in order to see whether this is so, it is necessary to consider what *Clayton's case* was, and the reasons given by Sir William Grant, who decided it. That learned judge says: "Where an account current is kept between parties as a trading account, there is no reason for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in which is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very fact of setting the two items against each other." This rule so formulated has been adopted in all the courts in Westminster Hall—see *Field* v. *Carr*, 5 Bing. 13.

It is to be remembered, however, that on more than one occasion it has been pointed out that this is not an invariable rule of law; the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule; and if it were necessary to decide it, I confess I should have great doubt whether the transactions I have described would not themselves negative the application of such a rule. The letter of the 22nd of June shows that the parties intended that the right of arresting the ship should be preserved, and that it was only to be suspended for the three months, and I cannot think that, knowing perfectly well what they were about, either of the parties could have supposed that the payment was to be so appropriated as to release *The Mecca* from the liability to arrest. But, in truth, I think this case is not within the rule at all. This is not an account current; there is no setting one item against another; credit is given for the £900 at the end of all the items. They are all separate transactions, and, although on one piece of paper, seem to represent only historically the transactions as they occurred.

How the principle of Sir William Grant's decision can apply to two transactions of identically the

same date, I cannot understand. There is in respect of these items no earlier date—it is the mere fact that one precedes the other in its place on the paper. I think it would be extremely inconvenient in business to draw inferences from the shape or order of accounts, and I think it would be an altogether novel application of a principle which has been estabilshed so long that I should feel great reluctance to engraft a new application upon it.

In this case it appears to me that the letter and account negative any appropriation of the £900 to any particular part of the indebtedness: and as the plaintiffs were entitled to appropriate, I think they have done so by this action, and I therefore move your lordships that the judgment be reversed, and judgment be entered for the plaintiffs for £401 2s. 9d.

Lord HERSCHELL.—This action was brought in the Admiralty Division *in rem* by the appellants against the owners of the steamship *Mecca* as defendants.

The action was brought to recover the amount of certain bills of exchange. The defence was payment. It is admitted that unless and except in so far as this defence can be established, the action is an undefended one. [His lordship then stated the facts, and proceeded:] It is contended on the part of the appellants that, inasmuch as the payment was not appropriated by the debtors, it was open to them to make any appropriation of it they pleased, and that not having, prior to bringing the action, made any other appropriation, they were entitled to treat the payment as made on account of *The Medina* items and thus to maintain the action against *The Mecca*.

The case was treated in the Court of Appeal as governed by *Clayton's case*. No appropriation of the payment having been made at the time, it was held that it must be attributed as a matter of law to the first three items of the account, and that the items relating to the steamship *Mecca* must therefore be treated as paid. I do not think the present case is governed by *Clayton's case*. It was there decided that where there is a current account between parties, and payments are made without appropriation of them, they are to be attributed in point of law to the earliest items in the account. In the present case, at the time the payment was made no account had been delivered by the appellants to the respondents. The debts in respect of the two vessels arose from transactions which were entirely distinct; they had never been brought into a common account. An account comprising all the items was for the first time made out and transmitted by the appellants to the respondents after payment was made. In the account thus made out credit was given for the £900 which had been received. At the time of the payment, therefore, there was no account to the items of which the payment could by operation of law be appropriated. The question to be determined is what was the effect of the transmission to the respondents of the statement of account of the 22nd of August. It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt in to a single account, and transmitting it to their debtors in the manner they did? I have had some doubt whether it might not be regarded as indicating to the debtors an appropriation of the sum paid to the earlier items in the order in which they appear in the account. But upon a consideration of all the circumstances, including the correspondence between the parties, I have come to the conclusion that the appellants did not intend to make any such appropriation, and that the respondents were not entitled so to regard it.

Lord MACNAGHTEN, after stating the facts, said: In addition to other defences which have failed, the respondents pleaded that part of the money paid to the plaintiffs by H. E. Moss & Co. "was in respect of the whole amount sought to be recovered by the plaintiffs" in the action. At the trial the defendants' counsel relied on the statement of account of the 22nd of August, 1894, as an appropriation by the plaintiffs of the £900 towards the payment of the four bills in the order in which they were entered in the account, and contended that by such appropriation *The Mecca* bills had been paid.

Gainsford Bruce, J., held that the payment was, by law, appropriated to the earlier items in the account, and gave judgment for the defendants. The judgment was affirmed on appeal.

I have some difficulty in following the reasoning of the learned judges in the Court of Appeal. There seems to be an error in the shorthand notes, because the Master of the Rolls is made to say that the account came in the first instance from the company. But, if I understand his meaning aright, he does say that the account passing between the parties did not of itself operate as an appropriation or afford any indication of an intention to appropriate; it was as if each party in turn had said, "Here is the account. I do not appropriate." Kay, L.J., treats the case as governed by *Clayton's case*, to which the Master of the Rolls also refers. "I cannot see any reason," Kay, L.J., says, "why *Clayton's case* does not apply to the facts before us." Later on, after stating the facts as they appeared to him: "That is," he observes, "the very case to which *Clayton's case* would apply." Smith, L.J., seems to take the same view as the Master of the Rolls. "Neither party," he says, "appropriated the payments to anything." Then he adds, "The £900, by the law, goes to the earlier items." If what occurred in August did not amount to an appropriation, it is difficult to see why the appellants were not at liberty to make their election in October when they found *The Mecca* at Cardiff. And certainly I am at a loss to understand what bearing the doctrine of *Clayton's case* can have upon the question.

Now, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor. In 1816, when *Clayton's case* was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or, at any rate, within a reasonable time, whatever that expression in such connection may be taken to mean. But it has long been held, and is now quite settled, that the creditor has the right of election "up to the very last moment," and he is not bound to declare his election in express terms. He may declare it by bringing an action, or in any other way that makes his meaning and intention plain. Where the election is with the creditor it is always his intention, expressed or implied or presumed, and not any rigid rule of law, that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account or anything else which indicates

an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of the civil law, reasonable as it is, that if the debts are equal, the payment received is to be attributed to the debt first contracted. Now, *Clayton's case* was this: Clayton had a current account with a firm of bankers. One of the firm died. Some time afterwards the bank failed. The customer's account was kept from first to last as one unbroken account. At the date of the death of the deceased partner the customer had a large balance to his credit. Afterwards he drew out sums which in the aggregate exceeded that balance. On the other hand, moneys were paid in from time to time to his credit, and at the date of the failure the balance in his favour was rather larger than it was at the date of the death. He claimed to attribute his drawings after the death to subsequent payments in. But Sir W. Grant said No. He distinguished the case from authorities which had been cited in favour of the claimant by saying, "They were all cases of distinct isolated debts between which a plain line of separation could be drawn, but this is the case of a banking account where all the sums paid in form one blended fund, parts of which have no longer any distinct existence; neither banker nor customer ever thinks of saying this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." The facts of the present case are very different. There is no current account between the parties here. There was no account between them at all until the bills were dishonoured. The debts were distinct. But it is, I think, important to observe that even in cases *primâ facie* falling within the doctrine of *Clayton's case*, the account between the parties, however it may be kept and rendered, is not conclusive on the question of appropriation. In a case in the Exchequer Chamber in 1874—*City Discount Co.* v. *M'Lean*, L. R. 9 C. P. 692, 22 W. R. Dig. 114, where there was a current and unbroken account between the parties, *Clayton's case* was pressed upon the court. "I quite agree," said Baron Bramwell, "with the principle of the cases cited, such as *Clayton's case* and *Bodenham* v. *Purchas*, 2 B. & Ald. 39, and I think we ought to follow them where applicable. . . . But we must decide every case according to its own circumstances." "The true rule," added Blackburn, J., "is that laid down in *Henniker* v. *Wigg*, 4 Q. B. 792, which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebuttted by evidence to the contrary." The rule in *Clayton's case* was very much considered in *Hallett's case*, (1880) 28 W. R. 732, 13 Ch. D. 696, by the Court of Appeal, consisting of Jessel, M.R., and Baggallay, L.J., and Thesiger, L.J. It is "a very convenient rule," said the Master of the Rolls, "and I have nothing to say against it, unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then of course that which is a mere presumption of law gives way to those other considerations." "*Clayton's case*," observed Baggallay, L.J., "was decided upon the principle that in the absence of any express intention to the contrary, or of special circumstances from which such an intention could be implied, the appropriation of drawings out to the payments in, as adopted in that case, represented what must be presumed to have been the intention of the parties concerned; and so viewed, the decision is quite consistent with the like presumption being rebutted or modified in another case in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in."

Now, if the rule in *Clayton's case*, which certainly at one time was considered to be a rule of such force and stringency as to interfere even with the equity of following trust moneys into the bank account of a fraudulent trustee, is to be accepted with this qualification, and if an account stated between the parties is only evidence of appropriation of payments, it seems to me that, in order to determine the question at issue on this appeal, it is necessary to consider the circumstances of the case more closely than they were considered in the courts below. If you look at the position of the parties when the payment of £900 was made, and the purpose for which the statement of account of the 22nd of August, 1894, was sent, and examine the terms of the account itself and the letter which accompanied it, it is, I think, impossible to suppose that the appellants could have intended to appropriate the £900 in a manner inconsistent with the rights which they asserted when they arrested the *Mecca*. It is, I think, equally impossible to suppose that they could have intended to renounce or waive their privilege of election. It is quite clear that when the bills were dishonoured the appellants were alive to their rights. They intimated very distinctly that they were prepared to seize both the vessels which were then lying at Suez. It was this threat that brought the company to terms. For some time the appellants could not obtain any satisfactory assurance from H. E. Moss & Co. The Hamidieh Co. put them off with empty promises. But at last the company got frightened, and on the 15th of June, 1894, they wrote to H. E. Moss & Co., referring to the steamers, and saying, "As Messrs. Cory Bros. & Co. threaten to take proceedings against both the above-named steamers if they will not promptly receive from us a satisfactory assurance that they will soon be paid, we beg you will not delay to give them such an assurance, otherwise the results will be very detrimental to the Hamidieh Co., and to our Mr. Constantine A. Theodoridi." So on the 22nd of June, Messrs. H. E. Moss & Co. gave the required assurance, on an undertaking by the appellants that they would not, for three months from that date, arrest any of the property of the Hamidieh Co., either in this country or abroad, unless, meantime, the amounts to be received from the salvage claims on underwriters should fall short of the amount of the bills held by them. Now, after that I rather doubt whether it would have been right for the company to try and steal a march upon their creditors by attempting to appropriate the money so as to release any part of their property. However that may be, the receipt which was given on the 15th of August seems to show that the intention of the parties was that at the expiration of the period of grace the appellants should be remitted to their original rights, giving credit on general account for any sums received.

Again, it seems to me that the letter of the 22nd of August conveyed a distinct intimation that the appellants would exercise their rights unless the balance were paid. It was for the purpose of showing what the balance was, and for no other purpose whatever, that the account was made up. It is impossible to suppose that the appellants, while looking forward to exercising their rights in case of default, would have made up an account with the intention of releasing one of the two vessels, when they could not tell upon which of the two they might be able to lay their hands. Then it seems to me that the very frame of the account affords some indication that it was not intended to apply the payment in discharge of the first three bills, for the interest on those bills is the very last item in the account. If the intention had been to discharge bills which carried interest, it surely would have been intended at the same time to discharge the accrued interest on which no interest would be payable. If the company thought that the appellants intended to discharge *The Mecca* bills, why did they not, when they received the account, ask for their return? I cannot help thinking that if they had made such a request they would have received a very indignant reply. The result might have been the return of the cheque and immediate seizure of the two vessels, which would hardly have answered the company's purposes.

In the result, I am of opinion that it was competent for the appellants to arrest *The Mecca* in October, 1894, and at that time to appropriate the money which they had received from H. E. Moss & Co. to *The Medina* bills.

I think that the appeal ought to be allowed.

Lord MORRIS concurred.

Appeal allowed.

Solicitors for the appellant, *Ince, Colt, & Ince.*

Solicitors for the respondents, *Lowless & Co.*

From C. A. (England). March 19.

KENNEDY *v.* DE TRAFFORD. (*a.*)

Mortgage—Power of sale—Mortgage by tenants in common—Purchase by one co-tenant—Private tender—Validity of sale.

No fiduciary relationship exists between tenants in common of real estate; and should one collect the rents of the whole, he does so as owner.

Where a mortgagee sells under a power of sale, in compliance with the terms of the power and in good faith, the sale cannot be impeached.

Decision of the Court of Appeal, 44 W. R. 454, [1896] 1 *Ch.* 762, *affirmed.*

This was an appeal from a decision of the Court of Appeal (Lindley, L.J., Kay, and A. L. Smith, L.JJ.) reported 44 W. R. 454 [1896] 1 Ch. 762, which reversed an order of the Vice-Chancellor of the Duchy of Lancaster. The facts are given at length in the court below, and are shortly stated by Lord Herschell.

Farwell, Q.C., and *A. C. Maberly*, for the appellant.—Tenants in common stand to each other in a fiduciary relation: *Van Horne* v. *Fonda*, 1 Johns. Ch. Rep. (N. Y.) 388, 406; *Palmer* v. *Young*, 1 Vern. 276; *Hamilton* v. *Denny*, (1809) 1 Ball & B. 199. Dodson acted as agent.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

They referred to *Ex parte Lacey*, 6 Ves. 625; *Eyre* v. *M'Donnell*, 15 Ir. Ch. Rep. 534, 548; *Orme* v. *Wright*, 3 Jur. 972; *Martinson* v. *Clowes*, 30 W. R. 795, 21 Ch. D. 857; *Keech* v. *Sandford*, 1 White and Tudor L. C., 6th ed., p. 53; *Farrar* v. *Farrars (Limited)*, 37 W. R. 196, 40 Ch. D. 395; and as to mere lapse of time, *Rochefoucald* v. *Bousted*, *ante*, 272, [1897] 1 Ch. 196.

Warmington, Q.C., and *T. Clarkson*, for the respondent De Trafford, and *Astbury, Q.C.*, and *G. Dodson*, for the respondent Dodson, were not heard.

Lord HERSCHELL.—I confess I think this as hopeless an appeal as has ever been presented to your lordships.

The action is brought against the mortgagees of some property in Manchester to set aside a sale made by them under the power of sale contained in their mortgage-deed. The property mortgaged was held by two persons, the defendant Dodson and a Mr. Carswell, as tenants in common. They were co-owners, each possessing an undivided moiety. The mortgage was for a sum of £60,000 to Sir. H. de Trafford, who is represented—he being dead—by the respondent De Trafford. It appears that the mortgagees became uneasy about their security (it matters not why), and gave notice calling in the money and pressing for payment. Payment was not made. Various proposals from time to time were made, none of which came to any effect. At the time to which I am referring Carswell had transferred his interest by a voluntary settlement to Brown, and he afterwards became bankrupt; and on the occasion of his bankruptcy Dr. Kennedy, the appellant, was appointed trustee. The rents, no doubt, were collected from time to time by Dodson, one of the defendants in this action, and one of the co-owners. I will come in a moment to the circumstances under which they were collected, but I will deal first with the questions raised with regard to the circumstances of the sale. Having, as I have said, called in their money, and payment not having been made, as they desired to reduce the mortgage debt, the mortgagees, then represented by their solicitor, Mr. Taylor, stated that they must be paid the rents of the property as received instead of their being held by the co-owners for their own benefit subject to the payment of the interest. Accordingly, from a date in the year 1887, the rents were paid over from time to time by Mr. Dodson, who received them, to the mortgagees. But they were not satisfied to let that state of things continue indefinitely; they kept pressing for payment and insisting upon payment. Ultimately they gave notice that they would take proceedings to foreclose. It was suggested that there should be a conveyance of the equity of redemption to save the trouble of foreclosing. Then they gave to Dr. Kennedy, the trustee in the bankruptcy who represented one moiety, this notice: "Our clients' instructions are to realize this security if they can obtain principal, interest, and costs. Is Mr. Carswell's trustee" (that is Kennedy) "prepared to pay them off? If not, we shall forthwith endeavour to effect a sale by private treaty. We are writing a similar letter to Mr. Dodson." There was a similar letter written to Mr. Dodson. Now, the mortgagees having given that distinct notice that, unless the parties came forward and paid off the mortgage, they were prepared to sell at a price which would realize principal, interest, and costs, it seems that at a somewhat later period Mr. Dodson entered into negotiations to become himself the purchaser of the property, and ultimately an arrangement was come to in December, 1888, according to which the mortgagees were willing to sell to Dodson for the amount of principal, interest, and costs, and they

were willing to leave £54,000 of the money on mortgage after the sale was completed. Mr. Dodson wished for some delay in order to be able to be in a position to carry out that arrangement, and it was agreed that the matter should be completed in the following April. In the month of February, 1889, a communication was made to Dr. Kennedy, or to his solicitors (it matters not which), that the mortgagees were negotiating a sale on the basis of payment of an amount equal to principal, interest, and costs; so that that was known to Dr. Kennedy in February, 1889. In May the transaction was completed by a conveyance. In the autumn of 1891 Dr. Kennedy took his first step in the way of making inquiries as to what the mortgagees had done, with a view to this action, which was afterwards brought.

The appellant seeks to set aside the mortgage on the ground that the mortgagees have been guilty of a breach of duty in relation to this sale. First of all, it is said that they have sold at an undervalue, and that that sale at an undervalue has arisen from their not discharging the duties incumbent upon them as mortgagees. Now, it is not disputed that they sold in good faith. They did not intend to do anything else but properly exercise the power of sale vested in them under their mortgage. But it is alleged that they did not put up the premises for sale by auction, that they only inserted two advertisements inviting a sale by tender, and that they ultimately sold for the amount of principal, interest, and costs to Mr. Dodson. I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of any breach of duty towards the mortgagor. Lindley, L.J., in the court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define all that would be included in the words "good faith" or to give an exhaustive definition of them, but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

It is not necessary in this case to give an exhaustive definition of the duties of a mortgagee to a mortgagor, because it appears to me that if you were to accept the definition of them for which the appellant contends—namely, that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith—I think in this case he did take reasonable precautions. Of course, all the circumstances of the case must be looked at. To sell in the manner in which the sale here took place might, let us assume for the moment, to be under some circumstances improper. What we have to deal with are the existing circumstances. Now here there are the two co-owners, who are not acting in all respects harmoniously together. The mortgagee communicates what he is about to do to each of these co-owners. He tells each of them that he is preparing to sell, and that he is willing to take principal, interest, and costs. To that he has received from the present appellant no remonstrance, no answer. Why is he to suppose for a moment that he would receive no answer or remonstrance if Dr. Kennedy thought that selling on such terms would be an improper sale as being at an undervalue, because it must be certain that more than that sum could easily be obtained! It is obvious that where such a communication is made, and no answer is received and no objection put forward, the mortgagee may very reasonably suppose that no objection can be taken, and that nobody considers that he will be selling at an undervalue if he sells for principal, interest, and costs. Having regard to the notice given under those circumstances to Dr. Kennedy, and to the fact that he had heard in February, 1889, that the property was being sold for principal, interest, and costs, and then took no objection to it, it seems to me preposterous for him to come forward at this time of day and allege that he has a right on that ground to insist that the sale is invalid on the ground that the mortgagee has not taken proper precautions in making the sale.

But then it is said that the sale was made to a person who was incapable of buying, because he was in a fiduciary relation, and that that fiduciary relation was known to the mortgagees who sold. I do not think it is established here at all that there was a fiduciary relation between the defendant Dodson and Kennedy. What are the facts? The mortgagors are co-owners; and no doubt one co-owner, Mr. Dodson, had been left by Carswell, in the first instance, I daresay, to collect the rents. Afterwards an arrangement was come to between him and Mr. Brown, who then represented Carswell's interest, that Dodson should collect the rents and pay the money into a bank, and that each of them should draw on that account for the expenses and for the division of the money which thus belonged to them. But it is a fallacy altogether to say that Dodson only got his right to collect the rents by virtue of that arrangement. Dodson was an owner of this property—the owner of an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner—and Dodson in collecting those rents and profits collected them in the right which he possessed as a co-owner of the property. He did not need agency or the appointment of agent to justify him in collecting those rents. If nothing had ever passed between the two co-owners which constituted an authority from the one to act for the other, his right to collect those rents would not have been one jot or one tittle less than it was. No doubt an arrangement was come to that these rents when collected were to be paid into a bank upon which both the co-owners were to draw, but that was an arrangement that might have been put an end to at any time. It was merely an arrangement which was come to by voluntary agreement between the two co-owners. Each co-owner would have an obligation to account to the other in respect of any rents he collected or moneys he received under it.

So much for the relation between Dodson and Brown prior to the bankruptcy, or prior to the date of the setting aside of the voluntary agreement; but after that date Dr. Kennedy became a co-owner, and there was no arrangement between Dr. Kennedy and Mr. Dodson at all. What happened was this—that the mortgagees had said to Dodson, "Now you must pay over the rents to us in reduction of our mortgage debt and payment of interest. You must no longer keep them or pay them to your co-owner." They were in a position to insist upon that. Accordingly, they insisting upon that, Dodson did deal in that way with the rents which he collected. That was the state of things during the time that Kennedy was the co-owner. I do not understand it to be suggested that during Kennedy's time Dodson was agent for Kennedy. He not only never received any authority from Kennedy to collect these rents, but he never did collect them for Kennedy otherwise than as paying

them over to the mortgagees to whom he was bound to pay them over. At all events, it is enough to say that there is not a shadow of ground for suggesting that during that time he was the agent of Kennedy.

But then it is said that during that period he was the agent of the mortgagees, because they, having insisted that he was to collect these rents and pay them over to them, he became their agent in that respect. It seems to me to be clear that he was not their agent to collect these rents. He collected these rents in his own right—the right he had as owner. He was collecting his own rents. No doubt they had insisted that those rents should be paid to them; but how the fact that the mortgagees have said, "When you have got your rents, pay them to us," made Dodson their agent to collect them, I am at a loss to see. Therefore I take it to be abundantly clear that he was not the agent of the mortgagees in collecting the rents any more than he was the agent of Dr. Kennedy, or than he had been the agent of Brown.

But then it is said, if you look at the evidence of Dodson you will find that he said he was an agent. I confess I do not think it is of any importance to look at any particular words of that sort used in evidence, especially when the words originated from the counsel and did not originate with the witness. No word is more commonly and constantly abused than the word "agent." A person is spoken of as an "agent," and no doubt in the popular sense of the word he may be said to be an "agent," although, when it is attempted to suggest that he is an "agent" under such circumstances as to create the legal obligations attaching to agency, that use of the word is only misleading. Therefore, whatever expressions Dodson may have used calling himself an agent, and however true and applicable they may have been in a popular sense, in point of law and in their legal sense they are meaningless. Dodson was not the agent of Kennedy, and he was not the agent of the mortgagees. If that be so, there is an end of the fiduciary relationship which is supposed to prevent his being a purchaser.

It is said in the present case—and I think it is the only other point that was urged—that it was concealed by the vendors, the mortgagees, from Kennedy that Dodson was the person who was purchasing, although they informed Kennedy that the purchase was being made. It seems to me to be utterly unimportant. If there was no fiduciary relation there was no obligation to reveal the name; there was no right in the other party to know it; there was no duty upon them to communicate it.

Therefore, it seems to me that all the grounds upon which the right to set aside this sale has rested utterly and entirely fail.

Another point has been raised—whether it arises upon the pleadings or not seems very doubtful—namely, that, whether the sale is to be set aside or not, Kennedy is entitled to claim as against Dodson that, under the circumstances under which Dodson bought, he should be declared trustee of the one moiety for Kennedy. That depends, in the first place, upon the question of the fiduciary relationship between them arising out of what has been said to be the management of the property and the collection of the rents. I have already, I think, sufficiently dealt with that part of the case. It is quite clear that in all the transactions for some time prior to this sale Dodson was not in any sort of way acting for his co-owner; the two were acting each for himself. The communications from the mortgagees were made to both of them, and so far from Dodson acting as Dr. Kennedy's agent, there was a certain amount of hostility between them—at any rate, there was a want of harmonious action.

But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such a relationship between them that the one co-owner could not take this property and hold it for himself, but that the co-owner is entitled on equitable grounds to have it declared that the benefit of one part of that purchase should be his. No authority has been cited in support of such a proposition. Cases have been referred to of a very different description, where the owner of an estate under a settlement, a tenant for life for example, has been held incapable of obtaining an enlargement of that estate for himself alone. It has been said that whatever benefit he gets must ensure to the benefit of all taking under the settlement. That is a totally different case from this case. The only authority, if it can be so called, which has been cited is the American case before Kent, C.; but he commences his observations by saying that he is not going to lay down a general rule which would be applicable to such a case as this. He deals with that case, the circumstances of which were peculiar and of immense complication, and he certainly does not lay down any rule or doctrine of law which supports the argument which has been addressed to your lordships. It is not necessary to enter into the details of that case. It is enough to say that, even if it is to be taken as enunciating a rule of law which would be as applicable in this country as in America, it does not enunciate any rule of law which would be sufficient for the appellant in the present case.

I think I have now covered the whole of the ground, and it only remains for me to move, your lordships, that this judgment be affirmed and the appeal dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. I must say that in the whole course of my experience I have never met with so bold and so hopeless an appeal. Certainly I never expected to find a proposition which was thought by a great judge to be so unreasonable and so absurd that of itself it made a complete answer to a case which had some show and appearance of justice, put forward as the foundation and the starting-point of a serious argument in this House. I find that in the case of *M'Mahon* v. *Burchell*, 2 Ph. 127, 134, before Lord Cottenham, one tenant in common claimed rent from another tenant in common who had been in occupation of the property. The Lord Chancellor says: "I must therefore take it that he (the defendant) means to raise this proposition, that the fact of the plaintiff having occupied the house not in entirety, but as a tenant in common, makes him liable to his co-tenants. A case has been referred to in which the Vice-Chancellor of England is represented to have so decided; but I cannot think that the Vice-Chancellor can have laid down any such doctrine; for the effect would be that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff." And then he goes on to say that there is no foundation for any such doctrine as that. That is exactly the ground on which this case was opened before your lordships. It was said that Dr. Kennedy took no part in the management of the property, that he left the dealing with the property entirely to Dodson, and that, therefore, Dodson was his bailiff. That was the exact position which counsel for the appellant said in the opening of their case Mr. Dodson occupied. There is no foundation for such a proposition that I can find in any of the books or in any of the authorities that have been cited.

Nor is there anything in the other ground on which

this case was attempted to be rested, the doctrine of principal and agent. In the whole of the bulky volume of evidence I cannot find a single word, or a single scrap of evidence, to show that Mr. Dodson ever accepted the position of agent in regard to Dr. Kennedy as his principal. On both these grounds it appears to me that the case entirely fails.

But I must say that I rather think that Dr. Kennedy did himself injustice, and did injustice to his clients, in saying that he left everything to Mr. Dodson, because I find a bill of costs of Dr. Kennedy's solicitors, which shows that they exerted themselves as they were bound to do; they exerted themselves very thoroughly for several months, making inquiries here, and making inquiries there, and doing everything that could be expected from persons in their position. That bill begins on the 29th of May, 1888, and goes down to August. They get all the documents, they write to all sorts of people, and they receive several answers, and they have several attendances on them; they write letters to parties requiring particulars of the property, and so on. That bill goes down to the 3rd of August, and then, on the 10th of August, there comes this letter from Taylor & Co. to these gentlemen saying, "As we have had no communication from you in this matter since your client's moiety was put up to auction, we presume he has abandoned the idea of purchasing, and we shall now deal with the property as we think best in the interests of our clients without any further notice to your client." That letter does not seem to have been answered; and it appears to me that when they received no answer to that letter they were justified in supposing that Dr. Kennedy had done his best to see if he could make any profitable use of this property, whether he could find a purchaser for it, and being satisfied that he could not do so had abandoned the property; and thereupon they sold the property, as I think they were entitled to do, to Dodson. I think they did everything that could reasonably be expected of them; but I entirely agree with what has fallen from Lord Herschell that, if a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached.

I entirely agree that this appeal must be dismissed with costs.

Lord MORRIS.—I concur. There is nothing that I can add with advantage.

Lord SHAND.—This case has formed the subject of very full opinions in the Court of Appeal. After what your lordships have said I have nothing to add, except that I entirely concur in what was said by the learned judges in the court below, and what has fallen from your lordships.

Appeal dismissed.

Solicitors for the appellant, *Chester, Mayhew, Broome, & Griffiths*, for *Crofton, Craven, & Worthington*, Manchester.

Solicitors for the respondent De Trafford, *L. W. Byrne*, for *Taylor, Kirkman, & Colley*, Manchester.

Solicitors for the respondent Dodson, *Pritchard, Englefield, & Co.*, for *Boote & Edgar*, Manchester.

From C. A. (Scotland.) Feb. 18.

LORD ADVOCATE v. ROBERTSON. (a.)

Inland revenue—Succession duty—Account duty—Insurance—Life policy—Assignment—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2 *and* 17—*Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.

Some years before his death a father made a voluntary assignment of a policy of insurance on his own life to his daughter, and she afterwards paid the premiums; previously to the assignment the premiums were paid by the father. In 1890, *on the death of the father, the daughter received the money due under the policy.*

Held, that the assignee was neither liable to succession duty nor account duty.

This was an appeal by the Crown from a judgment of the First Division of the Court of Session in Scotland. The Crown claimed account stamp duty or succession duty in respect of sums received under certain policies of life assurance, under the following circumstances:

James Fleming on the 21st of February, 1840, effected a policy on his life for £300 with the Scottish Equitable Life Assurance Society; and on the 9th of April, 1860, he acquired right by assignment to a policy for £250 effected on his life with the same society on the 4th of December, 1840. He kept up these policies, and regularly paid the premiums as they fell due, until the 29th of September, 1883. He then assigned both policies gratuitously to his daughter the respondent, Mrs. Robertson, who from that date paid the premiums. James Fleming died in 1890.

Graham Murray (*Lord Advocate*), and *Sir R. B. Finlay, S.G.*, for the appeal.

Shaw, Q.C., and *H. Anderson* (both of the Scotch Bar), appeared for the respondent.

Lord HALSBURY, C.—It appears to me that in this case there is a plain interpretation to be put upon plain words. I am only reiterating what has been said over and over again in dealing with taxing Acts, when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted. This claim has been put in two ways. It appears to me that it is susceptible of a very simple answer in respect of either of them. The first question is, whether it comes under the 2nd section of the Succession Duty Act, 1853: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval." This policy of insurance has been in existence a considerable number of years, I think. The person entitled ultimately to this money, herself in one sense created the property; that is, she continued the contract under which, if she continued to pay premiums, certain money would be payable upon the death. She continued that for a period of seven years; and therefore, reading simply the words as they stand, I do not think that she has "become beneficially entitled" "upon the death of any person;" because she has become entitled by reason—among other things—of her own payments during the period of seven years; and it

(a.) Reported by C H. GRAFTON, Esq., Barrister-at-Law.

appears to me, under that section, that in order to make this a "succession" we must introduce some words of this kind: "Disposition of property by reason whereof either partly or wholly a person has become entitled." If those words were introduced, in a certain sense it is true that she did partly become entitled by reason of premiums previously paid, the policy effected, and the assignment then made, supposing she continued to pay the premiums. But I find no such words in the statute, and I decline to do anything else than construe the words which I find there. I therefore am of opinion that under that statute it is impossible to maintain the claim of the Crown on this first ground. I then turn to the alternative claim, which is for account duty; and it appears to me that it is susceptible of an equally plain answer. I do not know that I can state it more plainly than Lord Adam has done. He says: "I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence." Here, again, in order to apply the tax to the particular case in dispute, one must introduce words into the statute such as: "For the benefit of any existing or future donee, or person who may become a donee." I find no such words. Unless you introduce by construction those words into the statute it is impossible, as Lord Adam says, to understand how it could be kept up for the benefit of a donee, when no donee was in existence. I agree with him. The Lord Ordinary's view seems to have been that, the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for the benefit of some possible donee at a future time. That really is an essential condition of the construction contended for by the Crown; and I am unable to agree with that construction. Under these circumstances I think that this appeal should be dismissed with costs, and the interlocutors affirmed; and I move your lordships accordingly.

Lord HERSCHELL.—I am entirely of the same opinion. The first question is, whether the money payable under the policies was property to which the lady became entitled on the death of her father by reason of the disposition which he made when he assigned the policies to her. I do not intend to lay down any principle, or to say anything applicable to any case but the one with which we are dealing, I shall solely consider whether that comes within the words of the enactment or not. In my opinion it does not. I do not think that it is accurate to say that the sum payable by the insurance company became hers by reason of the disposition which her father made. It is admitted that the entire sum cannot be said to have become hers by reason of that disposition; she would never have got it but for the fact that the premiums continued to be paid upon the policy. Therefore the suggestion is that it must be split up into two portions—the one to be attributed to the payment of premiums by her father before the donation; the other to be attributed to the payment of premiums by her afterwards; and that, being so divided, upon the former of those sums the duty would be payable. I can find nothing in the words of the Act to warrant and give support to such a contention. For these reasons I think that the appeal entirely fails, so far as the Succession Duty Act is concerned.

Then it is said that account duty is payable by virtue of the Act of 1881, and the 11th section of the Act of 1889. In order to bring the case within those statutes, it is necessary to show that the policy, the duty on the proceeds of which is in question, has been either "wholly kept up" "for the benefit of the donee"—which, of course, is not the case here—or has been partially kept up for the benefit of the donee. In my opinion it would be really an abuse of words to say that the policy was "kept up for the benefit of the donee" at the time when payments were being made by the father of the lady, not for her benefit, as far as appears, or for anybody's benefit but his own. The contention is that, because he afterwards creates a donee, the payment of premiums which he made when for aught that appears he had no donee at all in his mind—I do not mean merely any individual donee, but no notion of creating a donee—must be regarded, if he creates a donee, as having been made for her benefit. I do not think that it is reasonable to treat the language of the Act of Parliament in that way. I think that it would really be not using the words of the statute, but abusing them, if we put such a construction upon them.

Lord MACNAGHTEN.—I am of the same opinion.

Lord MORRIS.—I concur.

Lord SHAND.—I am of the same opinion, and while quite concurring in what has fallen from your lordships, I think that the grounds of judgment have been very clearly and accurately stated by the learned Lord President and Lord Adam in the Court of Session.

Interlocutors appealed from affirmed. Appeal dismissed with costs.

Solicitor for the appellant, *F. C. Gore*, for *P. J. Hamilton-Grierson* (Solicitor of Inland Revenue for Scotland).

Solicitors for the respondent, *Keeping & Gloag, for William Gunn*, Edinburgh.

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) — July 12, 13, 14, 15, 26.

WILDING v. SANDERSON. (a)

Practice—Consent judgment—Setting aside—Common mistake—Mistake of one party induced by the other—Approbating and reprobating.

Where a consent order does not correctly express the agreement come to between the parties it may be set aside on the same grounds and in the same circumstances as a contract in similar terms between the parties.

The party complaining of mistake is not disentitled to succeed because he has previously taken proceedings (unsuccessfully) to enforce the order in the sense in which he understood it.

A consent order set aside on the ground of mistake common to both the parties, or induced by one of them.

Decision of Byrne, J. (ante, *p.* 462), *affirmed.*

Appeal from the decision of Byrne, J. (reported *ante*, p. 462).

The facts are very fully stated in the judgment of Lindley, L.J.

Eve, Q.C., and *O. L. Clare*, for the appellants, cited *Powell* v. *Smith*, 20 W. R. 602, L. R. 14 Eq. 85; *Stewart* v. *Kennedy*, 15 App. Cas. 108, 38 W. R. Dig.

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

179; *Ormrod* v. *Huth*, 14 M. & W. 651; and *Walford* v. *Adie*, 5 Hare, 112, 117.

Macnaghten, Q.C., for a subsequent mortgagee.

Astbury, Q.C., and *Butcher, Q.C.*, for the respondents, cited *Thompson* v. *Hudson*, 18 W. R. 1081, L. R. 10 Eq. 497; *Paget* v. *Marshall*, 33 W. R. 608, 28 Ch. D. 255; *Harris* v. *Pepperell*, 16 W. R. 68, L. R. 5 Eq. 1; and *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345.

Clare, in reply, referred to *Clough* v. *London and North-Western Railway Co.*, 20 W. R. 189, L. R. 7 Ex. 26, 34; *Kennedy* v. *Panama, &c., Mail Co.*, 15 W. R. 1039, L. R. 2 Q. B. 580, 587; Fry on Specific Performance, 3rd ed., paragraph 747; and *In re Arbib & Class's Contract*, 39 W. R. 305, [1891] 1 Ch. 601.

Our. adv. vult.

July 26.—LINDLEY, L.J.—In 1874 Smith, who was a builder and quarry-owner, was indebted to two persons named Wilding, who were his solicitors and agents, in considerable sums for money borrowed, and for these sums the Wildings held some equitable securities. The Wildings not only lent Smith money, but received rents and other moneys from him, and on the 7th of October, 1877, Smith gave the Wildings a mortgage for £12,500 with interest at 5 per cent. This mortgage was not to secure further advances, but was for £12,500 which, according to the Wildings, was the amount then due to them from Smith. Smith, however, was not satisfied that he owed so much, and in January, 1878, Smith brought an action against the Wildings for an account of what was due on their mortgage, and for redemption. Ainsworth was Smith's solicitor in this action until the summer of 1879, when a change of solicitors took place. In March, 1878, Smith obtained a judgment declaring that the mortgage of the 7th of October, 1877, ought to stand as a security for what was due at that date from Smith to the Wildings on the balance of account of the dealings and transactions between them with interest at 5 per cent. from the 7th of October, 1877. The decree went on to direct an account of what was due to the Wildings for principal and interest on their security, having regard to the above declaration, and the judgment then proceeded to decree redemption in the ordinary way. Under this decree accounts were carried in; and it is obvious that the accounts which had to be taken included the cash accounts between the parties, and that interest would have to be calculated, not only on what Smith owed the Wildings, but on what the Wildings owed Smith for moneys received for him as his agents. There was much disputing over the accounts, but ultimately—viz., on the 4th of August, 1879, after Ainsworth had ceased to act for Smith, the accounts were agreed to, and Smith signed a memorandum stating that on the 7th of October, 1877, he owed Wildings on their security £11,805 3s. 1d., and that on the 22nd of January, 1878, he owed £11,053 12s. 7d., and that on the 1st of May, 1878, he owed £11,203 10s. 8d. on the same security, and he agreed to settle the action on those terms, and to pay his own costs and £100 towards the defendants' costs. An order staying proceedings was afterwards drawn up. As between Smith and the Wildings this ended the disputes between them. Unfortunately, however, there was a second mortgagee—viz., Ainsworth, who was not made a party to the action of *Smith* v. *Wilding* as he ought to have been, and who consequently was not bound by the proceedings in that action. Ainsworth's second mortgage was dated the 8th of February, 1879, and on the 22nd of August, 1890, Ainsworth commenced an action against the Wildings, Smith's trustee in bankruptcy, and a third mortgagee, Sir William Brookes, for an account of what was due on the security of the 7th of October, 1877. In this action Ainsworth sought an account against the Wildings as mortgagees in possession, and he further sought to charge them with losses sustained by sales by them at undervalues. Before this action came on for hearing Ainsworth died, and Sanderson and another, as his executors, revived the action, and a long correspondence took place between the solicitors of the plaintiffs and the solicitors for the Wildings with reference to the rights and liabilities of their respective clients. Before the letter of the 14th of March, 1894, hereafter referred to, all claim against Wildings for sales at an undervalue was abandoned; their liability to account as mortgagees in possession was admitted, and the only question which was left open for argument and for decision was for what sum the mortgage of the 7th of October, 1877, was to stand as a security. The Wildings had from time to time sold portions of the property comprised in that mortgage, and of course they would have to account for the sums so received in the ordinary way—*i.e.*, by applying the net proceeds of sale, first to arrears of interest and then to the principal due on the mortgage (see *Thompson* v. *Hudson*). But it was never suggested that the Wildings were to be charged with interest at 5 per cent. on the sums so received; and not only was this never suggested, but the correspondence clearly shows that all that the plaintiffs wanted was an account in the ordinary form against mortgagees in possession, and an account of what was due to the Wildings on their security of the 7th of October, 1877. It is unnecessary to go through the correspondence to make this plain; but the letters of the 12th of March and the 3rd of May, 1894, from the solicitors of Ainsworth's executors to the solicitors of the Wildings are so clear and definite as to leave no doubt whatever on the subject. It is all important to bear in mind that after the mortgage of the 7th of October, 1877, was executed, all dealings and transactions between Smith and the Wildings ceased. After that date the Wildings did not act for him; they made him no advances; they ceased to be his agent; they were mortgagees, and mortgagees in possession who had made sales, but they were nothing more. This explains how it is that no reference was ever made as to the mode of taking any account against them from that date, beyond requiring the "usual redemption order against a mortgagee in possession who has sold part of the mortgaged property." The proposed minutes which passed between the parties, and the interview on the 28th of June, 1894, between Mr. Burchell, who represented Ainsworth's executors, and Mr. Robbins, who represented the Wildings, carry the case no further. The parties had agreed on every point but one, which was whether the mortgage of the 7th of October, 1877, was to stand as a security for the sum settled between Smith and Wildings in August, 1879, or for some other sum, and how such sum was to be ascertained. This question was submitted to Romer, J., on the 23rd of November, 1894, and he then decided that the account settled between Smith and the Wildings in August, 1879, ought to be taken as *primâ facie* correct; but that the plaintiffs—*i.e.*, Ainsworth's executors—should be at liberty to surcharge and falsify any of the items except those agreed to before the 23rd of May, 1879. No other point was in controversy, and all parties were contented, and I see no grounds whatever for supposing that there was at that time any mistake or misunderstanding between the parties or their legal advisers. The judgment, however, as drawn up, is so worded as to go far beyond what was agreed and decided when judgment was given. [The Lord Justice read

the order of the 23rd of November, 1894, and proceeded:] Under this order as drawn up, this court has decided that "on the footing of" means "on the same principle as." This involves, as a consequence, that the sums realized by the mortgagees by sales of the mortgaged property are not to be treated as is usual in taking mortgagees' accounts, but are to be treated as sums in the hands of the mortgagees, and bearing interest at 5 per cent. The order as drawn up certainly does not express the agreement come to between the parties, as gathered from the correspondence and from what took place before Romer, J. The order as it stands was drafted by counsel for the plaintiffs, and was assented to by counsel for the Wildings. The words, therefore, were agreed to. But it is not suggested that the agreement to which the parties had come, at an earlier stage of the proceedings, was ever departed from or modified in any way. The words were assented to by Wildings' counsel in the belief that they carried out the agreement previously arrived at and nothing else. No departure from this agreement ever having been suggested, he was justified in treating his opponent as submitting the form of words proposed with the same view. In my opinion the case stands thus: Either there was a mutual mistake, or the one party has fallen into a mistake into which he has been led by the other side. Whichever view is right, the order as drawn up and passed and entered does not express the real agreement between the parties. The Wildings did not discover that they and the plaintiffs understood the order differently until March, 1895, when Wildings carried in their account, and the plaintiffs objected to it. Wildings contended that the order as drawn up ought to be construed in the sense they attributed to it, and in which they had always understood it, and Stirling, J., held that they were right; he considered that "on the footing of" was, in the order of the 23rd of November, 1894, equivalent to "from the foot of." On appeal, however, this court was unable to adopt this construction of the order, and on the 4th of December, 1895, the court reversed Stirling, J.'s decision. The mistake which had been made in drawing up the order then became apparent, and it cannot be truly said to have been discovered by the Wildings at any earlier date. As soon as they discovered it they set to work to have it corrected. Their first attempt was wrong in form, and was unsuccessful (see *Ainsworth* v. *Wilding*, 44 W. R. 540 [1896] 1 Ch. 673.) But on the 19th of March, 1896, they commenced the present action to have the order of the 23rd of November, 1894, rectified or set aside on the ground of mistake. On the 25th of March, 1897, Byrne, J., set it aside, and from this decision Ainsworth's executors have appealed. The third mortgagee, Sir Wm. Brooks, whose interest in this matter is the same as theirs, has appealed also, but it was admitted by his counsel, and indeed it is plain that if Ainsworth's executor's appeal fails the appeal of Sir Wm. Brooks must fail also. This court was not asked by either party to vary Byrne, J.'s judgment by rectifying the order of the 23rd of November, 1894; the plaintiffs are content to have that order set aside, and it is unnecessary, therefore, for us to consider whether that order might have been rectified or not.

The only question we have to consider is whether Byrne, J.'s judgment, setting aside the order of the 23rd of November, 1894, can or cannot be supported. I am clearly of opinion that it can, and that there are no grounds for reversing it. It was conceded, and in my opinion it is clear, that the order of the 23rd of November, 1894, being a consent order based on and intended to carry out an agreement come to between the parties, ought to be treated as an agreement which could be properly set aside on any ground on which an agreement in the terms of the order could be set aside. Mistake is one of such grounds. But it was strongly contended that a mistake in the meaning of the words used in drawing up the agreement is not enough, and in support of this contention reliance was placed on *Powell* v. *Smith* and *Stewart* v. *Kennedy*. These cases decide that a written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed. This is a sound principle, and as pointed out in *Stewart* v. *Kennedy* if it were not adhered to, the security of written engagements would be destroyed. But a mistake by one of the parties as to the meaning of words used may be induced by the other party, and if so induced, the above principle ceases to be applicable. *Stewart* v. *Kennedy* is an authority for this qualification. Again, a mistake as to the meaning of the words used may be accompanied by another mistake as to the subject-matter dealt with by the contract; and if the parties are not *ad idem* as to the subject-matter about which they were negotiating there is no real agreement between them. *Hickman* v. *Berens* [1895] 2 Ch. 638, 44 W. R. Dig. 41, is a recent illustration of that principle. In my opinion the order of the 23rd of November, 1894, is open to both of these objections. I have already stated the grounds on which I come to the conclusion that Wildings' advisers assented to the words of the order in reliance on what they knew from the letters of their opponents was all that they wanted and had bargained for. Wildings' advisers were induced by those letters, and by all that passed in court, to assent to the words adopted in the belief that they were understood by their opponents in the sense in which they themselves understood them, and not in a sense wholly inconsistent with those letters and with what passed in court. But further, Burchell's evidence shows that, although he never told his opponents that he was thinking of charging them with interest on the proceeds of the sales of the mortgaged property, he was all along intent on getting an order which would enable him to do so; and whilst the attention of Wildings' advisers was directed only to the mode of taking the account down to the 7th of October, 1877, being told that the subsequent accounts would be ordinary mortgagees' accounts, the executor's solicitor was bent on getting a subsequent account of a very different nature. The order as drawn up gives effect to his views, but it was assented to by Wildings' advisers, because their minds were addressed to a different matter altogether. Under these circumstances it is impossible in my judgment to hold Wildings bound by the order of the 23rd of November, 1894, as finally settled.

One other point requires notice. It was urged by the appellants that it was too late for Wildings to impeach the order of the 23rd of November, 1894, after their attempt to enforce it in the sense in which they understood it, and that if they wished to impeach it they should have done so as soon as they found that their opponents understood it differently from themselves. The answer to this contention is that they did not know that there was any mistake to rectify until their construction of the order was held to be erroneous; and that as soon as they found out their mistake they set to work to have it put right. The case in this respect also is like *Stewart* v. *Kennedy*, as will be seen by comparing the reports of the two appeals in 15 App. Cas., pp. 75 and 108.

Both appeals must be dismissed with costs.

LOPES, L.J., concurred.

CHITTY, L.J.—I have arrived at the conclusion that there was an actual agreement come to in

court between the parties, but that the order was incorrectly drawn, and did not embody the true agreement. The language of the order was no doubt accepted by all parties, but without any intention of departing from the meaning of the agreement come to in court. Consequently there was common error and a case is made for putting the order right or setting it aside. But the respondent does not ask for rectification, and is content with the order being set aside simply. No one asks for rectification; but further I agree with Byrne, J., as to the two grounds on which he set aside the order. Assuming that the error as to the meaning of the agreement was on the side of the Wildings only, I have no hesitation in saying that the error on their part was induced by the letters of Burchell and by the language inadvertently used in court by counsel for Ainsworth's representatives. That an error so induced is ground for setting aside a contract is established by the decision of the House of Lords in *Stewart* v. *Kennedy*. I also think that if the appellants' view of the facts ought (contrary to my opinion) to be accepted, the parties' minds were not addressed to the same subject-matter. The Wildings and their advisers were bargaining about one matter and one matter only—viz., for what principal sum the Wildings' security ought to stand; while, according to the appellants' contention, Ainsworth's representatives and their advisers were negotiating not only about this point but about the principle on which the subsequent accounts were to be taken. Certainly the Wildings and their advisers had no thought of negotiating about any such subject as that they were to be charged with interest at 5 per cent. on the moneys received from the sales, a charge which would result in throwing on him some three or four thousand pounds. A consent order can be set aside on any ground that would invalidate an agreement contained in an order: *Huddersfield Banking Co.* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273.

There is one point remaining. It is said by the appellants that by reason of their subsequent conduct the Wildings cannot now complain of the order. It is urged that they have affirmed the contract as it stands expressed on the face of the order, and in the sense in which it was construed by the Court of Appeal. This argument in my opinion is urged in vain. The Wildings have throughout maintained that the agreement ought to be construed in the sense in which they interpreted it. Stirling, J., thought the Wildings were right, but the Court of Appeal held that they were wrong. Wilding then applied by motion to Romer, J., to have the order set right; but he failed on the technical ground that this could not be done on motion. Thereupon he at once instituted the present action. The order of November, 1894, has not been acted upon in the meanwhile, and the position of the parties has not been changed. A comparison of the two cases of *Stewart* v. *Kennedy* shows that, after failing in an attempt to obtain a decision in his favour on a point of construction, it is competent for a man to institute an action to have the contract set aside.

For these reasons I think the appeals ought to be dismissed.

Appeals dismissed.

Solicitors, *Bower, Cotton, & Bower*, for *Ainsworth, Sanderson, & Howson*, Blackburn; *Robbins, Billing, & Co.*

From Chan. Div. (Lindley, Lopes, and Chitty, L.JJ.) — June 28.

In re RUMNEY AND SMITH'S CONTRACT (*a.*)

Vendor and purchaser—Building society—Mortgage—Power of sale—Sale by transferee.

A power of sale can only be exercised by the person designated for the purpose in the instrument which creates the power. Accordingly, in the case of a mortgage by a member of a building society to the trustees of the society which contained a power of sale limited to the trustees of the society,

Held, that the power in question could not be exercised by a transferee of the mortgage.

Whether a mortgage by a member to the trustees of a building society can be validly transferred by them to a stranger without the consent of the mortgagor, quære.

This was an appeal from a decision of Stirling, J., declaring that a vendor had not shown a good title to the premises comprised in a certain contract for sale.

The appeal raised two questions: First, whether a mortgage to a building society was transferable at all; and secondly, whether, assuming that such a mortgage was transferable, the power of sale could be exercised by the transferee.

By a mortgage dated the 2nd of October, 1877, Wm. Dawson, a member of the Wilts and Western Benefit Building Society, mortgaged to the trustees of the society certain houses to secure the sum of £200. The £200 was payable by instalments in the usual way, and the period of repayment was spread over about twenty-one years. The covenant to pay was to pay to the trustees or trustee for the time being of the society or to such other person or persons as should according to the rules of the society from time to time be authorized to receive the same. Then came a conveyance of the houses in question "to the trustees, their heirs and assigns, to hold unto and to the use of the trustees, their heirs and assigns." This was the only place in the deed where the word "assigns" occurred.

The conveyance was subject to a proviso for redemption on payment to the trustees or trustee for the time being of the said society or other the person or persons who, according to the rules of the society, should from time to time be authorized to receive the same.

Then came the power of sale, which was in the following terms: "Provided nevertheless that in case default shall be made in payment in manner hereinbefore provided and covenanted in that behalf of the said instalments or any of them or any part thereof respectively, or in case the mortgagor, his heirs, executors, administrators, or assigns shall fail to pay all or any of the fines or other moneys which shall become due or payable by him or them or to observe and keep all or any of the rules and regulations of the said society (of which several defaults or any of them the certificate of the chairman for the time being of the directors of the said society shall at all times be conclusive evidence), then at any time or times thereafter and whether any previous default shall have been waived or not it shall be lawful for the trustees or trustee for the time being of the said society without any further or other consent or authority from and notwithstanding the dissent of the mortgagor, his heirs or assigns absolutely to sell the mortgaged premises with their appurtenances or any part or parts thereof." And the receipt in

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

writing of the trustees or trustee for the time being of the society or of the persons or person who for the time being should assume to act as such trustees or trustee was to be an effectual discharge to any purchaser.

In 1896 the society in whom the securities had become vested assigned the mortgage debt and securities to Mr. Rumney, the present appellant.

The mortgagor was no party to the assignment.

This assignment was never actually executed, but was treated as valid and subsisting.

At a sale by auction on the 26th of August, 1896, the appellant Rumney, on the assumption that he was the assignee of the mortgage debt and had the power to sell the property incidental to the security, contracted to sell the mortgaged premises to the respondent Smith.

An objection was taken that the power of sale was exercisable only by the trustees or trustee of the building society, and the matter having been brought before the court by a summons under the Vendor and Purchaser Act, Stirling, J., without deciding anything as to the validity of the transfer, held that the objection was good on the ground that it was settled law that powers or trusts for sale could only be exercised by the person designated for the purpose in the instrument which created such trust or power.

The vendor appealed.

Graham Hastings, Q.C., and *E. Ford*, for the appellant.—The case of the *Ulster Building Society* v. *Glenton*, 21 L. R. (Ir.) 124, 36 W. R. Dig. 27, is a direct decision in our favour. [LINDLEY, L.J.—I have been looking at the *Ulster case*, and there the mortgagor consented to the transfer.] There is nothing in the relationship between the mortgagor and the society to prevent the security being transferred, and it is convenient that it should be possible to transfer it. The only case at all against us is *Bradford* v. *Belfield*, 2 Sim. 264, and no titles depend on that case. There is no case of a mortgage where it has been held that the assigns of the mortgagee cannot sell because they have not been named in the power of sale.

They also referred to Lord Cranworth's Act.

Buckley, Q.C., and *Jolly*, for the respondent, were not called on.

LINDLEY, L.J., stated the facts and continued: Now, two questions arise of some importance. The first question is, whether such an assignment as was made, or is to be treated as having been made, by this deed of 1896, without the consent of the mortgagor, is a valid assignment. I will not express a concluded opinion upon that question. It appears to me to be one which, when it arises, will deserve a great deal of consideration, because one cannot help seeing that the machinery of the Building Societies Act is not adapted to such an assignment at all; it will not work without a great deal of friction. As to the Irish case, to which Mr. Graham Hastings referred, *Ulster Permanent Building Society* v. *Glenton*, which appears to be an authority that an assignment is valid, I am struck by the observations of the learned judge, who treated the mortgagor as consenting and as bringing the whole thing about. Of course if the mortgagor consents there is no difficulty. I do not go so far as to say without further consideration that a mortgage debt owing to a building society cannot be assigned without the consent of the mortgagor. All I say is that it is a matter which appears to be fraught with difficulty, and will require a great deal of consideration before it is held that it can be assigned—of course I mean to a stranger who has nothing to do with the rules of the society, and cannot give the mortgagor the benefit which the building society can. I will do what Stirling, J., did, pass that by.

We have then to consider whether, if the debt was validly assigned, Mr. Rumney, the assignee, had power to sell. It appears from the authorities, which are plain, that he had not. It appears on the true construction of the mortgage deed that power of sale was only given to the trustees of the building society. I do not mean only the trustees who happened to be trustees at the date of the mortgage, because, no doubt, new trustees could have the security assigned to them and exercise the power of sale, but I do not think this power could be exercised by a person who has no connection with this society at all. In the case of *Bradford* v. *Belfield*, and others which followed and approved that case, it is shown that a power of this kind cannot be assigned, and it would be stretching the authorities, and, I think, making new law, if we held that a transferee of this debt could exercise the power. That is the short point on which Stirling, J., relied, and I think he was right.

LOPES, L.J.—I am of the opinion that the decision of Stirling, J., is perfectly right. I have little to say after what has been said, and, indeed, I have little to say at all, because the point, in my mind, is a clear one and very short. The first thing one has to do is to look at the power as given in the deed. Now, the power given in the mortgage deed is to the trustees or trustee for the time being of the society, and there is no mention of assigns at all to be found. It appears, therefore, to me that the transferee of the mortgage, who is the plaintiff, cannot exercise any power of sale. With regard to the second point, which I understand to be this: whether if he was an assign under a valid transfer he could or could not sell—that is a point of great difficulty, and one upon which I do not desire to express any opinion on the present occasion. I think the decision of the learned judge was perfectly right.

CHITTY, L.J.—I think the decision of the learned judge was right. It is not necessary to decide whether such a mortgage as this is capable of being transferred at all. There are, as appeared during the course of the argument, many objections which, however, might on further consideration be got over. The principal ground of the objection is the greater burthen which a transfer of this security would impose upon the mortgagor with regard, for instance, to the payment of costs of transfers and other matters of that kind; and, indeed, reading the written deed through carefully, there are other objections which I do not stay to point out. I have not formed any concluded opinion, and it is not necessary that I should do so. With regard to the question whether this power of sale was transferable it has already been pointed out that the power is limited to the trustees or trustee for the time being of the society. It is quite plain that new trustees of the society could exercise the power, but there is no mention of assigns in this part of the deed itself. That, of course, is not fatal, because the rest of the deed might show with sufficient clearness that it was intended it should be transferable. *Primâ facie* a debt is transferable, but the power is not *primâ facie* transferable. On the contrary, the old cases show that there must be some words of limitation which on a fair and proper construction of the whole instrument show the intention that the power should be exercised by some other person than the person mentioned.

We have now become so accustomed by virtue of improved conveyancing and by reason of the statutes to find a power of sale accompanying a mortgage debt that there is a danger of assuming that as part of the general law. No doubt the statutes made it

quite plain, and all the conveyances in years past have made it perfectly plain. But the power for one man to sell another's estate is *primâ facie* power given to that man and that man only. So much so that even his survivors have been held not to be entitled to sell. With regard to this as a whole—and I express my opinion not simply by reason of the omission of the words "assignment of the power," but, reading the whole deed—I think it was not intended that this power of sale should be exercised by any person other than the person specifically designated in the power of sale.

LINDLEY, L.J.—The appeal will be dismissed with costs.

Solicitors, *Howard Rumney*, for *Mann & Rodway; Moon, Gilks, & Moon.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 2.

HARRIS *v.* SLEEP. (*a.*)

Receiver and manager—Salary—Allowances—Services rendered for benefit of estate outside the duty of a receiver.

On a dissolution of partnership one of the partners was appointed by the court receiver and manager without salary. He carried on the business successfully, and ultimately purchased it under an order of the court. He, during the continuance of the business, being a skilled mechanic, did work as an ordinary workman and included in his accounts an item of £2 per week for services rendered by himself as a workman.

Held (*reversing* Kekewich, J.), *that though the receiver and manager had committed a technical irregularity in not asking for wages at the time of his appointment, yet he was entitled to be paid for work done by him for the benefit of the estate, to do which was no part of his duty. The allowance of £2 per week was therefore allowed.*

Appeal of the defendant from a decision of Kekewich, J. (reported on another point, *ante*, p. 536).

The defendant in an action for dissolution of partnership was appointed receiver and manager of the business, he being a partner, without salary. He carried on the business very successfully, and ultimately purchased it at a valuation pursuant to an order of the 26th of October, 1893. At the time the defendant took over the management of the business it was heavily in debt, and at the time of the purchase there was more than enough money to pay all the debts. The defendant in his accounts included in the workmen's wages a sum of £2 per week for work done by himself as an ordinary workman.

Kekewich, J., disallowed this claim on the ground that the defendant was in a fiduciary position and could not employ himself.

The defendant appealed.

Warmington, Q.C., and *M. L. Romer*, for the appellant.—*Potts* v. *Leighton*, 15 Ves. 273, and *Malcolm* v. *O'Callaghan*, 3 My. & Cr. 52, show the principle on which the court acts. It was no part of the receiver's duty to work as a common workman, and if he did so he is entitled to remuneration for it. *Bristowe* v. *Needham*, 2 Ph. 190, decided that if a receiver takes proceedings on behalf of the estate and is successful he is entitled to his expenses, but not otherwise.

Renshaw, Q.C., and *F. Thompson*, for the respondents.—In any case the allowance of £2 per week is too great. The defendant was in a fiduciary position, and his duty and his interest would clash. They referred to *In re Ormsby*, 1 Ball & B. 189, and *Burden* v. *Burden*, 1 V. & B. 170.

LINDLEY, L.J.—The appellant committed a technial irregularity in not asking, when he was appointed receiver and manager, that wages might be allowed him for services rendered by him as a workman. There were two partners in the business. Each of them received £2 a week for his services, their departments being different. The partnership has been dissolved by the court. The appellant was appointed receiver and manager without salary. He was a practical man skilled in vicework and forgework. He has acted as receiver and manager, and has throughout worked with his own hands at forgework and vicework, which he was accustomed to do during the continuance of the partnership; and for this extra work, which it was no part of his duty as receiver and manager to perform, he now asks to be paid. He has carried on the business successfully, and, though it was in an unsound state at the time of the order for dissolution, it has been sold for a sum more than sufficient to pay all the creditors in full, and it is now said that he ought not to be remunerated for his services as a workman; for that it is without precedent that a receiver and manager should be allowed any remuneration for services rendered by him unless he asks for it at the time of his appointment. If he does not ask for it then he runs a great risk of not getting it; but the court, when the circumstances are brought before it, will see that what is right is done. I think that this appeal should be allowed, but as the appellant is technically in fault, the costs will come out of the estate.

LOPES, L.J.—The appellant has done valuable work, which he was not bound to do, and which has resulted in benefit to the business. I think that he ought to be allowed some remuneration for his services, and ought not to be deprived of it because he did not ask for it on his appointment. In my opinion the appeal ought to be allowed.

RIGBY, L.J.—I am of the same opinion. I cannot agree that the position of a trustee is the same as that of a receiver and manager. As a general rule, a trustee, with very few exceptions, will not be allowed a commission for work which he is not bound to do. Here a business was carried on by two partners, one of whom attended to the book-keeping, and the other superintended and assisted in the manual part of the business. The partnership was dissolved by the court. One partner is appointed receiver and manager and agrees to act without salary; but I doubt whether it occurred to anyone that if he worked as a mechanic in the workshop he should not be paid for the actual work done. Of course, technically he ought to have asked, when he was appointed receiver and manager, that his weekly wages might be allowed him, and he thereby ran a great risk of not getting anything. A receiver in the ordinary course has a commission by way of poundage; but it is the practice of the court to make allowances for extraordinary services. In *Potts* v. *Leighton* a receiver, who was by his own default deprived of his salary, was held not to be thereby disentitled to an allowance

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

for services rendered. That furnishes a better guide than the strict rule as to trustees.

Appeal allowed.

Solicitors, *Robbins, Billing, & Co.; Law & Worsam.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) — May 24.

MACAULAY *v.* POLLEY. (*a.*)

Solicitor—Authority—Compromising claim before action brought.

A solicitor, who is instructed by a client to make a claim on a third person for compensation for personal injuries, has no authority, in the absence of express directions, to effect a compromise before action brought, so as to preclude his client from bringing an action.

Appeal from an order of Grantham, J., at chambers.

The plaintiff, having sustained personal injuries through the default of the defendant, instructed a solicitor to make a claim on the defendant for compensation.

The solicitor, before action brought, agreed with the defendant to accept the sum of fifteen guineas in settlement of the claim. This sum was accordingly paid by the defendant to the solicitor, but without the plaintiff's consent.

The plaintiff then brought this action, and the defendant thereupon applied for a stay of proceedings on the ground that the plaintiff's claim had been satisfied.

The learned judge dismissed the application, and the defendant appealed.

Lynch, for the defendant, referred to *Fray* v. *Voules*, 7 W. R. 446, 1 E. & E. 839; and *Chowne* v. *Parratt*, 11 W. R. 668, 14 C. B. N. S. 74.

C. E. Jones, for the plaintiff.

Lord ESHER, M.R.—In this case before action brought the plaintiff's solicitor arranged a compromise with the defendant and accepted a sum of money from him. There is no evidence that the plaintiff instructed the solicitor to do this. It was held by Willes, J., in *Duffy* v. *Hanson*, 16 L. T. Rep. 332, that under such circumstances a solicitor was not authorised to make a compromise. I adopt that view, and I think that this compromise was not binding on the plaintiff. The appeal must be dismissed.

A. L. SMITH and CHITTY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *James Gray.*

Solicitors for the defendant, *Hillearys.*

From Q. B. Div. (Lopes and Rigby, L.JJ.) — May 18, 19, 20.

IMRAY *v.* OAKSHETTE. (*b.*)

Landlord and tenant—Lease—Breach of covenant not to sub-let—Forfeiture—Relief—Protection of under-lessee—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing and Law of Property Act,* 1892 (55 & 56 *Vict. c.* 13), *s.* 4.

The court has jurisdiction under section 4 *of the Conveyancing and Law of Property Act,* 1892, *to grant relief to an under-lessee on forfeiture of the superior lease by the lessee, even where the forfeiture has been incurred by reason of the breach of a covenant not to assign without licence, against which breach no relief could have been obtained under the Conveyancing and Law of Property Act,* 1881. *But such relief will only be granted where the under-lessee can prove that he is blameless and has exercised all precautions which a reasonable, cautious, and careful person would use.*

L. became assignee of a sub-lease of a term of twenty-one years less twelve days; the original lease contained a covenant not to assign or sub-let without consent. The sub-lease was made without consent, but L. had no actual notice of the covenant, and his contract did not give him a right to call for the title of the original lessee. L. laid out a large sum of money on the property.

Held, that L. was guilty of negligence in precluding himself from investigating his lessor's title, and was not entitled to relief against forfeiture incurred by the lessee through breach of covenant.

Appeal of a defendant, Lyons, from Day, J., at chambers, who refused relief against a forfeiture of a lease.

By indenture dated the 23rd of May, 1894, the plaintiffs demised certain premises in Walworth to the defendant Mrs. Oakshette for a term of twenty-one years from the 29th of September, 1893, at a yearly rent of £160. The lease contained a covenent by the lessee not to assign or sub-let the premises or any part thereof for more than three years without the consent in writing of the lessors, with a forfeiture clause on non-compliance with the covenant.

By various under-leases, the original one by Mrs. Oakshette being without licence, the underlease of one messuage became vested in the defendant Lyons, who entered into possession and spent a large sum of money on the house. He had no right to call for Mrs. Oakshette's lease, and said he always regarded her as the superior landlord.

By indenture dated the 3rd of September, 1896, Mrs. Oakshette assigned all her interest in her original lease to the defendant Hurlock.

In March, 1897, the plaintiffs commenced this action against Mrs. Oakshette, Hurlock, Lyons, and another to recover possession of all the property alleged to be forfeited through the under-leases granted without licence.

Lyons then took out a summons asking to be relieved from the forfeiture so far as it affected the subject-matter of his under-lease, and that the property might be vested in him for the residue of the term freed from the covenants contained in the original lease of May, 1894, but subject to the rent of £80 which he had agreed to pay.

Day, J., dismissed the summons, being of opinion that he had no jurisdiction to make the order, but gave leave to appeal.

The defendant Lyons appealed.

Buckmaster, for the appellant.—Under section 4 of the Conveyancing Act, 1892, where a lessor is endeavouring to enforce a right of re-entry or forfeiture under any covenant in a lease, the court may on the application of any under-lessee make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in such under-lessee on such conditions as the court shall think fit. There is nothing in these words to except from the operation of the section forfeiture for breach of covenant not to assign. *Cholmeley School*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

(*b.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

v. *Sewell*, [1894] 2 Q. B. 906, shews that sub-section 6 of section 14 of the Conveyancing Act, 1881, applies only to head-leases, and under-leases are excepted. In this case the under-lessee was quite ignorant of any breach having been committed.

Duke, for the respondent.—The two Conveyancing Acts must be read together, and neither lessee nor under-lessee can get any relief from forfeiture incurred through breach of covenant not to assign without licence. Were it otherwise, the under-lessee would be in a better position than the lessee.

T. W. Chitty and *Morten*, for Hurlock. [By the COURT.—You have no *locus standi*.]

Buckmaster, in reply.—Lyons is willing to take an assignment of the whole property, which he can do under section 4 of the Act of 1892. If the plaintiffs do not agree to this, they will take the benefit of the money which Lyons has expended on the property without repaying him. Lyons had constructive notice of the defect, but that will not disentitle him to relief.

Cur. adv. vult.

May 20.—LOPES, L.J.—This is a case of some importance involving the question of the jurisdiction of the court to grant relief against forfeiture to an under-lessee where the breach of covenant is assigning without consent, and the terms upon which such relief should be granted, if there is jurisdiction to grant it. Lewis Lyons, an under-lessee, applied to be relieved from a forfeiture incurred by the original lessee in consequence of a breach of a covenant not to assign without the consent of the superior lessor. That the lessee had forfeited his lease was not disputed, but it was contended that the court could grant no relief to an under-lessee where the breach of covenant creating the forfeiture was the breach of a covenant not to assign.

The question of jurisdiction depends on the construction to be placed on section 14 of the Conveyancing Act, 1881, and the fourth section of the Amending Act, 1892. The relief given against forfeiture by section 14 of the Act of 1881 does not extend (sub-section 6) "to a covenant or condition against the assigning under-letting parting with the possession or disposing of the land leased." The lessee, therefore, can obtain no relief in such a case. The case of an under-lessee is not provided for by the Act of 1881 at all, and the under-lessee, so far as the Act of 1881 is concerned, can obtain no relief. It was, I presume, considered a hardship on the under-lessee, when he is not a party to any breach of covenant by the lessee (his lessor), and, if under-lessee of a part of the property, when he has done all that his lessor ought to have done, that he should be deprived of his property by reason of a forfeiture incurred by his lessor. Accordingly, section 4 of the Conveyancing Act, 1892, gave power to the court to protect under-lessees on forfeiture by their lessors. [His lordship read that section, and proceeded:] Section 1 of this Act said the Act was to be read as one with the Conveyancing Acts, 1881 and 1882. Mr. Duke's contention is that the effect of this is that the exclusion from section 14 of the Act of 1881 of breach of covenant from assigning without consent is incorporated with section 4 of the Act of 1892, and that the under-lessee in respect of such covenants is in the same position as the lessee—that, in effect, all the Act of 1892 does is to place the under-lessee in the same position as the lessee, and that neither can get any relief in respect of such covenants. I was at first very much attracted by this argument, but on consideration I do not think that the Acts of Parliament in question can be so construed, when the very general words of section 4 are carefully regarded. Sub-section 6 of section 14 of the Act of 1881 applies to lessees and lessees only. Section 4 of the Act of 1892 is dealing with under-lessees, different persons with different interests; and unless there are clear words indicating that the same restriction was to be imposed upon them as upon lessees under the earlier Act, I should be unwilling to imply it. Indeed, it seems to me that there are grounds for different treatment. There is a privity between lessor and lessee which does not in ordinary cases exist between lessor and an under-lessee; the one would have express notice, while the other might have no notice of the covenant not to assign, which he was breaking. If we were to read into the Act of 1881 section 4 of the Act of 1892, it would be convenient to place section 4 of the later Act after section 14 of the former Act, and I do not see how the restrictions contained in sub-section 6 of section 14 could be carried on to and imported into section 4 placed as I have suggested. In direct antithesis to the limitation contained in sub-section 6 of section 14 we are met by the very general words "where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease."

It was urged by Mr. Duke that in thus construing the Act we were placing the under-lessee in a better position than the lessee. This matter is so well dealt with by Charles, J., in *The Wardens of Cholmeley School* v. *Sewell*, [1894] 2 Q. B. 906, at p. 911), that I shall venture to read from his judgment. [His lordship read that page, and continued:] I come, therefore, to the conclusion that the court has clearly jurisdiction.

Assuming the jurisdiction, ought relief to be granted to the under-lessee in this case? It is a relief which ought to be given with caution and sparingly. It is exceptional. It could not be given to the lessee. It materially affects the interests of lessor and lessee. Before asking for it the under-lessee ought to be in a position to prove that he is blameless and exercised all those precautions which a reasonable, cautious, and careful person would use. Here the under-lessee became assignee of a term of twenty-one years, less twelve days, with a covenant not to assign without consent, and he was about to spend £500 on the property. This ought to have put him on inquiry: *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353. Mr. Buckmaster admits that the under-lessee had constructive notice of a defect in the title. If the under-lessee had investigated the title he would have found the restrictive covenant, and then would not have spent his money without obtaining the necessary consent. What has happened arises from the neglect of the under-lessee; and in these circumstances I do not think we ought to grant him grant him the relief he asks. The granting this relief is a matter of discretion.

The appeal is dismissed.

RIGBY, L.J.—I am of the same opinion. Two main questions have to be decided. First of all, the true construction of the Conveyancing Acts, treating the Act of 1892 as one with that of 1881. That may be said to be the main question. Upon that I have arrived at a clear conclusion on the lines of the judgment of Charles, J., already referred to. I will say a few words from my own point of view on the different sections. There is no important question of construction raised here for the first time on the Act of 1881. It is a question, mainly, as to the meaning of section 4 of the Act of 1892 read as part of the Act of 1881.

Now, Mr. Duke urged everything that possibly could be said on that side, that we ought to treat

section 4 as a section amending section 14. I think there was an insurmountable difficulty in the way of the success of that argument. Look at the Act of 1892. It is dealing, of course, in this part of it, with under-leases and forfeiture; and there are different clauses, and the sub-section in section 2 is an obvious amendment of section 14. Sub-section 2 of that section 2 says: "Sub-section 6 of section 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture, on bankruptcy of the lessee or on taking in execution of the lessee's interest, only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section 6 shall cease to be applicable thereto." The precise meaning of that it is not necessary to go into here, because it is not involved in this case; but it obviously intended to change the law as between an original lessor and original lessee, and is therefore appropriately treated as amending section 14 of the Act of 1881. Then there is a further amendment which I do not need to notice, and then we leave, as it seems to me, section 14 altogether.

The Legislature having introduced by section 2 some such amendment as was thought necessary for section 14, goes on to enact in section 3, "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent." That is something going outside and beyond anything that was contained in section 14. It could not, by any reasonable intendment, be treated as an amendment of section 14. Then we come to the critical section—section 4. It would have been perfectly easy, if it had been intended, to have included that provision in the earlier section 2. The fact that it was not introduced there seems to me rather a strong argument for treating it, in point of verbal construction (which is all that I am talking about now), as an independent section, just as section 3 is an independent section. That is very much confirmed when we find this clause introduced by exactly the same sort of language as that which introduced sub-section 2 of section 14: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation," and so on. That looks as though it was a parallel section and not an amending section. When we consider the nature of it I think that comes out clearly. There may be cases, no doubt, in which an under-lessee ought, for all purposes, to be considered as in the same position as the original lessee; but there may be cases even with regard to a covenant not to assign, as to which there is no jurisdiction to give relief to the original lessee, in which it would be reasonable to give relief to the under-lessee. I will take as an instance in support of the argument a possible, but not very probable case, where a covenant against assigning without consent was contained in a separate deed, and not referred to in the original lease. As between original lessor and original lessee it would not make the slightest difference; but the under-lessee would not have constructive notice of the covenant at all. If he looked at the original lease itself (I am assuming there is no reference in that to the collateral covenant) he would have no notice at all. So by the act or omission of the original lessor, the under-lessee is placed in a position of difficulty, for he could not by any means get at that collateral deed. I think that is a case which the Legislature contemplated, and there may be other cases where it would be hard upon the under-lessee to treat him as though he were a party to the covenant which he would not have the chance of even ascertaining the existence of if he examined the title ever so closely. I think it is reasonable to suppose, to provide for cases of that kind, the Legislature chose to give the High Court of Justice the very wide discretion which is contained in section 4. I come to the conclusion that section 4 was deliberately intended to be a parallel section, and that the discretion given to the court does involve a power (in very exceptional cases, I agree) to give relief to an under-lessee, even though it might be a case of a breach of a covenant not to assign. But how is that discretion given to the court to be exercised? Not as though by express language the courts were told by the Legislature not to take any notice of the previous legislation. I think it is the duty of the court to consider that previous legislation most carefully, and to take care that they do not indirectly, by the exercise of the discretion given to them, do away with that which was a clear intention in the case of the Act of 1881, to withdraw from the court all discretion as between original lessor and original lessee when the forfeiture arose from breach of covenant not to assign without consent. We have, therefore, to consider that one of the cardinal features of the Act of 1881 was that the lessee shall not have relief against breach of the covenant not to assign. What was the intention of the Legislature in so enacting, I cannot say; it might be suggested to be owing to the wilful nature of the act. That will not do. There are other cases of wilful breach of covenant against which the court has discretion as to granting relief. It may be, and possibly is, partly because of the irreparable nature of the act. In the other cases you would place the lessor and lessee in precisely the same position in all respects as they were. In the case of a breach of covenant not to assign, that cannot be done. If you give relief to the lessee there, you cannot place the parties in precisely the same position. You may place them in as good a position—that is for the consideration of the court. At any rate, the Acts of Parliament exclude that question as between lessor and lessee. For my part I see great difficulty in imagining any case under section 4 where it would be right to give relief unless it was founded upon some act or omission of the lessee; but I do not lay that down as a rule. When a wide discretion is given to the court, it certainly ought not to be the business of the court immediately to begin to lay down rules to regulate it.

Now, coming to this case, what is the position of the under-lessee? He buys according to the form of contract which is prescribed by the Conveyancing Act of 1881. That was a continuance of the policy of the Vendor and Purchaser Act. It only comes to this: Where there is no provision to the contrary, where the parties do not choose to make a different bargain, they shall be presumed to have bargained on the terms mentioned in the Act. It does not say, and it was impossible to suppose that the Legislature ever intended that an under-lessee should not be affected by any defect of title of the original owner, because the original lessor might have never had any interest in the property. It was only intended to form a model for a contract when the parties did not think fit to depart from it. And in the

ordinary case of a lease for occupation purposes the probability is that they would not depart from it. It was intended to remedy a mischief that arose when a man had agreed to take an under-lease and he wanted to get off his bargain, and therefore began to harass his lessor by requiring him to give information as to title which he could not give. But, as pointed out by the late Master of the Rolls in the case already referred to, *Patman* v. *Harland*, that is reasonable where a man is merely taking an occupation lease; but if he is intending to spend money on the premises—for instance, a building lease for 1,000 years, would it be rational or reasonable in him to adopt that statutory form of contract? The answer is, No. He ought to say, "Notwithstanding that statute, I must have a reasonable production of the documents relating to the whole title." Now in this case the statutory form of contract was adopted; that is just the same as though the under-lessee had said, "I will not ask about the title"; but of course he has constructive notice of everything he could have arrived at in the proper way by consulting the title, if he had acted reasonably. A man cannot say by shutting his eyes, "I did not see, and therefore I am not to be bound by such-and-such a defect." Constructive notice differs, no doubt, from express notice in the way in which it arises. But what is the meaning of it? You have constructive notice when you ought to be treated as though you had express notice. If there is constructive notice, it is exactly the same thing as express notice for any purpose we have to deal with. Here is a gentleman proposing to take an under-lease and bargaining that he would not investigate the title, and saying, "I am content to run the risk; and although I am going to spend money I will not inquire into the superior title; I will take my chance of that." I think I might stop there and say there is no case.

But many other things have been referred to here. The first thing that this lessee would know of the title would be that Mrs. Oakshette granted a lease for twenty-one years, less ten days, to Adams. Adams assigned or underlet to Muspratt, and Muspratt to the present applicant. Everyone acquainted with conveyancing knows that that would point strongly to the fact that Mrs. Oakshette, the lessor, was not the freeholder. People do not create terms for twenty-one years, less ten days, unless there be a superior lease. Mr. Buckmaster pointed out that the rent was to be paid to the heirs. That might be, as far as it went, likely to throw off the under-lessee from inquiry; but something in the opposite direction was pointed out by the length of the term itself. I do not go into this carefully because I think no representation made by the lessee could bind the original lessor unless he was to blame in some way for allowing it to be made. The conclusion which ought to have been arrived at, would be that it was a very carelessly drawn lease, and not much reliance could be placed upon the precise terms of it. At any rate it was by reason of the trustfulness of this under-lessee that he did not find out the terms of the original lease. I can see no conceivable reason here for giving him the relief he asks for.

Appeal dismissed.

Solicitors, *Harris & Chetham; Gush, Phillips, Walters, & Williams; Morten, Outler, & Co.*

From Q. B. Div. (Lopes and Rigby, L.JJ.) — May 19.

SOUTHPORT TRAMWAYS CO. v. GANDY. (a.)

Practice—Writ—Specially-indorsed writ—Recovery of land and mesne profits—Ord. 3, *r.* 6—*Ord.* 14, *r.* 1—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 214.

The plaintiffs issued a specially-indorsed writ under ord. 3, *r.* 6, *claiming possession of certain lands held over by the defendant, who had been tenant to the plaintiffs, after the termination of his tenancy, and £80 for mesne profits. On an application under ord.* 14, *r.* 1, *for leave to sign final judgment for £80 and for possession, the accompanying affidavit stated that the £80 was claimed as double value for six months in consequence of the defendant having refused to deliver up possession.*

Kennedy, J., *gave the requisite leave and directed mesne profits "to be calculated up to the date of the plaintiffs obtaining possession."*

Held (*affirming* Kennedy, J.), *that, notwithstanding the terms of the affidavit, the writ was specially-indorsed so as to bring it within order* 14, *and that the learned judge had jurisdiction to make the order giving mesne profits up to the time of possession being obtained.*

A specially-indorsed writ was issued claiming possession of certain premises at Southport. The particulars described the property and stated that the defendant had been tenant to the plaintiffs and that his tenancy had expired by notice on the 23rd of March, 1897. The plaintiffs claimed "possession and £80 mesne profits."

The affidavit in support of an application to sign final judgment under ord. 14, r. 1, stated that £80 was claimed for mesne profits in respect of the premises in consequence of the defendant having refused to quit and deliver up possession, such sum being six months' rent at double value from the 23rd of March, 1897.

Kennedy, J., gave leave to sign final judgment for possession of the premises "and for mesne profits, to be calculated up to the date of the plaintiffs obtaining possession." He also gave leave to appeal.

The defendant appealed and asked that the order might be set aside, or part of it, and that he might have unconditional leave to defend.

Scrutton, for the appellant.—The double value here claimed is a penalty and ord. 3, r. 6 (*c*) does not authorize a specially-indorsed writ for such a purpose. The action is brought under 4 Geo. II. c. 28. Ord 14, r. 1 (*b*), describes the proper procedure which the judge should have followed. A second action should have been brought to recover the mesne profits.

T. Shepherd Little, for the plaintiffs.—Ord. 3, r. 6, is divided into two parts, (1) liquidated demands; (2) unliquidated damages in the nature of mesne profits. Appendix C., s. 7, gives a form of claim for possession of land and mesne profits, and that was the form adopted here. It is not the judge's duty to put the plaintiffs to the expense of a second action for the recovery of mesne profits.

Scrutton replied.

LOPES, L.J.—In my opinion the order appealed from is perfectly good. The first objection taken to it is that the writ is not a specially-indorsed writ so as to bring it within order 14. I have not the slightest doubt that it is a perfectly good writ for the recovery of the land and mesne profits. That is perfectly correct. The plaintiffs might have

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

put in a claim for any amount they thought fit for mesne profits. They might have said £10,000, and the claim, although exorbitant, would not have effected the validity of the writ. It is said that the plaintiffs have filed an affidavit from which it appears that their claim was not made for mesne profits, but for a penalty—viz., double value for holding over, and so was not within ord. 3, r. 6; but that affidavit in no way invalidates the writ, and the order which the learned judge has made is perfectly within the terms of the writ, being an order for possession and mesne profits up to the time of the plaintiffs obtaining possession.

Then it is urged that he had no jurisdiction to give mesne profits up to that time, and that he could only give them up to the date of his order. But the defendant had written a letter to say that he would not go out of possession, and that possession was nine points of the law. The learned judge saw that it was impossible to tell when the defendant would give up possession, and that it would be useless to give mesne profits only up to the time of his order. The learned judge in my opinion was quite right in giving mesne profits up to the time of possession being obtained.

RIGBY, L.J.—I am of the same opinion. The only difficulty which I felt on the first point was owing to my want of knowledge of the practice in these cases. I did not know whether it was not incumbent on the plaintiffs to state in the writ the amount they were prepared to stand by. But it was admitted that there was no rule or practice to that effect, and I take it that even if an exaggerated amount is claimed, it will not make the writ bad. The writ, then, is perfectly good. I give no opinion upon the question whether double value for six months might have been recovered in this form of proceeding; it was not claimed by the writ, and therefore does not come in question. In these days no judge is bound to go back and trace out the origin of his jurisdiction. He finds that he has jurisdiction to make an order for recovery of the land and payment of mesne profits, and he was quite right in making an order for the payment of mesne profits till the time when the plaintiffs obtain possession. It would have been wrong to drive the plaintiffs to bring a second action.

The appeal will be dismissed, with costs.

Appeal dismissed.

Solicitors, *F. A. Rudall*; *Rowcliffes, Rawle, & Co.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) } May 24, 25, 27; June 3.

DALTON v. FITZGERALD. (a.)

Estoppel—Settlement of land by grantor having no title—Acquisition of possessory title by tenant for life—Rights of remaindermen—Statute of Limitations—3 & 4 Will. 4, c. 27, s. 34.

A. obtained in 1867 possession of land under a settlement made in 1842 whereby an estate was limited to him for life, with remainder over. The settlor had no title to the land in question.

Held, that A., and those claiming through A., were estopped from setting up as against the remaindermen any title adverse to the deed of settlement—e.g., a title by possession under the Statutes of Limitation.

Hawksbee v. Hawksbee, 11 *Hare*. 230, *and* Board v. Board, 22 *W. R.* 206, *L. R.* 9 *Q. B.* 48, *approved and adopted.*

Appeal of the defendants from a decision of Stirling, J. (reported [1897] 1 Ch. 440).

The facts sufficiently appear from the written judgment of Lindley, L.J.

Elton, Q.C., Buckley, Q.C., and *Carson,* for the appellants.—These lands can under no circumstances fall within the settlement of 1842. It conferred no beneficial interest on anybody other than what the will of John Dalton gave, and there was obviously a mistake. John Dalton at the date of his death left two co-heiresses, his daughters Elizabeth and Lucy. Lucy, who was a married woman, executed the deed, but it was never acknowledged, and was therefore inoperative. Elizabeth could only deal with her own moiety; she intended the trustees to grant the lands in ignorance of her rights, and this cannot operate as an estoppel: *Carpenter* v. *Buller*, 8 M. & W. 209; Shelford's Real Property Statutes, 9th ed., p. 258. There are two classes of cases: (1) where a testator without title makes an effective devise assuming a good title: *Board* v. *Board*, 22 W. R. 206, L. R. 9 Q. B. 48; *Hawksbee* v. *Hawksbee*, 11 Hare, 230; (2) where a testator having a good title makes an ineffective devise: *Paine* v. *Jones*, 22 W. R. 837, L. R. 18 Eq. 320, and *In re Stringer's Estate*, 25 W. R. 815, 6 Ch. D. 1. This case falls within the second class. [They also referred to *Kernaghan* v. *M'Nally*, 12 Ir. Ch. Rep. 89; *Scott* v. *Nixon*, 3 Dru. & Warr. 388.] *Kernaghan* v. *M'Nally* was supposed to apply the principles of other cases, but it was a misapplication of principles, and the arguments which showed them to be right showed that case to be wrong.

Hastings, Q.C., and *Prior,* for the respondent.

Cur. adv. vult.

June 3.—LINDLEY, L.J.—The question raised by this appeal is whether the plaintiff is entitled to eject the defendants from certain lands in Bulk in the county of Lancaster. In 1894 Sir Gerald Fitzgerald died, seised and in possession of the lands in question. The plaintiff says that Sir Gerald was tenant for life only under a deed of 1842, and the plaintiff claims as entitled in remainder under the same deed. The defendants say that, although Sir Gerald entered upon and enjoyed the lands as tenant for life only, and believed himself to be so, yet that this was a mistake, and that when he died he was really tenant in fee, and that he devised the lands to the defendants on certain trusts. On his death they entered on the lands, claiming to be entitled to do so as the trustees of his will, and in that character and under that title they defend this action. The defendants, however, further contend that, even if they have no title, they are in possession, and that the plaintiff has no title, and cannot therefore eject them. Stirling, J., decided in favour of the plaintiff. I will first examine the question of title. The right of the plaintiff to eject the defendants will then be easily disposed of.

Under John Dalton's will of 1828 the lands in question, if comprised in it, would in 1842 have been vested in trustees upon trust to convey them to the persons then equitably entitled to them under the limitations contained in the will. It was contended by the defendants, and I will assume correctly, that the lands in question did not pass by this will. It is tolerably plain that everyone interested in the will thought that the lands were comprised therein. In 1842 the trustees of the will, acting, as they and everyone else supposed, in conformity therewith, conveyed the legal estate in the lands comprised in the will, and also, in express terms, the lands in Bulk

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

which are now in question, to the persons who would have been equitably entitled to them if they had passed by the will. The daughters and co-heiresses of the testator, to whom, according to the defendants, these lands had descended, were parties to this conveyance, but they were not conveying parties, nor did the daughter who was then married acknowledge the deed under the Fines and Recoveries Abolition Act.

Under the deed of 1842 the lands in question were conveyed so that, in the events which have happened, they legally vested according to the deed (1) in the testator's two daughters and co-heiresses for their lives; (2) in the testator's nephew, Sir James Fitzgerald, for life; (3) in Sir Gerald Fitzgerald for life; (4) in the plaintiff for life. The surviving daughter and co-heiress died in 1861, and Sir James Fitzgerald then entered into possession as tenant for life. He died in 1867, and then Sir Gerald Fitzgerald took possession as tenant for life, and he died in February, 1894. Shortly before his death, however, he seems to have been advised that the lands in question had not passed under the will of 1828, and that the deed of 1842 was inoperative as to them, and on the 3rd of January, 1894, he procured himself to be registered under the Land Transfer Act of 1875 as owner in fee in possession. He did this without notice to anyone interested in disputing his claim. He left a will or codicil devising these lands to the defendants upon certain trusts, and they claim the lands accordingly. The fact that Sir James Fitzgerald, and after him Sir Gerald Fitzgerald, took and held possession as tenants for life under the deed of 1842, and not otherwise, is conclusively proved by the numerous dealings with those estates by them in their lifetimes. It is not necessary to refer to them at length.

Now, it is contended by the defendants that, if the lands in question were not comprised in the will of 1828, the deed of 1842 was inoperative as a conveyance of them, and that Sir Gerald Fitzgerald acquired a good title to these lands by the Statute of Limitations, and that he was entitled, and that the defendants as his devisees are entitled to set up the title so acquired against the plaintiff, who claims the lands in remainder under the deed of 1842. This contention is really based on a misconception of section 34 of 3 & 4 Will. 4, c. 27, which extinguishes the right and title of the person against whom the statute has run. That section does not confer a statutory title against everybody upon the person in whose favour the statute has run, although it does as against those persons whose rights are barred by the statute. This was pointed out by Martin, B., in *Anstee* v. *Nelms*, 4 W. R. 612, 1 H. & N. 225, at p. 232, when he said that "the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against the remainderman." This was approved as good sense and good law in *Board* v. *Board*. The misconception as to the effect of the statute is extremely well put in the following passage in Pollock and Wright on Possession, at p. 95: "It would be possible at first sight to suppose that, as between a succession of independent occupiers who were all wrongdoers as against the true owner, the law must be indifferent, with the result of conferring an absolute title upon the person who happens to be in possession when the time of limitation expires. Reflection, however, shows this to be contrary to the reason and principles of the law. Possession being once admitted to be a root of title, every possession must create a title which, as against all subsequent intruders, has all the incidents and advantages of a true title. William is the possessor and apparent owner of a house; in that house he dies; we will suppose him to die intestate. John, wrongly supposing himself to be entitled as the heir of William, enters and occupies the house. Peter is really William's heir, but ignorant of the facts; in course of time, having obtained information and advice, he sues John. It turns out that William had disseised Giles the true owner, by mere encroachment or in some other way, and would have had no answer to an action brought by Giles or his assigns to recover the land. But since William's death the period of limitation has expired, and the right of Giles is extinguished. Can John use this as a defence against Peter? No; for the statute has nothing to say, for better or worse, about the person in actual possession, or the relative worth of the qualified rights to possess which may have arisen while time was running against the true owner. It says that Giles, and those who have, or would have had, his estate, shall not from henceforth sue any one; it does not say that Peter shall not sue John. Whether some one has a higher title or not, Peter has a better title than John, as he would have had though the true owner's claim were still enforceable. In the language of the modern authorities, 'possession is good title'—nothing less—'against all but the true owner.'"

When the authorities are examined they are all in favour of the plaintiff; none really support the defendants' contention. *Board* v. *Board* is, in my opinion, clearly in point, and clearly right. Whether *Kernaghan* v. *M'Nally* did not go too far it is not necessary to consider. I have great difficulty in reconciling it with Sir E. Sugden's previous decision in *Scott* v. *Nixon*. *Paine* v. *Jones* is intelligible having regard to the facts of that case. The widow, who had entered as tenant for life under a will which did not pass the lands in question, was allowed by the court (under circumstances which do not appear) to exclude them from a conveyance to new trustees, and she was allowed to keep possession of them after it had been ascertained that she had no right to them. But I am not satisfied of the soundness of the distinction drawn by Malins, V.C., between cases of persons having no title under a will because it does not purport to include the lands they claim, although they believe that it does, and persons claiming under a will which purports to deal with land to which the testator has no title, although he thought he had. No doubt a person may by mistake treat himself as tenant for life of property of which he is himself the owner, and such a mistake can be set right unless he has so acted as to render a rectification of the mistake unjust to others. But the distinction drawn by the Vice-Chancellor, although it would include such a case, goes much further, and unless restricted it seems to me likely to lead to error. That case, which is the one principally relied upon by the defendants, is not really an authority for them, owing to its peculiar facts. Nor is the passage read from Sir G. Jessel's judgment in *In re Stringer*. What he was objecting to (6 Ch. D., p. 10) was the extension of the doctrine of estoppel to tenants for life who do not dispute their testator's title, but who do dispute the legal validity of their dispositions of property which was their own. It appears to me clear that Sir Gerald Fitzgerald never acquired a legal title to these lands by the Statute of Limitations as against the plaintiff, and that as between them the deed of 1842 regulates their rights. The defendants, as Sir Gerald's devisees, are in no better position than he was, and, so far as title is concerned, the plaintiff is entitled to the lands in question for life under the above deed. I pass now to the defendant's contention that, being in possession it matters not by what title, and that it is sufficient to show

that the lands did not vest in the trustees of the will of 1828, and were therefore unaffected by the deed of 1842, and do not therefore belong to the plaintiff. If the defendants had entered, claiming no title under Gerald Fitzgerald, this point would require attention, but in truth it does not arise. The defendants are trustees of his will, and as such they defend this action. We need not consider whether as squatters, claiming no title themselves, there would be any difficulty in ejecting them. The appeal must be dismissed, with costs.

LOPES, L.J.—I do not propose to re-state the facts of this case so fully stated in the court below, but will content myself by enunciating the principles of law applicable to those facts. When certain facts in the case are rightly understood, it does not appear to me to be a case of difficulty, and is covered by authority. It is to be assumed that the lands of Bulk did not pass under the will, and were subsequently erroneously settled with other lands by the deed of 1842, which deed gave Sir Gerald Fitzgerald a life interest in the property so settled. He really had no title to the lands of Bulk, but entered into possession of them under the deed of 1842, exercising powers conferred by that deed, such as the powers of jointuring and charging portions for younger children. He also paid succession duty as tenant for life. The effect of the deed was to confer a legal title on the beneficiaries under the deed, of whom the plaintiff was one. Sir Gerald Fitzgerald remained in possession of the lands of Bulk sufficiently long to entitle him to the property under the Statute of Limitations, if he is not estopped. The defendants are devisees of Sir Gerald Fitzgerald, and "are his privies." Estoppel binds not only the parties but the privies. The defendants, therefore, are in no better position than Sir Gerald Fitzgerald, and if he was estopped, they are estopped. If a person obtains possession of land, claiming under a will or a deed, he cannot afterwards set up another title to the land against the will or deed, though the deed or will did not operate to pass the land in question. It is said the property passed by the will, and not by the deed. But how can this be said about the lands of Bulk? They were not included in the will, but were settled, or, at any rate, were purported to be settled, by the deed. A person having no title to land settles it on A. for life with remainder to B. A. enters and takes possession and deals with the property as tenant for life; that person is estopped from telling the truth; his month is shut—he has availed himself of the settlement for the purpose of obtaining possession of the land, and he cannot afterwards seek to invalidate that which enabled him to obtain possession, and this though subsequently he may have acquired a good title. If a man obtains possession of land, claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed, though it did not operate to pass the land in question; and if he remain in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed. If the interest devised to him by the will is a life estate the devisees or grantees in remainder will be entitled to enter when that estate determines—and not only is a person who enters under a will or a deed estopped from setting up a title adverse to the will or deed, but anyone who gains possession through a person interested in the land under the will or deed is bound by the same principle of estoppel: *Hawksbee* v. *Hawksbee*; *Board* v. *Board*, which latter case in my judgment governs the case now under consideration. I am of opinion that the doctrine of estoppel applies to this case, and that Sir Gerald Fitzgerald and all persons claiming under him are precluded from denying that the settlement was effectual. The appeal must be dismissed, with costs.

RIGBY, L.J.—I do not think it necessary to re-state the terms of the settlement of 1842. Possession was held under the terms of it from 1842 to 1867. The plaintiff, claiming possession as tenant for life under the settlement of 1842, among other contentions, set up the contention that the defendants, as deriving title under Sir Gerald Fitzgerald, were estopped (whatever the real title might have been) from disputing the right of the plaintiff under the settlement of 1842. Assuming in favour of the defendants that no estate in the lands in question passed by the settlement, I am of opinion that this contention on the part of the plaintiff must succeed, and therefore that it is not necessary to go into any other point argued. It was indeed argued that, on the face of the settlement, the want of title of the grantors sufficiently appeared to prevent an estoppel; but on this point I agree with Stirling, J. I am quite unable to distinguish the present case from that of *Board* v. *Board*, the authority of which has not been questioned and cannot in my judgment be successfully questioned. This case arises under a deed, and not under a will, but the doctrine of *Board* v. *Board* is no part of the law of wills, and depends only upon an estate being taken under an instrument, whatever it may be. It follows that it would be useless to inquire further into the validity of the settlement of 1842, the very principle of the decision being that no inquiry into the title is permissible on the part of a person who himself entered by virtue of the settlement or of persons claiming through him. I abstain therefore from commenting upon any other part of the case on the ground of the irrelevancy of all other considerations set up. I will add that for my part I do not desire to express any doubt as to the cases of *Paine* v. *Jones* and *In re Stringer*. I consider them irrelevant to the present case. I feel the same difficulty in reconciling the decision in *Kernaghan* v. *M'Nally* with Lord St. Leonards' decision in *Scott* v. *Nixon* that has been expressed by my brother Lindley.

Appeal dismissed.

Solicitors, *Carlisle, Unna, Rider, & Heaton; H. B. Bell.*

High Court of Justice.

Q. B. Div.
(Hawkins and Wright, JJ.) June 19; July 3.

THE GRAND JUNCTION WATERWORKS COMPANY (*Appellants*) v. DAVIES (*Respondent*). (*a.*)

Water—Rating—Annual value—House and garden—Supply of water for domestic purposes—Basis of assessment—Justices—Exclusion of part of premises—Grand Junction Waterworks Act, 1852 (15 & 16 *Vict. c. clvii.*), *s.* 46—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 68.

Section 68 *of the Waterworks Clauses Act*, 1847, *provides that the water rate shall be payable according to the annual value of the "tenement supplied with*

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

water," and if any dispute arise as to such value, the same shall be determined by two justices.

Held, that the justices, in determining under this section the annual value of premises consisting of a dwelling-house and garden occupied as one residence, cannot exclude the garden or any part of the premises, but must take into consideration the whole premises as being the "tenement supplied with water."

Case stated by justices of the peace sitting at the police court, Brentford, in the county of Middlesex.

The appellants and respondent appeared before the justices, upon an application to the justices by the respondent under section 68 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which provides: "The water rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

The application was to determine the value of a certain tenement known as No. 1, Grange-road, Ealing, supplied with water by the appellants, and owned and occupied by the respondent, a dispute having arisen as to such annual value between the appellants and the respondent. The tenement is outside the area to which the Water Rate Definition Act, 1885 (48 & 49 Vict. c. 34), applies.

By section 46 of the Grand Junction Waterworks Act, 1852 (15 & 16 Vict. c. clvii.), it is enacted that the appellant company "shall, at the request of the owner or occupier of any house in any street within the limits of this Act in which any pipe of the company shall be laid, furnish a supply of water for domestic purposes where the annual value of the dwelling-house or other place supplied shall not exceed £200 at a rate per centum per annum on such value not exceeding £4," &c.

By section 48 it is enacted that "a supply of water for domestic purposes shall not include a supply of water . . . for gardens, fountains, or ornamental purposes."

By section 49 it is enacted that "the company may supply any person or body within their limits with water to be used within such limits for other than domestic purposes at such rate and upon such terms and conditions as shall be agreed upon," &c.

The Waterworks Clauses Act, 1847 (except the provisions with respect to the communication pipes to be laid by the undertakers and section 35) was incorporated with this private Act.

The premises in question consisted of a dwelling-house with a gravelled approach in front and garden at the back, consisting in part of lawn and in part of kitchen-garden, with greenhouse and tool-shed. The whole of the premises were occupied by the respondent as a residence, and the garden and the other appurtenances formed part of the curtilage of the house. The total area of the premises was a little over half-an-acre.

The appellants supply the respondent with water for domestic purposes under and in pursuance of section 46 of the private Act, and section 68 of the Waterworks Clauses Act, 1847, at a rate according to the annual value of the tenement supplied with water. The respondent has also under threat of legal proceedings paid to the appellants for the use of water for garden purposes during the season of 1896 the sum of one guinea, but no agreement under the 49th section of the Act was made between the parties for the supply of water for garden purposes.

The question at issue was as to what was to be taken into account in determining the annual value of the "tenement supplied with water."

For the appellants it was contended that the tenement, the annual value of which was to be determined, was the whole area of the premises occupied by the respondent as one undivided tenement.

For the respondent it was contended that the tenement was the dwelling-house alone, and that the garden ought to be excluded in calculating the annual value of the "tenement supplied with water"; and the respondent's witnesses, in order to show that the garden might have a letting value apart from the house, suggested that by making entrances and dividing off the premises into three separate parts, the part of the garden consisting of lawn might be let as a lawn-tennis ground, the remainder of the garden might be let as a kitchen garden, and the dwelling-house would then stand with only a small piece of ground attached to it. The appellants' witnesses asserted that such suggestion would completely alter the character of the premises and decrease their letting value.

The justices found as facts that the annual value of the whole tenement as occupied by the respondent was £100; but that the annual value of such tenement, if a certain portion of the garden were excluded, was then £80; and that such piece of garden, although occupied by the respondent as part of the premises and not divided or separated in any way, and though desirable for the enjoyment of the premises, might have been separately let.

They were of opinion that neither the respondent's nor the appellants' contention was correct, and that in arriving at the annual value of the tenement supplied with water they had to make a special assessment for water purposes only for the purpose of a domestic supply, and were therefore obliged to determine what quantity of garden should in their opinion reasonably go with the house.

They were further of opinion that to determine the annual value of the tenement they ought to consider (1) that the garden is by the statute expressly excluded from receiving water under the head of domestic purposes, and (2) that under the *Bristol Waterworks Co.* v. *Uren*, 15 Q. B. D. 637, 33 W. R. Dig. 239, and the cases there cited, a reasonable amount of garden must be included in the assessment for domestic supply.

It appeared to the justices that a distinct and appreciable area beyond that which was reasonable and necessary for the enjoyment of the dwelling-house (having regard to its character and the locality) —viz., the back or kitchen garden, could be severed and form by itself a defined unit for the purpose of separate assessment for all rating demands, as it was of reasonable size and capable of being divided and let for a building site or for other purposes.

They accordingly held that the annual value of the tenement for the purposes of the said section was £80.

The question for the court was whether the justices were right or wrong in law in holding that they had to make a special assessment only for water purposes for the purpose of a domestic supply, and were therefore entitled to determine what quantity of garden should reasonably go with the house apart from the fact of what was then occupied therewith, and whether they were right or wrong in excluding a portion of the garden in determining the annual value of the tenement supplied with water. If the justices were wrong the assessment was to be raised to £100.

Bosanquet, Q.C. (*Ram* with him), for the appellants.—Under section 68 of the Waterworks Clauses Act, 1847,

what has to be assessed is the annual value of the "tenement supplied with water." The tenement supplied with water in this case was the whole residential tenement, the whole premises as they existed at the time and as they were then occupied by the respondent. The justices therefore, in ascertaining the annual value, had no jurisdiction to exclude the garden or any part of the garden or of the premises, but they were bound to take into their consideration the whole premises as they then stood and were occupied by the respondent. It has been said that by making entrances and carrying out other alterations the parts might have been let separately, but the respondent has not chosen to separate these parts, and until he does so what has to be assessed is what is occupied by him as one residence and one tenement: *Bristol Waterworks Co.* v. *Uren*, 15 Q. B. D. 637; *West Middlesex Waterworks Co.* v. *Coleman*, 33 W. R. 549, 14 Q. B. D. 529; *Busby* v. *Chesterfield Waterworks and Gas Light Co.*, 6 W. R. 515, 27 L. J. M. C. 174. He also referred to and read the judgment in the unreported case of *Lowe* v. *Lambeth Waterworks Co.*, decided by Jessel, M.R., in 1875, and referred to in the judgment of A. L. Smith, J., in the *Bristol Waterworks Co.* v. *Uren*.

E. Shortt (*F. Low* with him), for the respondent.—The tenement supplied here was the dwelling-house alone, and not the garden. The supply in this case was a supply for domestic purposes under section 46 of the private Act, and by section 48 a supply for domestic purposes does not include a supply for the garden. The garden is expressly excluded from such supply, and if the garden were to be included the supply would be a supply to the garden for garden purposes, and would be regulated by agreement under section 49 of the private Act. The cases cited are not much in point, as in the private Acts in question these gardens were not excluded, whereas in this private Act gardens are excluded; and these cases merely say what were domestic purposes. That is not material here, as it is regulated by the Act. The Act excludes from domestic purposes certain things, amongst which are gardens. Therefore what was supplied here was the dwelling-house alone, and not the garden, and the garden ought to be excluded from the assessment. If the whole of the garden ought not to be excluded, then it was a pure question of fact for the justices to determine how much garden ought reasonably to go with the house. That is a question for the justices, and it is a question which they have dealt with by including a certain part of the garden and excluding another part. The justices were right in the principle adopted, and their decision ought to stand.

Cur. adv. vult.

July 3.—The judgment of the court was read by

HAWKINS, J.—[The learned judge stated the facts, and proceeded:] The appellants contended that the whole area of the premises occupied by the respondent as one individual tenement ought to be taken into account. The respondent contended that the dwelling-house alone ought to be considered and that the garden ought to be excluded. After hearing evidence the justices found as a fact that the annual value of the whole was £100; but that a portion of the garden, though not in any way divided or separated from the rest of the premises and though occupied as part of the premises and though desirable for the enjoyment of the premises, might, by making entrances, cutting off a great part of the kitchen garden, one greenhouse and a portion of another, fowl houses, and a coach and bicycle house, have been separately let, and that in this view the annual value would be and was reduced to £80. In my opinion the justices had no jurisdiction to exclude such portion of the garden, &c., from their consideration in determining the annual value of the tenement supplied with water. The 68th section of the Waterworks Clauses Act of 1847 confers upon them no authority to curtail the area, or to alter the boundaries of the existing tenement and to reduce the limits of the garden to that extent which they think should reasonably go with the house by making alterations never contemplated by the owner or occupier and which could not be carried out without substantial operations. The section contemplates only a mere valuation of the existing tenement as the owner and occupier up to the present time have chosen to enjoy it. The whole, in my opinion, forms the residential tenement, and that is the tenement supplied with water. If the owner and occupier desire to curtail the area they can do so for themselves, and when—if at all—they have done so they will be entitled as of right to a valuation of the curtailed area. The reported cases mentioned to us in the course of the argument do not throw much light on the question immediately before us. Still they may be usefully referred to. In the *West Middlesex Waterworks Co.* v. *Coleman* water was supplied for domestic purposes to a house occupied as a licensed public-house. The company contended that in ascertaining the annual value for the water rate the fact that the premises were licensed should be taken into consideration, and that the rate should not be based on their value for domestic purposes only, but on their value as they stood and as they were occupied, and the court held that this contention was correct. In the *Bristol Waterworks Co.* v. *Uren* A. L. Smith, J., intimated the view of himself and Mathew, J., to be that a garden forming part of the amenities of a dwelling-house and occupied with it should be treated as added to the house in assessing the value of the house. In this I entirely agree. In the latter case the case of *Lowe* v. *Lambeth Waterworks Co.*, decided by Jessel, M.R., in July, 1875, was referred to, but the case does not seem to have been reported in any of the regular reports. We think, therefore, the justices were wrong, and that the assessment must be raised to £100.

Appeal allowed; assessment raised to £100.

Solicitors for the appellants, *Bircham & Co.*

Solicitor for the respondent, *H. P. Davies.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — July 19.

EDWARDS v. STEEL, YOUNG, & CO. (*a.*)

Ship—Master—Seaman—Discharge at foreign port—Maintenance and passage home—Deposit of sum with consular officer—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 186, *sub-section* 2 (d).

The plaintiff's service as a seaman on board a ship of the defendants having terminated at a foreign port, the master attended before the British consul in order to comply with section 186, *sub-section* 2 (d), *of the Merchant Shipping Act*, 1894, *which enacts that under such circumstances the master may "deposit with the consular officer such a sum of money as is by the officer deemed*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

sufficient to defray the expenses of" the seaman's "maintenance and passage home." The consul fixed a sum, which the master paid, and the consul gave the plaintiff a voucher for his passage home, which, however, did not include his maintenance on board.

Held, that the master had complied with the statute, and that no action lay at the suit of the seaman against the shipowners to recover the expenses of his maintenance during his passage home.

Judgment of Collins, J., ante, *p.* 553, *affirmed.*

Appeal from the judgment of Collins, J., at the trial of the action without a jury (*ante*, p. 553).

The action was brought to recover expenses incurred by the plaintiff by reason of the master of the defendants' ship, in which the plaintiff was employed as a seaman, having, on the discharge of the plaintiff at a foreign port, wrongfully failed to comply with the provisions of section 186 of the Merchant Shipping Act, 1894.

The plaintiff, who was a seaman living at West Hartlepool, signed articles for a voyage on board the defendants' steamship *Capenor* from West Hartlepool to any port or ports within certain limits for a period not exceeding a year, and back to a final port of discharge in the United Kingdom or on the Continent of Europe between the Elbe and Brest, at the master's discretion.

On the termination of the voyage the crew were discharged at Antwerp, and, together with the master of the ship, they attended before the consul for the purpose of being paid their wages. The consul required the master to give a guarantee for a certain sum to cover the expenses of the crew's passage home, which the master accordingly did; and the consul thereupon arranged with the men to pay their wages and to provide them with a passage home, offering them all a passage to Grimsby, which they all accepted. Their wages were paid up to the date of their discharge, and the consul made out and handed to them vouchers for their passage to Grimsby. The master subsequently paid the consul the guaranteed sum. On the day after their discharge they sailed for Grimsby. The plaintiff had to pay for his food during the passage, as the voucher for his passage did not include maintenance on board, and on arriving at Grimsby he had to pay his railway fare to West Hartlepool.

The plaintiff claimed (1) maintenance and expenses at Antwerp from the time of his discharge till he sailed for Grimsby; (2) maintenance on the voyage from Antwerp to Grimsby; (3) railway fare from Grimsby to West Hartlepool.

Section 186 of the Merchant Shipping Act, 1894, enacts as follows: "(1) In the following cases—namely, . . . (*b*) where the service of any seaman or apprentice belonging to any British ship terminates at any port out of her Majesty's dominions; . . . (2) the master shall also, besides paying the wages to which the seaman or apprentice is entitled, either (*a*) provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman, or (*b*) furnish the means of sending him back to some such port, or (*c*) provide him with a passage home, or (*d*) deposit with the consular officer . . . such a sum of money as is by the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home; . . . (4) if the master fails, without reasonable cause, to comply with any requirement of this section, the expenses of maintenance or passage home, if defrayed by the seaman or apprentice, shall be recoverable as wages due to him."

Collins, J., gave judgment for the defendants. The plaintiff appealed.

Robson, Q.C., and *J. D. A. Johnson*, for the plaintiff.

Joseph Walton, Q.C., and *Lewis Noad*, for the defendants.

Lord ESHER, M.R.—This is an action by a seaman against shipowners to recover something which he claims to be entitled to over and above his wages. He entered into an agreement of employment with them, and by that agreement he might be discharged at a port in the United Kingdom, or at one of certain ports abroad, of which Antwerp was one. He was discharged at Antwerp, and by the contract he was entitled to be paid his wages up to the time of his discharge and nothing more. But the Merchant Shipping Act provides that he shall receive something else over and above that to which he is entitled under the contract. Section 186 says that "where the service of any seaman terminates at any port out of her Majesty's dominions, the master shall, besides paying the wages to which the seaman is entitled"—that is, in this case, his wages till he was discharged at Antwerp—"either (*a*) provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to a port in the United Kingdom agreed to by the seaman." Taking that clause alone, the master would not have to pay the seaman anything; if employment were found for the seaman on board another ship he would receive wages from that other ship. The section goes on, "or (*b*) furnish the means of sending him back to some such port." The master would do that if he paid some other ship to take the seaman back to such a port; or, though I very much doubt this, he might possibly do it by giving the man himself sufficient money to find his own passage. "Or (*c*) provide him with a passage home." I think that that does not mean a passage to any port in the United Kingdom. I am inclined to think, though it is not necessary to decide the point, that it means to the port from which the seaman was shipped, or to some other port in the United Kingdom to which he may agree to be sent. "Or (*d*) deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of his maintenance and passage home." That puts on the consular officer the duty of determining what sum of money is sufficient. I think it makes him the arbitrator of what the amount should be without appeal. If the master deposits with the consular officer the sum so determined, no action can lie against the shipowner at the suit of the seaman; and of course no action can lie against the consular officer.

In my opinion, where the consular officer does undertake to send a seaman home, he ought, in considering the sum to be deposited, to include not only the cost of the passage, but also the maintenance of the seaman during the voyage. But if he fails to do so, there is no remedy against the shipowner. If sub-section (*d*) is complied with, the seaman is not entitled to anything further. The plaintiff here also claims maintenance while he was at Antwerp, and his train fare from Grimsby to West Hartlepool. As to the first, the Act does not provide for the payment of any such maintenance, and as to the second, the plaintiff cannot claim it, having agreed to be sent to Grimsby. The appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. Sub-sections (*a*), (*b*), and (*c*) deal with the seaman and the shipower alone. Sub-section (*d*) brings in the consular officer, and the meaning is that the

consular officer is put above the seaman and the shipowner, and he is to determine what sum the shipowner is to deposit. The shipowner must obey, and there is no appeal. Here the obligation imposed by the sub-section has been performed by the shipowner, and no action lies. But in my opinion when the consular officer comes to determine the amount to be deposited by a master under sub-section (*d*), he ought to take into account the maintenance of the seaman on board as well as his passage home.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Pattinson & Brewer.*

Solicitors for the defendants, *W. A. Crump & Son.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Chitty, L.JJ.) } May 6, 7; July 16.

CONSERVATORS OF THE RIVER THAMES *v.* SMEED, DEAN, & CO. AND ANOTHER. (*a.*)

River—Thames—Conservators—Right to take sand and gravel—"Bed of the Thames"—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 87, 238.

By section 87 *of the Thames Conservancy Act,* 1894, *it is provided that it shall not be lawful for any person other than the conservators, their agents, servants, and workmen to dredge or raise any gravel, sand, ballast, or other substance from the "bed of the Thames" without the license of the conservators.*

Held, that the words "bed of the Thames" as applied to the lower and tidal portion of the river mean the soil of the river between ordinary high-water mark on one side of the river and ordinary high-water mark on the other side. The right of the owner or occupier of lands on the banks of the Thames below Staines to take gravel and sand is not preserved by section 238.

Pearce *v.* Bunting, [1896] 2 *Q. B.* 360, 44 *W. R. Dig.* 142, *overruled.*

This was an appeal by the plaintiffs from the judgment of Bruce, J.

The plaintiffs claimed a declaration that the soil of that portion of the River Thames known as Hadleigh Ray forms part of the bed of the River Thames within the meaning of section 87 of the Thames Conservancy Act, 1894. They also asked for an injunction to restrain the defendants, their servants, or agents from dredging and raising gravel, sand, ballast, and other substances in that portion of the River Thames known as Hadleigh Ray without the licence of the plaintiffs.

The plaintiffs are a body corporate by virtue of section 5 of the Thames Conservancy Act, 1894.

By section 87 of that Act it is provided that "any person, with and in accordance with the licence of the conservators, and under the hand of the chairman of the conservators or the secretary, may dredge and raise gravel, sand, ballast, and other substances from the bed of the Thames (other than that portion thereof mentioned as reserved to her Majesty in section 59 of the said Act); but subject to the provisions of the said Act it shall not be lawful for any person other than the conservators, their agents, servants, and workmen to dredge or raise any gravel, sand, ballast, or other substance from the bed of the Thames other than that portion thereof mentioned in the said section, except with and in accordance with such licence; and if any person acts in contravention of this enactment, he shall for every such offence be liable to a penalty not exceeding twenty pounds without prejudice to any other remedy or proceeding against him; provided that nothing in this section shall take away or prejudice or affect the rights, if any, of dredging or raising gravel, sand, ballast, or other substances from the bed of the Thames above the City Stone above Staines, which would have been vested in or exerciseable by owners of the soil of such bed if this Act had not been passed."

On the 28th of September, 1896, the defendant, Thomas Pearce, who was at the time in the employ of the defendants, Smeed, Dean, & Co. (Limited), and was acting with their authority and consent, dug sand at a place called Hadleigh Ray, in the county of Essex, which is between high and low-water mark of the River Thames, while the said place was dry, and placed it in a barge then lying on the said place. The defendants acted thus without any licence of the plaintiffs authorizing them and empowering them to do so.

By their defence the defendants denied that what they had done constituted a dredging or raising of sand within the meaning of section 87 of the said Act, or that Hadleigh Ray is a part of the "bed" of the Thames within the meaning of the said Act.

The defendants further pleaded that they did such acts by virtue of a licence from one William Foster, who had a lease of Hadleigh Ray from one William Booth, the owner thereof; in the alternative the said William Booth and his predecessors in title had taken sand and received payments for licences to take sand from Hadleigh Ray from time immemorial without the licence of the plaintiffs.

Jelf, Q.C., and *J. E. Bankes,* appeared on behalf of the appellants.

Channell, Q.C., and *Scrutton,* for the respondents.

The arguments of counsel sufficiently appear in the following written judgments.

July 16.—A. L. SMITH, L.J.—This action is brought by the Conservators of the River Thames, asking for a declaration that a place called Hadleigh Ray, in the county of Essex, is part of the "bed of the Thames" within the meaning of section 87 of the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), and for an injunction restraining the defendants from dredging and raising gravel, sand, ballast, and other substances therefrom without the licence of the plaintiffs. Had the plaintiffs asked for a declaration that they were entitled under that section to license persons to dredge and raise gravel, sand, and other substances, as they thought fit, from the place in question, irrespective of whether such dredging and raising was for the purpose of preserving and fostering the navigation of the Thames, for reasons hereafter given, I should have said that the plaintiffs would not have been entitled to it. Hadleigh Ray lies adjacent to the left bank of the Lower Thames within the jurisdiction of the conservators, and is situated between the high and low-water marks of the river at ordinary tides—*i.e.*, when the tide is in, it is covered with water, and the navigation of the Thames, whether for profit or pleasure (section 72) passes and repasses over it; and when the tide is out it forms part of the shore of the river. It is the property of Mr. Booth, whom I will call the licensor of the defendants, who have been raising sand therefrom without the licence of the plaintiffs.

The view I take of the Act of 1894 is this: The conservators are a statutory body brought into existence for the purpose of preserving, improving, and maintaining the navigation of the River Thames from Cricklade to Yantlett Creek (and they have

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

some jurisdiction below that creek), but the powers granted to them by the Act of 1894 are all subservient thereto, and except for these purposes no powers are granted to them at all. I omit the powers given to them for keeping the waters of the Thames pure, for these powers have no bearing on the case. Keeping this in mind, I take first of all section 87 to see what powers are thereby granted to the conservators, for it is upon the true construction of this section that the decision of this case depends. The section is as follows: [His lordship read the section.] It must here be noticed that there is no saving clause in this section in favour of owners of the soil of the bed of the Thames below Staines, though it is argued that such a saving clause should be read into this section. I will deal with this hereafter. As I read this section it empowers the conservators to grant licences to persons to dredge and raise gravel and other substances from the bed of the lower Thames, and it prohibits anyone not a licensee (except the conservators by themselves, their agents and servants) from so doing. Now the question is, What do the words "from the bed of the Thames other than that portion of the bed or soil or shores of the Thames reserved to her Majesty" mean? Do they mean the bed of the Thames between ordinary high-water mark on one side and ordinary high-water mark on the other side of the river? or do they mean only that part of the bed of the Thames which is exclusive of the shores? There is certainly no such limitation in the section. Then what is the *primâ facie* meaning of the words, the "bed of the Thames"? In my judgment they denote that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river. It need not be constantly covered if in the ordinary course of things it is habitually covered. I will cite a passage from the judgment of an American case—namely, that of the *State of Alabama* v. *State of Georgia*, 23 Howard's Rep. Sup. Court U.S., p. 505, which I cited in my judgment in *Hindson* v. *Ashby*, *ante*, p. 252, [1896] 2 Ch. 25, for it exactly conveys what I understand by the meaning of the phrase "bed of a river." It is this: "The bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter or spring or the extreme droughts of summer and autumn." This, when applied to a tidal river, means, without reference to extraordinary tides at any time of the year. This, in my judgment is the *primâ facie* meaning of the words "bed of the Thames," and the question is, In the Act of 1894, is there a context which causes the words not to bear their *primâ facie* and ordinary meaning?

In the unreported case in 1891 of *Goolden* v. *The Conservators of the Thames*, a construction was placed by the House of Lords upon the words "bed of the Thames," as used in section 6 of the Thames Conservancy Act of 1867, which Act, although repealed by the Act of 1894, has, as regards sections 6 and 7 thereof, in substance been re-enacted in the Act of 1894, by sections 83 and 87, with the addition of the saving clause in section 87, in favour of the owners of lands above Staines. This case throws a considerable light upon some of the points raised in the present action, though I notice neither my brother Cave nor my brother Wills, in their judgments in the case of *Pearce* v. *Bunting*, [1896] 2 Q. B. 360, 44 W. R. Dig. 142, alluded to it. It is to review their decision in this last case that the present action is brought. Section 6 of the Act of 1867, upon which the House of Lords gave judgment, is as follows: "The conservators may from time to time dredge, dig, raise, take up, and remove any shoals, shelves, or banks in the bed of the Thames, and deepen and otherwise improve the same between the City Stone, near Staines, and Cricklade, and may carry away and sell or otherwise dispose of the gravel, sand, and other substances thereby obtained." Section 7 is this: "It shall not be lawful for any person other than the conservators, their agents, servants, and workmen to dredge, dig, or raise any gravel, sand, or other substance from the bed of the Thames between the City Stone, near Staines, and Cricklade, except with the licence or consent of the conservators under their common seal, . . . and if any person acts in any respect in contravention of this section, he shall for every such offence be liable on summary conviction to a penalty not exceeding £20, without prejudice to any other remedy or proceeding against him." These sections, when passed, only applied to the Upper Thames above Staines, but by section 29 of the Thames Navigation Act, 1870, these two sections were made to extend and apply to the Thames below the City Stone, near Staines, to Yantlett Creek. Thus, after the year 1870, these two sections applied to the whole Thames from Crickdale to Yantlett Creek, and did so when *Goolden's case* was decided in 1891 by the House of Lords. Whatever the "bed of the Thames" meant in section 6 of the Act of 1867, it meant the same in section 7 of that Act, which last section is almost identical with section 87 of the Act of 1894, excepting the proviso saving the rights of owners above Staines, which is expressly inserted in section 87 of the Act of 1894. The House of Lords in *Goolden's case* held that the words "bed of the Thames" in section 6 of the Act of 1867 meant the soil underneath the waters of the river situated between bank and bank; and that the dredging powers of the conservators conferred by this section extended not only to that part of the Thames above Staines which was navigable, but also to that part of the Thames which was not navigable and which was the private property of a riparian owner. That this section was held to take away and interfere with private rights is beyond dispute, although no compensation was given to the owner of the soil for this deprivation of his rights. The House of Lords also held that the dredging powers of the conservators were limited to improving the bed of the river—that is, to the exercise of the powers conferred upon them by the Acts, and that if dredging were carried on by the conservators for purposes other than that of exercising the powers conferred upon them by the Act, such dredging would not be permissible. I think that what the House of Lords then held has pointed application to the true construction of section 87 of the Act of 1894.

I now turn to the group of sections with the heading, "Dredging and Ballasting" in the Act of 1894—namely, sections 83 to 89 inclusive, of which group section 87 forms a part, to see what are the powers the conservators have had conferred upon them as regards dredging and ballasting by these sections, and to see whether any context can be derived therefrom as to any special meaning to be applied to the term "bed of Thames." Sections 83 to 86 inclusive are sections enabling the conservators to do certain acts. Section 87 is the section which empowers the conservators to prohibit others from doing certain acts. Now section 83 enacts that the conservators may from time to time do all or any of the following things:

(1) For the purpose of maintaining and improving and freeing or keeping free from obstructions the navigation of the Thames:

(*a*) "Dredge, cleanse, and scour the Thames

This, I should say, embraces the whole of the Thames within the jurisdiction of the conservators, so far as it is material to this case, from high-water mark on the one side of the river to high-water mark on the other below Teddington Lock to Yantlett Creek. It is over this area the navigation of the Thames, whether for profit or pleasure, is entitled to pass and repass (section 72), and over this area the conservators are empowered to dredge, cleanse, and scour the Thames for navigation purposes. Dredging necessarily involves raising the gravel, sand, and other matter dredged, for otherwise what is the use of dredging?

(*b*) "Alter, deepen, restrict, enlarge, widen, diminish, lengthen, shorten, straighten, and improve the bed and channel of the Thames." It is not necessary for this case to determine whether the context of the sub-section limits the "bed of the Thames" to something which the words would otherwise embrace.

(*c*) "Reduce or remove shoals, shelves, banks, and other accumulations in the Thames." This, as it seems to me, is the same as sub-section (*a*), which I have dealt with.

(*d*) "Abate or remove . . . all impediments, obstructions, and annoyances in the Thames or on the banks or shores thereof." This sub-section appears to have been taken from section 98 of the Thames Conservancy Act of 1857. By section 3 of the Act of 1894 shore means shores of the Thames as far as the tide flows and reflows—*i.e.*, up to Teddington Lock, between high and low-water marks at ordinary tides. It will be noticed that these four sub-clauses to sub-section 1 deal with what the conservators may do for maintaining, improving, and keeping free from obstruction the navigation of the Thames. But they have other powers. By sub-section (2) of section 83 the conservators may dredge and raise gravel, sand, and other substances from the Thames. This phrase appears to me to be equivalent to what I have dealt with under sub-clause (*a*), but only for the purposes of the towpaths and for filling up creeks, inlets, bends, flats, and slob lands in and adjoining the Thames, and for constructing and altering and repairing such works. There is a proviso to this sub-section in favour of that part of the river above Staines—namely, that gravel, sand, and other substances dredged or raised above Staines for these purposes shall be used for such purposes above Staines. This sub-section also has reference to the matter of the better navigation of the Thames. By sub-section 3 of section 83 the conservators may dredge and raise "from the Thames" below Teddington Lock ballast for supplying the same to vessels in the Thames. This relates to carrying on navigation in the Thames. By sub-section 4 of section 83 the conservators may sell the overplus of the gravel and sand raised for the purposes aforesaid if not wanted for such purposes, but only the overplus. Lord Herschell deals with this power of sale of surplus in the *Goolden case*. Sub-sections 5 and 6 of section 83 also apply to the ballasting of ships in the Thames. By sections 84 and 85 "in the Thames" and "the course of the Thames" are the words used, and these sections also apply to navigation purposes. By section 86 the conservators are empowered to deposit gravel, sand, and other substances raised by them for the purposes of the preceding sections upon lands belonging to them, or may in or upon the bed of the Thames "place piles and make groynes, retaining walls, and other works, and may sell and dispose of the lands thereby filled up, raised, or reclaimed." In this section "bed of the Thames" appears clearly to include the shore between ordinary and high and low-water marks; for how can a retaining wall be placed in the bed of the river below low-water mark? And if so for what purpose? This section has a proviso in which the words "bed" or "shores" or "afloat in the Thames" are used.

I have dealt thus far with the group of sections, and they, in my judgment, amply suffice to show that no context can be obtained therefrom, showing any peculiar meaning to the words "bed of the Thames," and it will be seen from a judgment about to be delivered by brother Chitty that he sets out with particularity and in detail the many other sections which have in them the words "shores," "bed of the river," and other expressions. These sections I have considered, and the result is that, in my judgment, it is not possible to arrive at any context therefrom, and I can find nothing in the Act which can be relied on as cutting down the ordinary and *primâ facie* meaning of the words the "bed of the Thames" in section 87.

My judgment upon this peculiarly ill-drawn Act is, that the conservators by themselves, their agents and servants, have power to dredge and raise gravel, sand, ballast, and other substances from all parts of the River Thames within their jurisdiction between ordinary high-water mark on one side of the river and ordinary high-water mark upon the other, if they do so for the purpose of preserving, improving, and maintaining the navigation of the Thames, or for the other navigation purposes mentioned in the Act; and that they are also empowered to grant licences to other persons to dredge and raise gravel, sand, and other substances for like purposes, but for no other; that by the section 87 there is an absolute prohibition imposed against anyone dredging or raising gravel, sand, ballast, or other substances in the Thames between ordinary high-water mark on the one side and ordinary high-water mark on the other, without the licence of the conservators, even although the soil between those limits is private property; and that for doing so without the licence of the conservators the penalty mentioned in the section attaches. My judgment only applies to the Lower Thames.

In the case of *Pearce* v. *Bunting* above-mentioned, my brother Cave relied greatly, and my brother Wills also to some extent, upon the fact that as no compensation was given by the statute it was improbable that private rights would be interfered with by the Legislature, and this ordinarily is so; but the case of *Goolden* v. *The Conservators of the Thames* in the House of Lords indicates that these dredging powers are given to the conservators for navigation purposes without compensation being also given to private owners for having their rights thus interfered with. I may point out that by section 72 of the Act of 1894 public rights of navigation are given over private waters, and the sole saving clause therein in favour of landowners is that they may prevent the anchoring, mooring, loitering, or delay of any vessel thereon, and no compensation for this deprivation of their rights taken away by the section is given to the landowner. The question, as it seems to me, is not what soil has been vested in the conservators, which my brother Cave held to be the question, but what powers of dredging and raising gravel and other substances, and of granting licences to others to do so, have been granted by the statute to the conservators whereby to preserve, improve, and maintain the navigation of the Thames.

If a private owner were to be allowed to dredge and raise gravel from the bed of the Thames in the tideway at his own will and pleasure, it is manifest that this might so interfere with the flow of the river as in some cases to seriously impede its navigation; and, in my opinion, it is to prevent and guard against this that this plenary and exclusive power of dredging and raising gravel and other substances is

given to the conservators over that part of the bed of the Thames where Hadleigh Ray is situated. As to the point taken on behalf of Mr. Booth, that his rights were saved by section 238 of the Act of 1894, it will be seen that this section commences with the words "Except as in this Act expressly provided," and if my construction of section 87 be correct, it has been expressly provided that no one other than the conservators and their licensees may dredge and raise gravel from the bed of the river, and section 238, therefore, does not avail him. As regards the suggestion that the words in section 87 "but subject to the provisions of this Act" apply to section 238 of the Act, I do not agree with it. There are other sections to which these words apply, and one instance will suffice, namely, section 234, sub-section 3, which enacts "nothing in this Act shall prejudice or affect any right of dredging or raising gravel, sand, ballast, or other substances from the the bed of the Thames conferred on the Tilbury Company." The owner of Hadleigh Ray has had no such section inserted in his favour. It is to a provision such as this that the words in section 87 "subject to the provisions of this Act" apply, and, in my opinion, not to section 238, which, for the reasons above, does not refer to section 87. If rights of private owners in the Lower Thames were intended to be preserved as regards dredging and raising gravel, it appears to me inconceivable that the Legislature should not, in section 87, have reserved these rights as they did the rights of private owners in the Upper Thames. This, however, is pointedly, and in my judgment intentionally, omitted. For the reasons above I think that this appeal should be allowed, and that it should be declared that the respondents are not entitled to dredge or raise gravel, sand, and other substances at Hadleigh Ray without the licence of the conservators. In my judgment this appeal should be allowed with costs here and below.

CHITTY, L.J. — The question in this appeal is whether the defendants are entitled to dredge or raise any gravel, sand, ballast, or other substances from the land known as "Hadleigh Ray" between high and low-water marks at ordinary tides of the River Thames without the licence of the conservators. The question is raised as a point of law on the construction of the Thames Conservancy Act, 1894, and was argued on the assumption, agreed to by the parties, that the soil is owned by the licensors of the defendants. Hadleigh Ray is situate in Essex on the north side of the river, and lies within the jurisdiction of the conservators. It is part of the "shore" of the Thames within the meaning of the definition in the 3rd section of the Act. It is subject at common law to the public right of navigation in a tidal river, including all incidental rights, such as grounding a vessel till the tide serves (see *The Mayor of Colchester* v. *Brooke*, 7 Q. B. 339); it falls within the provisions of the 72nd section of the Act, whereby it is enacted that it shall be lawful for all persons, whether for pleasure or profit, to go and be, pass and repass, in vessels over and upon every part of the Thames through which Thames water flows, and whereby certain rights of mooring and the like are conferred on the public. The learned judge before whom the question came on for argument in the court below felt himself bound by the decision of the Divisional Court in *Pearce* v. *Bunting*, and accordingly gave judgment for the defendants. The object of the conservators in instituting this civil action and bringing this appeal was to obtain a judgment of this court overruling the decision of the Divisional Court in *Pearce* v. *Bunting*, from which no appeal lay.

The more important sections on which the question turns are the 87th and the 238th, but the argument took a wide range and extended to numerous other sections of the Act of 1894, and of the preceding but repealed Acts from 1856 downwards. Three principal points were raised: First, as to the meaning of the term "bed of a river" in its ordinary acceptation, the plaintiffs contending that it includes the shore, and the defendants that it does not; secondly, as to the meaning of the term "bed of the Thames" in the 87th section, regard being had to the context and the rest of the Act; and, thirdly, as to the effect of the 238th section, the defendants contending that it saved all the proprietary rights claimed by them on behalf of their licensors.

The Act which we have to construe is a consolidating and amending Act; the general objects of such Acts is to present the whole body of the statutory law on the subject in a complete form, repealing the former statutes. The principle of interpretation of a codifying Act is laid down by Lord Herschell in the *Bank of England* v. *Vagliano*, 39 W. R. at p. 667, [1891] A. C. at pp. 144 and 145; a statute codifying the law is to be interpreted as it stands, and recourse is not to be had to the former law, except upon some special ground—such, for instance, as an ambiguous provision. The same principle applies to such an Act as that which is now before us, but in a less stringent degree. In this Act clauses of the repealed Acts are found repeated, but often in altered form, and with amendments, whereby the sense may be in great measure changed. Speaking generally, I think that the enactments must be dealt with as they now stand, and that a minute critical examination of repealed clauses ought not to be entered upon for the purpose of interpretation, except upon special grounds. So far as relates to the questions raised the Act under consideration is not a specimen of good drafting. It is, on the face of it, not the production of one firm hand; probably many hands took part in the drafting before the Act assumed its final form. Many instances occur of a departure from the cardinal rule that the same word should always be employed to mean the same thing.

The conservators of the Thames are a body originally created by statute, and finally reconstituted by the Act of 1894 with more extensive powers over the Thames. The Act recites that it is expedient that the powers of the conservators for preserving, freeing from obstruction, and improving the navigation of the River Thames, whether for profit or pleasure, should be extended as in the Act appears. The powers of the conservators include the maintenance of the purity of the water and certain other matters not material to the present case. The powers which are relevant are those relating to the maintenance and improving of the Thames as a navigable river. These powers are committed to the conservators for the general benefit of all concerned with the river, as well of the public using the river for navigation as of the owners of the soil, including the shores and the banks; it is for the common benefit of all concerned that these statutory powers are centred in one representative and responsible body (see sections 8 and 9.) Experience had shown that the maintenance of the navigation along this great public way could not be left to the common law and the individual proprietors along the river from its source to the sea; and no substantial improvements could be effected without statutory powers. Dredging in the river has always an effect, more or less according to the extent of the operation, upon the flow of the water and the navigation of the river. There is no substantial difference in the effect whether the dredging takes place above or below the flow of the tide, nor

whether it is carried on in the bed, in the narrow sense for which the defendants contend, or in the shores over which the ordinary tides flow. The claim set up by the defendants is a right to dredge to any extent, at their free will and pleasure, and without limit of any kind. It is a part of their case as presented at the bar that they are not bound by any consideration of the navigation; they claim to remove the gravel and sand in unlimited quantities for the purposes of profit by sale to brickmakers and others. Certainly if their claim is well founded their operations may have a serious effect upon the navigation of the river. The Act contains in the 3rd section definitions, guarded in the usual fashion, of "the Thames" and of the word "shore," but does not contain any definition of the word "bed." The expression "the Thames" means and includes so much of the River Thames and Isis respectively, as are between the town of Cricklade in Wiltshire, and an imaginary straight line drawn from the entrance to Yantlett Creek in Kent to the City Stone opposite to Canway Island in Essex, and so much of the River Kennet and other rivers as is mentioned in the definition. The Thames, therefore, as I read the definition, includes so much of the shore where the tide flows as is covered with water at high water at ordinary tides. The word "shore" means the shores of the Thames so far as the tide flows and reflows (that is, up to Teddington Lock) between high and low-water marks at ordinary tides. The term "bed of the Thames" not being defined is thus far left to bear its ordinary meaning. The definition of "shore" cannot of itself be properly made use of to limit the ordinary meaning of the bed of the Thames. If that term is large enough to include the shore where the tide flows, it is not, in my opinion, a legitimate course of reasoning to say that its meaning is cut down because shore is defined.

Now, the reason for defining "shore" must be found in the Act itself. It occurs in fourteen sections at least of the Act, in thirteen sections with other words, and in one section without—namely, in the 58th, 59th, and 60th sections, the 69th, the 83rd, 92nd, 111th, 116th, 182nd, 184th, 185th, 204th, 205th, and 239th. The view I take of the 58th, 59th, and 60th sections is this. I think that they are conveyancing sections, whereby certain property and powers vested in the conservators at the passing of the Act are continued in them, notwithstanding the repeal of prior Acts and the alteration of the constitution of conservancy by the Act itself, and whereby there is also continued the express reservations in the specified Crown property as such reservation existed at the passing of the Act. The words used in these sections are the bed and soil and shores of the Thames (section 58); the portion of the bed or soil or shores of the Thames (section 59); and the banks, shores, and wharves of the Thames (section 60). According to the practice of conveyancers (and an excellent practice it is) the same set of words is used in the conveyance and reservation as were used in the original conveyances and reservations. The history of these sections is traced by Cave, J., in his judgment in *Pearce* v. *Bunting*. His judgment rests in a considerable measure upon them and on the use of the term shores in addition to bed and soil, indicating in his opinion that shore is distinct from, and is not included in, the term "bed." He apparently confines the dredging powers of the conservators to the property vested in them. In this opinion I am unable, viewing the whole Act, to concur. I think that these sections do not limit the conservators' powers of dredging, whatever they may be, as disclosed by the other parts of the Act, and that such powers are not confined to the property vested in them. Following out the sections in which the word "shores" occurs, I came to the 69th, empowering water-bailiffs to seize fish unlawfully taken and prohibited apparatus, not only on the water of the river, but on the shores or banks of the river. It was obviously convenient to extend the powers to the shore and to mention the shore specifically. Similar observations occur to me as properly applicable to section 83, sub-section 1 (*d*), in regard to the removal of obstructions and nuisances. I say the same of the 92nd section, sub-section 1, relating to the putting of gravel or other substances, or stones, or rubbish into the Thames or on the shore thereof, whence it might be washed into the river. The 111th section prohibits the making of docks and other works or erections as enumerated, upon the bed or shore, or afloat on the Thames, without the conservators' licence. The 116th section relates to the consideration for any licence granted by the conservators for doing in or upon the bed or shores, of or afloat in the Thames below Teddington Lock, any of the things enumerated at great length including docks, piers, and embankments and walls. This section appears to interfere in some degree with the rights of the proprietors of the soil of the shores as set up by the defendants without qualification or compensation. The 182nd section prohibits the execution of the works upon the bed or shores of the Thames below Teddington Lock by the conservators or their licensees without the permission of the Board of Trade. The 184th section relates to the removal of works executed with such permission. The consent of the owner of the shore is not in terms required by the 182nd section. The 185th section prohibits the discharge of guns over or upon the Thames or the shores, banks, or towpaths thereof, or any land for the time being vested in the conservators above an imaginary straight line drawn from Barking Creek to Margaret Ness. Here, again, a proprietory right of the owners of the shores, and also of the banks, is interfered with, as is generally done in the case of land near a highway, and it was considered necessary or expedient to include specifically shores, banks, and towpaths. The remaining sections are the 204th and 205th, relating to the jurisdiction of magistrates and the powers of the police; here, again, it was apparently considered necessary or expedient to use words which would prevent questions being raised. I reserve the 239th section for the present. With that exception I have dealt with all these fourteen sections, necessarily in a very brief manner. In all of them, having regard to the subject-matter and the context, there would appear to be some reason why shores should be mentioned specifically. They are none of them (I still except the 239th section) dredging sections; and regard being had to the variety of the words used, they do not appear to me to afford any safe guidance as to the meaning of the term "bed" in the sections specially relating to dredging. Whatever may be the force of the observations I have made on these sections, the sections themselves at all events supply the reason for the definition of the word "shore." Recurring to the word "bed," I find it in at least sixteen sections of the Act—namely, sections 58, 59, 62, 72, 83, 86, 87, 88, 89, 111, 182, 184, 204, 205, 234, and 239; in twelve sections with other words, such as soil or bed, bed and channel, bed or shores; and in four sections without any other words. It will not, however, serve any sufficiently useful purpose to go through these sections; the language of the Act cannot stand any critical examination.

I come now to the important group of sections, the 83rd to the 89th inclusive, placed under the head "Dredging and Ballasting." The 83rd sec-

tion has already been carefully dealt with by Smith, L.J. I concur generally in his observations upon this section. The powers conferred by the 1st sub-section are expressly granted for the purpose of maintaining and improving and freeing from obstruction the navigation of the Thames. The leading power is that under (*a*) to dredge, cleanse, and scour the Thames. This is general, and in my opinion includes the shore. The powers under (*b*), (*c*), and (*d*) seem to be subsidiary powers. I can see no sufficient reason for excluding the shores from (*b*) and (*c*); they are expressly included in (*d*). To an Act drawn as this is, I think it would be dangerous to apply the rule of *expressum facit cessare tacitum*. I decline to draw the inference that because shores are mentioned in (*d*) they are excluded from (*a*), (*b*), and (*c*). The 2nd sub-section also relates to navigation. The power to dredge and raise "from the Thames" gravel, sand, and other substances is conferred only for the purpose mentioned in the sub-section. Here, again, "the Thames" is mentioned. Why does "Thames" not include the shore? The power to dredge and raise from the Thames below Teddington Lock, conferred by the 3rd sub-section, is expressly limited to the purpose of supplying ballast to vessels on the Thames, a purpose connected with navigation. The power in the 4th sub-section to sell or otherwise dispose of gravel and other substances is confined to gravel and substances raised by the conservators under the proviso of the 83rd section and not required for the purpose for which they were raised. The conservators have no unlimited or roving power to raise gravel and other substances; they have no power to carry on any general trade of raising and selling gravel and the like. In the 86th section it would be almost impossible to read the term "bed" in the restricted sense contended for by the defendants; "groynes" possibly might be placed in the bed, taken in the restricted sense, but they are usually placed on the shore; and I cannot call to mind a single instance of a retaining wall being placed in the bed, in the narrow sense, nor can I understand what useful purpose it would serve if there placed.

I come now to the 87th section. It has already been stated. I shall not read it again. It divides itself into three parts. The first confers on the licensees of the conservators powers to dredge and raise gravel, sand, ballast, and other substances from the bed of the Thames, except that portion which is mentioned in section 59—that is, to put it shortly, in front or immediately adjacent to, land reserved to the Crown. Turning to the 59th section I find the words, "the portion of the bed, soil, or shores of the Thames." I am unable to extract any satisfactory light from this strange drafting; it would rather seem from the exception that the word "bed" in the 87th section includes the "shores," but I place no reliance on this point. My opinion on this first part of the 87th section is as follows: An unlimited power of granting licences to others to dredge is not conferred on the conservators. The only licences which the conservators can lawfully grant are licences to dredge and raise gravel and other substances for the same purposes as the conservators can by their own agents, servants, and workmen dredge and raise. The licensees, however, are by this 87th section expressly forbidden to dredge in the land reserved to the Crown by the 59th section, whereas by the 83rd section the conservators themselves (that is, by their agents, servants, and workmen) are not expressly placed under the like prohibition. But the Crown rights seem to be fully protected by the 59th and other sections, such as the 213th. As the conservators themselves cannot directly carry on a general trade of raising and selling gravel, so in my opinion they cannot do so indirectly by granting licences to others. As at present advised, I think that it is not competent for the conservators to make a profit by the grant of licences or to raise money by the grant of licences, though they may be entitled to make a reasonable charge for the grant sufficient to cover the actual expense in granting them. The powers of the conservators and their licensees to dredge are not directly before us in this action; but it is impossible to decide the actual question properly without taking them into consideration. The second part of the 87th section contains the prohibition on which the conservators rely. Laying aside for the moment the introductory words, "subject to the provisions of this Act," there appears to me to be an unqualified prohibition precluding any person other than the conservators, their agents, servants, and workmen from dredging or raising gravel and other substances from the bed of the Thames other than the portion previously reserved to the Crown in section 59. And I cannot find any sufficient reason for confining the expression "bed of the Thames" in the first or second part of the 87th section to a restricted sense excluding the shore. The third part of the section contains an express reservation from the operation of the section itself in favour of the owners of the soil of the bed of the Thames above the City Stone, above Staines Bridge, of such rights, if any, of dredging or raising gravel or other substances "as would have been vested in or exerciseable by them if this Act (of 1894) had not been passed." This is significant; it imports that without the proviso the rights of the upper proprietors of the bed of the Thames would have been taken away by the previous parts of the section. There is no similar proviso as to the owners of the shores. The proviso, however, leaves open the question whether the word "bed" does or does not include the shores.

I now turn to the 239th section, which appears to have an important bearing. It relates to payments to be made by the conservators to the Crown. By the proviso at the end of the section the conservators are to pay to the Commissioners of Woods £500 a year in lieu of all payments which would otherwise, pursuant to the section, be payable "in respect of ballast, sand, earth, or gravel dredged or raised by the conservators or any person by their authority from the bed or shores of the Thames." This proviso assumes that powers are conferred by the Act on the conservators and their licensees to dredge and raise gravel from the shores as defined, and affords an additional reason for holding that the expressions "the Thames" and "bed and channel" of the Thames in the 83rd section (sub-section 1 (*a*) and (*b*)), and the term "bed of the Thames" in the 87th section are not used in a sense which excludes the shores.

I come now to consider the first of three points mentioned in an early part of this judgment—namely, What is the proper meaning of the term "bed" when applied to such a river as the Thames, which from its source as far as Teddington Lock is a non-tidal river, and from Teddington Lock downwards is a tidal river? In my opinion the bed of the Thames means, and includes, the soil or ground which is covered by water in the ordinary course of nature; the ground over which the water flows or on which it lies. I exclude all extraordinary causes whereby the volume of the water is increased or diminished, such as unusual floods or droughts, and unusual winds, which have a considerable effect on the tidal—and particularly the upper tidal—portions of the river. So far as the tide flows and reflows I include, as part of the bed, the soil or ground lying below high-water mark at

ordinary tides. Such being my opinion on the ordinary and proper signification of the term "bed" when applied to a tidal river, I proceed to the second point: Is there on the face of this Act of Parliament sufficient ground to cut down the *primâ facie* meaning of the "bed of the Thames" and to exclude the shores as defined in the 3rd section? I have partially dealt with this point when going through particular sections. In my opinion there is not sufficient ground. Wending my way, as well as I can, through the mazes of this Act, and the variety of the words employed, I think that the Act does not restrict the meaning of the "bed of the Thames" in the 87th section. Unlimited dredging on the shores as defined would tend to change the course and flow of the water, and so impair the navigation of the river. There are in the higher parts of the river reached by the tide many considerable strands left bare at low water, the removal of which would change the course of the river and alter the navigation. Under the second portion of the 87th section no fetter is imposed on the conservators in the granting or withholding the necessary licence. But I cannot presume that such a representative body as the conservators are would refuse to grant the licence to the proprietors of the shores as defined, where they were satisfied that the dredging might take place without injury to the navigation. On the third point, whether the rights of the licensors of the defendants are saved by the 238th section, my opinion is that they are not. No doubt the general rule is that private rights are not taken away by an Act of Parliament without compensation (see *Lyon* v. *Fishmongers Co.*, 25 W. R. 165, 1 App. Cas. 662). But in the unreported case of *Goolden* v. *The Thames Conservators* the House of Lords held that the plaintiff's rights as proprietor of part of the bed of the upper part of the Thames were taken away without compensation by the Thames Conservancy Act, then under consideration, but since repealed. Smith, L.J., has already dealt with that decision. It does not directly govern the present case, because there is a difference between the language of that Act and the Act of 1894. The 238th section commences with an exception, "except as in this Act expressly provided." The question here is whether the second part of the 87th section comes within this section. Now, it is urged for the defendants that the second part of the 87th section is not within the exception in the 238th section, because the second part is itself expressly made subject to the provisions of the Act, and therefore to the provisions of the 238th section. It must be admitted that there is some force in this argument. But as I read the 87th section it does expressly provide that no person other than the conservators and their licensees may dredge or raise gravel from the bed of the Thames, and I think that the words "subject to the provisions of the Act" are satisfied by applying them to other parts of the Act, exclusive of the 238th section. First there is the proviso at the end of the 87th section itself, which is very significant. This proviso expressly saves the dredging rights of the proprietors of the Upper Thames, but is silent as to the rights of the proprietors of the Lower Thames. The inference from this proviso appears to be that the dredging rights of the latter are intended to be affected by the section. The argument for the respondents renders this proviso not only idle but worse than idle. According to this argument the 238th section would have saved the dredging rights of the proprietors in the Upper as well as the Lower Thames without distinction. Secondly, there is the 234th section, sub-section 3, which expressly enacts that "nothing in this Act shall prejudice or affect any right of dredging or raising gravel, sand, ballast, or other substances from the bed of the Thames conferred on the Tilbury company under or by virtue of any Act." The 213th section seems to be another such section. There may also be others, such as sections 218, 219, 222, 223, and 236; there is, however, not sufficient information before the court to enable me to express any definite opinion on the subject. It would seem that in the case of the Grand Surrey Docks (section 236) the proprietors have some power of dredging in the river opposite the entrance to the docks by virtue of their special Act (18 & 19 Vict. c. cxxxiv), s. 64. The 238th section, on the face of it, does not save rights which are interfered with by express provisions of the Act, and some of such rights are interfered with without compensation; among these are, as I think, the rights of the lower proprietors to dredge without the licence of the conservators. The negative or prohibitory part of the 87th section is supplemental to the dredging powers of the conservators conferred in order to give effect to the main object and leading principle of the Act—namely, the maintenance and improvement of the river for the purpose of navigation by means of the conservators' power. For the reasons above stated, I think that the appeal should be allowed, and the question of law answered in the negative.

A. L. SMITH, L.J.—I have been requested by the Master of the Rolls to state that he agrees in these judgments.

Appeal allowed.

Solicitor for the appellants, *James Hughes.*

Solicitors for the respondents, *Farlow & Jackson.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — July 9.

HESTON AND ISLEWORTH URBAN DISTRICT COUNCIL v. GROUT. (a.)

Local government—Public health—Sewers—Expenses—Interpretation Act, 1889 (52 & 53 *Vict. c.* 63), *s.* 38—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 151, 257—*Notice under section* 150—*Effect of adoption of Private Streets Works Act*, 1892, *after a notice has been given under section* 150 *of the Public Health Act*, 1875.

Notices under section 150 *of the Public Health Act*, 1875, *requiring the owner of a house to sewer and make up the street in which his premises are situated, are valid if duly given while that Act is in operation, and can be enforced notwithstanding that before the works required are actually done the local authority has adopted the Private Streets Works Act*, 1892, *section* 25 *of which excludes the operation of section* 150 *of the Public Health Act.*

Decision of North, J., ante, *p.* 612, *affirmed.*

Appeal by the defendant against a decision of North, J. (reported *ante*, p. 612, where the facts and statutes are set out).

Macmorran, Q.C., and *Ribton*, for the appeal.—Section 150 of the Public Health Act, 1875, "does not apply" since the Private Streets Works Act of 1892 was adopted, and the notice is inoperative. As the later Act was voluntarily adopted by the local authority, the provisions of section 38 of the Interpretation Act, 1889, as to rights

(a.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

"acquired, accrued, or incurred" under a "repealed" enactment have no application. Section 24 of the Act of 1892 is simply a re-enactment of section 6 of the Public Health Act, and does not help the other side. The local authority had only an option, which is not a right acquired under the former Act: *Abbott* v. *Minister for Lands*, [1895] A. C. 425, 431, 43 W. R. Dig. 123.

They also referred to sections 3, 6, and 7 of the Private Streets Works Act, 1892; section 341 of the Public Health Act, 1875; and *Reg.* v. *Holdsworth*, 1 Q. B. 220.

Warmington, Q.C., Swinfen Eady, Q.C., and *Morton W. Smith*, for the urban district council, were not called upon.

LINDLEY, L.J.—It appears to me that the conclusion at which the learned judge has arrived is quite right. The question turns really on the true construction of the Private Streets Works Act of 1892 (55 & 56 Vict. c. 57), possibly assisted by the Interpretation Act, 1889 (52 & 53 Vict. c. 63). I pass over the Interpretation Act, 1889, for the present. [His lordship stated the material provisions of the Act of 1892, and proceeded:]

We have now to apply these several enactments to a case in which the local authority—the district council—gave a notice under section 150 of the Public Health Act, 1875, when that Act was in force in this district. That was a perfectly valid notice, and under that the local authority did what they were clearly entitled to do—apportioned the expenses among the frontagers. That notice was in force for nearly three years—two and three-quarter years at least—and in the interval, the notice having expired and nothing having been done, the district authority applied to the Local Government Board to sanction a loan for the purpose of doing the work. That was the state of things when, in June, 1894—nearly three years afterwards, it is true—the district authority resolved to adopt the Private Streets Works Act, 1892. Accordingly, as from that time, section 24 of the Act of 1892 says that section 150 of the Public Health Act, 1875, is not to be in force. But it would be a very forced construction to hold that the notice which was given was to be dropped, and that whatever had been done under it must go for nothing. Even without the aid of the Interpretation Act, 1889, I should come to the conclusion that that could not be the right view. But if we fall back upon the Interpretation Act, I cannot help thinking that the moment you find a provision that a particular section ceases from a certain date to apply to a certain district, that is a repeal from that time so far as regards that district. I cannot see any difference practically. That, therefore, lets in the provisions contained in section 38 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63). Sub-section 2 says that "Where any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not (*b*) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." If there is otherwise any doubt about the matter, that enactment is amply sufficient to remove it. I cannot come to the conclusion which Mr. Macmorran has urged us to come to, that the true construction of the Private Streets Buildings Act, 1892, is that the adoption of that Act renders any previous notice futile, merely because the Act of 1892 is in force. It is perfectly obvious, of course, that after the Act of 1892 comes into force you cannot give any fresh notice under section 150 of the Public Health Act, 1875, and, therefore, all the consequences of giving such a notice under that section cease to apply. As for the future, it is clear that section 150 is to have no operation. But that does not affect a notice given previous to the adoption of the Act of 1892. I think, therefore, that the appeal fails, and must be dismissed with costs.

LOPES, L.J.—I think this case is very clear. I do not feel that I can really add anything to that which has already been said, and with which I entirely agree.

RIGBY, L.J.—I also agree, for the reasons which have been given by Lindley, L.J.

Appeal dismissed.

Solicitors, *Woodbridge & Sons; H. R. Peake.*

High Court of Justice.

Chan. Div. } Stirling, J. } June 18; July 6.

In re EHRMANN'S TRADE-MARKS. (*a*.)

Trade-mark—Registration—Dissolution of partnership—Application by partners for separate registration of old firm's trade-marks—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 72.

The prohibition under section 72 *of the Patents, &c., Act*, 1883, *of the registration by the comptroller of a trade-mark identical with one already on the register or having such a resemblance to it as to be calculated to deceive is intended to protect the public as well as benefit the owners of trade-marks. The court, therefore, in the exercise of whatever discretion it may have under section* 72, *will, in considering whether it ought to encourage two concurrent applications for the registration of similar or identical marks by directing the comptroller to proceed with them, be governed by the principle laid down in the case of* In re Dewhurst's Trade-Marks, 44 *W. R.* 672, [1896] 2 *Ch.* 137, *and refuse the application unless satisfied that no harm is likely to arise by reason of such registration causing either confusion or deception; and the fact that the applicants were formerly partners and are asking for the registration in their respective names of the trade-marks used by the old firm is not sufficient to induce the court to accede to their application.*

This was a motion asking that the comptroller should be directed to proceed with certain applications for registration of trade-marks, and raised questions as to the rights of new firms created by a dissolution of a partnership with regard to the trade-marks used by the old firm.

Down to December, 1896, five brothers named Ehrmann carried on business in partnership as wine and spirit merchants in the City of London, under the style of Ehrmann Bros. and Ehrmann Frères, and used in the course of their business various trade-marks.

In 1894 four of them brought an action against the fifth for the dissolution of the partnership.

By a deed dated the 23rd of December, 1896, the partnership was dissolved on the terms therein contained.

The important clauses of the deed were Nos. 4, 6, and 11.

Clause 4 provided that the business of the existing firm should belong to and be carried on by the parties

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law

thereto in manner following, that is to say, Ferdinand Baruch Ehrmann and persons claiming under him might carry on the same under the name of Ehrmann Bros., and the other partners and persons claiming under them might carry on the same under the name of Ehrmann Frères, and that the goodwill of such business should continue in and belong to the parties to the deed subject to the provisions thereof.

Clause 6 provided that the said Ferdinand Baruch Ehrmann and persons claiming under him, and also the other partners and persons claiming under them should be entitled to use all or any of the trade-marks mentioned in the first schedule to the deed, with certain alterations specified in the deed as to some of such marks.

Clause 11 of the said deed provided for the application by the said Ferdinand Baruch Ehrmann for the registration of the trade-marks specified in the second schedule to the deed, and for the application by the other partners for the registration of the trade-marks specified in the third schedule to the deed, such applications to be made in manner specified in such clause. It also provided that all the parties to the deed should so far as necessary or expedient concur in and consent to and give authority for the making and prosecution of the application mentioned in such clause, and also that, if the Comptroller-General or any court or other authority should make it a condition of granting the applications thereinbefore provided to be made, or any of them, that the registrations of the trade-marks mentioned in the said first schedule to the deed or any of them should be cancelled under section 91 (6) of the Patents, Designs, and Trade-Mark Acts, 1883-1888, then the several parties to the deed should at their own expense do and execute or concur in doing and executing all acts and documents necessary to procure such cancellation.

The trade-marks referred to in the first schedule to the deed were nine in number; eight of them were registered in the name of the old firm of Ehrmann Bros.; the ninth was unregistered.

The trade-marks referred to in the second schedule to the deed were the trade-marks subsequently applied for by F. B. Ehrmann; and those referred to in the third schedule the trade-marks subsequently applied for by the other partners in the old firm.

In pursuance of clause 11 two sets of applications were made for the registration of nine trade-marks, which were practically identical with one another and with those in use by the old firm.

The comptroller refused to accede to any of the applications.

The applicants appealed, and their appeals now came before the court on a motion asking that the comptroller might be directed to proceed with the applications.

Graham Hastings, Q.C., and *John Cutler, Q.C.*, for the motion.—The principle is that the new firm are entitled to the same benefit as the old firm were. [STIRLING, J.—Is not your case under section 87? The right has passed away from the old firm and gone into two new firms; would not the proper course be for each to register?] That might be done. [STIRLING, J.—The objection is under sections 71 and 72.] We submit that the court has power to register two persons as proprietors of the same mark. Here both parties are entitled to use the old trade-marks, but both want to have the trade-marks in question on the register in their own name. Where a firm dissolves partnership it cannot be disputed that all members of the dissolved firm are entitled to use the old trade-marks. That was the ground of the decisions in *Dent* v. *Turpin*, 9 W. R. 548, 2 J. & H. 139, *Banks* v. *Gibson*, 13 W. R. 1012, 34 Beav. 566, and *Benbow* v. *Low*, 29 W. R. 837. The principle of those cases, which applies here, is that if under the terms of the dissolution each partner can use the trade-marks of the old firm that right is one which the court can and ought to perfect under section 72.

Buckley, Q.C., and *H. Terrell*, for F. B. Ehrmann, adopted the same arguments.

Sir R. Webster, A.G., and *Ingle Joyce*, for the comptroller.—The objections to this application are that under the statute exclusive rights would be given contrary to the statute, and that trade-marks which would mislead the public would be on the register. If this application were to succeed greater rights would be given in respect of new trade-marks than exist in respect of the old marks. The principle of every decision is against allowing the same trade-mark to more than one firm, the whole spirit of the Act is against this view. [They referred particularly to sections 70, 76, and 87.] Section 72 (1) only relates to old trade-marks, and the comptroller is not to register two additional marks for different people. The statute does not allow the comptroller to register additional marks in respect of the same goods in favour of different persons, and it can make no difference that such persons applied on the same day and asked to be allowed to use the same mark. Here the public is to be asked to understand that each applicant has a right to use the mark to the exclusion of the other. *Benbow's case* was the case of an old trade-mark, and is no authority here. *Dent* v. *Turpin* and *Banks* v. *Gibson* were not cases of registration at all. The court will not register the same marks for different people: *In re Dewhurst*, 44 W. R. 672, [1896] 2 Ch. 137.

John Cutler, Q.C., in reply.—These trade-marks are already on the register. [STIRLING, J.—Then you ought to claim under section 87.] Then we should have to satisfy the comptroller as to the title to each mark. According to section 77 only the registered proprietor of the mark can institute proceedings for infringement, and that is why we wish to be registered. [STIRLING, J.—Under section 70, if the goodwill of the old firm has ceased, the old firm may no longer be able to enforce it.] Then *Dent* v. *Turpin* must be taken to be no longer law. These marks do not come within section 73. The Attorney-General says that these marks are deceptive; but if two identical old marks can be registered, why should two new marks be calculated to deceive? [STIRLING, J., referred to section 74 (3).] That only says that a mark publicly used by more than three persons on the same description of goods shall, for the purposes of the section, be deemed common to the trade in such goods. [STIRLING, J.—You could not contend that more than three persons could claim to be registered in respect of a new mark?] No. [STIRLING, J.—Well, but your application comes to this, that these five persons can come here and claim to be registered in respect of the same mark.] That is not the case here; there are only two persons; and if five were to apply they would have destroyed the distinction of their mark. [STIRLING, J., referred to *Dewhurst's case*. That was not the case of the dissolution of a partnership. [STIRLING, J.—Is the fact of two persons having been in partnership any ground that the comptroller should register these two parties?] No. [STIRLING, J.—Then what is the special circumstance here?] Here there is a trade-mark used by the old firm, and the partnership is dissolved on the terms that both parties should continue to use the trade-mark. There is nothing illegal in that; and they now wish to be able to bring an action for infringe-

ment in each of their respective names. [STIRLING, J.—The Court of Appeal has said in *Dewhurst's case* that only one person is to be registered. You must have some special circumstance, and if the consent of the person on the register is not a special circumstance, then how can an agreement on dissolution constitute a special circumstance?] The special ground is that, on the terms of the dissolution, there is nothing to prevent the partners continuing to use the mark. [STIRLING, J.—You are asking for more than the existing rights.] We are only asking to be put on in order to protect our existing rights. *Benbow's case* was not decided on the ground that the marks were old ones.

Cur. adv. vult.

STIRLING, J.—As regards the eight marks already on the register the comptroller raises the objection that under section 72, sub-section 1, he cannot proceed with the application until the existing entries have been cancelled. An order for cancellation might possibly be made under section 91, sub-section (*c*), but no application for the purpose has yet been made. The applicants are willing to make the necessary applications provided that the order for cancellation is made simultaneously with the registration of the marks in accordance with the applications. Possibly this might be arranged, but beyond this the comptroller raises the objection that identical new marks ought not to be registered in the names of two different persons. This objection applies with equal and immediate force to the applications relating to the ninth mark, which is not on the register.

Neither of the clauses of section 72 applies in strictness to this last mark; but, as was laid down by the Court of Appeal in *In re Australian Wine Importers* (*Limited*), 37 W. R. 578, 41 Ch. D. 278, the court has a discretion "as to whether, though registration is not prohibited, it is such a registration as the court ought not to encourage by directing the comptroller to go on": see p. 288, *per* Cotton, L.J. It was there held that the registration of the mark of a "Golden Fleece" in respect of wine ought not to be permitted in the face of the opposition of the owner of a mark of the same kind registered in respect of spirits, on the ground that the use of such a mark was calculated to deceive when applied to goods of a description similar to that in respect of which registration had taken place.

In the case of *In re Dewhurst's Trade-Mark* it was further held by the Court of Appeal that a mark which in the judgment of the comptroller had such resemblance to one on the register as to be calculated to deceive ought not to be registered, even if the owner of the registered mark consented. [His lordship read the judgment of Lindley, L.J., at p. 148, and continued:] What is prohibited by section 72 is the registration by the comptroller of a mark identical with one already on the register, or having such resemblance to it as to be calculated to deceive. These provisions exist, according to the decisions, not merely for the benefit of the owners of trade-marks, but for the protection of the public. There are at least two evils attendant on the registration of identical or similar trade-marks: first, the certainty of confusion; and secondly, the high probability of deception; and I read the judgments delivered in the Court of Appeal in *Dewhurst's case* as meaning that such registration ought not to be permitted unless the court is satisfied that there is no reasonable probability that harm is likely to arise from these causes. The like principle ought to govern the court in considering whether it ought to encourage two concurrent applications for the registration of identical or similar marks by directing the comptroller to proceed with them; and there is in the present case no evidence to satisfy me that the mischief to which I have alluded is not likely to occur. When it is inquired whether there are any special circumstances to induce the court to exercise such discretion as it may have under section 72, all that is said is that the applicants were formerly partners, and used marks identical with those in question for the purposes of their partnership; that they have dissolved the partnership, each of the applicants being entitled to use the marks; and that it is highly desirable that each of the applicants should be able to sue separately under section 77.

It may be observed on this that as to the marks already on the register, there will be no difficulty in suing in the names of the registered owners; and clause 7 of the deed of the 23rd of December, 1896, provides for such a case; and as to the one mark which remains unregistered, it might be registered in the same way as the other marks, and the rights would be regulated by the same clause. In any case the mere convenience of the applicants would not justify the court in departing from the principles laid down in the cases to which I have referred.

In argument some reliance was placed on the case of *Dent* v. *Turpin*, where it was held that each of two persons who had derived from a common predecessor the right to use a trade-mark was, under the law as it stood previously to the passing of the Trade-Mark Acts, entitled to sue separately in respect of an infringement of the right. It appears to be an answer to any claim founded on this decision that the applicants are not now applying under section 87 of the Act for the registration of an assignment or transmission of the marks in question. Even if they were I apprehend that for the purposes of the Trade-Mark Acts some limitation must be imposed on the application of the doctrine of *Dent* v. *Turpin*, at all events where more than three persons claimed to be assignees of a registered mark. It could hardly be contended that new marks can be registered in the names of a greater number of owners than is allowable under section 74, sub-section 3, in the case of old marks.

Solicitors, *Goldberg, Langdon, Barrett, & Newall; Wild & Wild; Solicitor to the Board of Trade.*

Chan. Div. Stirling, J. — June 15, 30.

STROHMENGER *v.* BOROUGH OF FINSBURY PERMANENT INVESTMENT BUILDING SOCIETY. (*a.*)

Building society—Alteration in rules—Ultra vires—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16 (2) (4), 18.

In contracts between a building society and one of its members the rights will be governed by the rules from time to time in force, and the member will be bound by any alterations in the rules, provided that such alterations are within the power of the society to make. But where a society which was subject to the provisions of the Building Societies Act, 1874, *in order to meet losses incurred by the society, passed a resolution under section* 18 *of the Act to alter the rules so that the amount due from the society to each member in respect of the shares held by him on a certain date should be taken to be thirty-three-fiftieths of the net amount paid on such shares,*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Held, that the Act of 1874 *contemplated that fully paid-up shares should be repaid, and that therefore a rule that fully paid-up shares should only be repaid in part was* ultra vires, *though in the event of a member wishing to withdraw it would be competent for the society to prescribe the terms of his withdrawal.*

This was an action by the plaintiff on behalf of himself and all other members of the defendant society asking for an injunction to restrain the society, their directors, officers, and servants from acting on certain alterations recently introduced into the rules of the society.

The question was whether the alterations were such as the society had power to make.

The plaintiff was the holder of paid-up shares of the society.

The society was formed in 1867 under the old statute 6 & 7 Will. 4, c. 32. That Act provided: "It shall be lawful for any number of persons to form themselves into and establish societies for the purpose of raising . . . shares . . . and for the several members of each society from time to time to assemble together and to make, ordain, and constitute such wholesome and proper rules and regulations for the government and guidance of the same as to the major part of the members of such society so assembled together shall seem meet, so as such rules shall not be repugnant to the express provisions of this Act and to the general laws of the realm . . . and also from time to time to alter and amend such rules as occasion shall require, or annul or repeal the same, and to make new rules in lieu thereof under such restrictions as are in this Act contained."

The society received a certificate of incorporation under the Building Societies Act, 1874, the provisions of which Act were now applicable to the society.

Section 7 of that Act repealed the old Act, but the repeal was not to affect any subsisting society established under the old Act until such society should have obtained a certificate of incorporation under the Act of 1874. The important sections of this Act are section 16 (2) (4) and section 18.

Section 16.—The rules of every society hereafter established under this Act shall set forth: (2) The manner in which the stock or funds of the society are to be raised, the terms upon which paid-up shares (if any) are to be issued and repaid, and whether preferential shares are to be issued, and if so, within what limits, if any; and whether the society intends to avail itself of the borrowing powers contained in this Act, and if so, within what limits, not exceeding the limits prescribed by this Act. (4) The terms upon which shares may be withdrawn, and upon which mortgages may be redeemed.

Section 18.—Any society under this Act, certified previously to the passing of this Act, may alter or rescind any rule, or make any additional rule by the vote of three-fourths of the members present at a special meeting called for the purpose, of which meeting notice specifying the proposed alteration, rescission, or addition shall be given to the members in the manner provided by the rules of the society, or, in the absence of such rules, by letters sent through the post seven days previous to such meeting; and any society hereafter established may alter or rescind any rule, or make an additional rule, in the manner its rules direct; and every society under this Act altering or rescinding any rule, or making an additional rule, shall forward two copies of every resolution for rescission of a rule, and of every alteration of or addition to its rules, signed by three members and the secretary, and a statutory declaration of an officer of the society that the provisions of this section have been complied with, to the registrar, who, if he find that such alteration, addition, or rescission is in conformity with this Act, shall return one of the copies to the secretary or other officer of the society with a certificate of registration, and retain and register the other copy.

The rules as they existed down to the period when the alterations were made contained the following provisions:

Rule 71. Any member may, subject to the provisions of rules 73 and 91, withdraw all or any part of his shares upon giving one month's notice in writing. . . .

72. The rule previously numbered 72 was rescinded at a special general meeting of the society on the 13th of January, 1891.

73. In the event of the assets of the society being insufficient to meet the liabilities thereof, the directors may order that a sum sufficient to discharge a proper proportion of such liabilities shall be deducted from the amount payable to any member on withdrawal. The decision of the directors as to the sum so to be deducted may be made either before or during the currency, or after the expiration of the notice of withdrawal but before compliance therewith. If, owing to the number of members desirous of withdrawing their shares or to the amount of money available for the purpose or on any other account, the directors are of opinion that the interests of the society require the postponement of payment to members who have given notice of withdrawal the directors shall have power, whether the assets are sufficient to meet the liabilities or not, to postpone payment to any such members who have given notice of withdrawal for a period not exceeding one year and from time to time to continue such postponement for like further periods or to direct such payment to be made in rotation according to priority of notice as the funds of the society will allow. . . .

74. Until a notice of withdrawal has been complied with subject to deduction or postponement, the member giving the same shall continue to be bound by these rules or any alteration thereof whether such alteration be made before or after notice of withdrawal.

91. The funds of the society shall be applied solely for the purpose set forth in these rules and in manner therein provided. Firstly, in payment of all expenses of the society authorized by the rules. Secondly, in payment of the interest, dividends, or bonuses due to the holders of investment shares. Thirdly, in making advances to members notwithstanding the currency or expiration of any notices of withdrawal by other members. Lastly, in repaying subscriptions to members withdrawing their shares.

118. In case three-fourths in number and value of the investing members of the society for the time being present at a general meeting specially convened for the purpose shall resolve that no new business be transacted, then the society shall cease to transact any new business accordingly. [The rule then provided at some length for the distribution of the surplus assets, which provision, shortly stated, came to this, that the directors should get in the assets and pay and discharge liabilities, and when all liabilities and expenses were discharged the surplus assets should be divided among the investing members; and the whole of such surplus assets being disposed of the society should be and be deemed to be at an end.]

The society, through the defalcations of an officer, lost a large sum of money. Meetings were held to consider what ought to be done. Ultimately resolutions were passed, some of which were now complained of.

The first alteration necessary to mention was in rule 71, to strike out the words "his subscriptions" and substitute "the amount standing to his credit in the books of the society."

Next to insert as rule 72: "The amount due from the society to each member in respect of any share or shares held by him on the 1st of December, 1896, shall be deemed to be and taken as thirty-three-fiftieths of the net amount paid on such share or shares, anything in these rules to the contrary contained notwithstanding."

In rule 73 strike out the first paragraph and substitute, "The directors may at any time order that a sum sufficient to discharge a proper proportion of any loss, actual or anticipated, incurred by the society shall be deducted from the amount payable to any member on withdrawal."

P. S. Stokes, for the motion.—The rules must be fair. It is true that the society has power to alter its rules, but it is not fair for the society to pass a resolution which deprives the applicant of a portion of the amount due to him. Where a man has paid money on the terms that he shall have it back on certain notice, the society cannot alter the terms and prevent him from having it back on giving the notice.

He referred to *Knight* v. *Tabernacle Building Society* (unreported), *Barnard* v. *Tomson*, [1894] 1 Ch. 375; *Auld* v. *Glasgow Working Men's Building Society*, 35 W. R. 672, 12 App. Cas. 197; Wurtzburg on Building Societies, 3rd ed., p. 386.

Graham Hastings, Q.C., and *Wurtzburg, contra.*—The plaintiff would be bound by the rule even if passed after he became a member. If a member makes a mortgage of shares to a society under which he is entitled to redeem on payment of certain moneys the society can make a rule that he shall be entitled to redeem on these terms and have to bear his proportion of a loss as well: *Rosenberg* v. *Northumberland Building Society*, 37 W. R. 368, 22 Q. B. D. 373; *Bradbury* v. *Wild*, 41 W. R. 361, [1893] 1 Ch. 377; *Pépé* v. *City and Suburban Benefit Building Society*, 41 W. R. 548, [1893] 2 Ch. 211; *Reg.* v. *Brabrooke*, 69 L. T. Rep. 718. [STIRLING, J.—If I understand your argument, the society can make any rule it pleases?] Yes, if the rule is fair: *Barnard* v. *Tomson*.

Stokes, in reply.—The question is whether this alteration is a proper one, and I submit it is not. The society can pass rules that as a member comes to withdraw he shall receive only a certain amount, but this rule is that under no circumstances shall a member receive more than a certain proportion of what is due to him. The Act says you must provide for repayment, but here they provide for non-payment. All the cases go on the point whether a man is bound by the rule, but here the question is whether the rule is *ultra vires*. *Barnard* v. *Tomson* did not decide that a reduction was binding. It is beyond their power to pass a rule to pay only £33 out of £50. No matter what the assets of the society are, they ought to say as each withdrawal comes on how much ought to be taken off for losses.

Cur. adv. vult.

June 30.—STIRLING, J., stated the facts, and continued: Upon the argument two points were discussed—first, whether the alteration in the rules could be made so as to prejudice or affect the rights of the plaintiff as a fully paid-up shareholder; and secondly, whether, supposing this can be done, rule 72 is within the powers of the society. Now, as to the first point the authorities seem to me to be clear. There are a series of cases of which I need only mention *Wilson* v. *Miles Platting Building Society*, 37 W. R. 369, 22 Q. B. D. 381; *Rosenberg* v. *Northumberland Building Society*, and *Pépé* v. *City and Suburban Benefit Building Society*, which show that members of a building society may enter into contracts with the society that their rights shall be regulated not merely by the rules in force at the time of the contract, but by any rules which the society may from time to time make. Looking at rule 74 of the existing rules, which is not affected by the alterations, it appears to me to be clear that as to any matters within the powers of the society the rights should be governed by the rules from to time in force; and secondly, that so far as these alterations are within the powers of the society the plaintiff is bound by them. In fact this point was not seriously disputed in argument.

The real point to consider is whether rule 72 is within the powers of the society. The effect of that rule is to wipe out for all time nearly three-tenths of the money paid up by every member who had shares in the society on the 1st of December, 1896. The objection which is taken is that the Act, if it does not say so in express terms, implies that the paid-up shares are to be repaid in full. The rules which the society is authorized to make under section 16 are to provide for the terms on which such shares are to be repaid, and are also to provide for the terms under which shares may be withdrawn. No doubt as it seems to me there is a difference in the force of the section as regards these two matters, and the application of that remark is, I think, to be observed in connection with the relief sought to be obtained on the present occasion. The plaintiff does not complain of the alteration in rule 73 or of that rule itself. That is a matter which relates to the terms of withdrawal. [His lordship read the proposed alteration, and continued:] So far as I can see that is a reasonable rule, for it seems right and proper that if a society suffer loss a member shall not be entitled to withdraw without making some contribution to that loss. And if he insists on taking away his money when the loss is impending, the directors are entitled to say, "You shall not do so except by first making provision to meet that loss." But it is a totally different thing to say that for all time and for all purposes a certain amount shall be struck off from the amount which has been contributed to the funds of the society, because *primâ facie*, according to the terms of the Act, an investing member would be entitled to have the contributions repaid to him on dissolution, or when the surplus funds became distributable within the meaning of section 13, and when no longer required for the purposes of the society.

The proposed rule 72 goes far beyond the terms as to withdrawal, and would affect the distribution of the funds under rule 118, which relates to distribution. A similar point was considered by the Divisional Court in *Knight* v. *Tabernacle Permanent Benefit Building Society*, which came before Grantham and Charles, JJ., on the 1st of July, 1892, of which case I have been supplied with a report. The point is put neatly by Charles, J., according to this report of the judgment. In that case the society did not go so far as they have on the present occasion, because the rule there said that the amount due from the society to each member in respect of the share or shares held by him should be deemed to be five-sixths of the net amount paid on such share or shares. Then there was a further rule to the effect that out of the profits accumulated in the manner prescribed in rule 7a, one-sixth of the nominal value of the share was to be paid to the shareholder. So that there was an expectation held out to the members of the society that at a future time, under more favourable circumstances, they might receive the amount which had been

written off. The Divisional Court held the rule to be beyond the power of the society. Charles, J., says: "The question we have to ask ourselves is this: Are those rules *ultra vires* or not? What they did was clear enough. They said they would pay Mr. Knight £10 with reference to each share; and as to the one-sixth, they would pay him out of the balance, if any, of net profits in future. In other words, the repayment of the odd one-sixth was entirely contingent upon the financial prosperity of the society. Could they do that? In answer to that question I must refer to the Act of 1874 itself, which, by the 16th section, provides that the rules of every society shall set forth, amongst other things, 'the manner in which fully paid-up shares (if any) are to be issued and repaid.' Section 18 gives power to the society to alter or rescind any rule in the manner therein prescribed, and it is contended that inasmuch as section 18 gives that unqualified power to alter any rule, they could alter the rule which formerly existed as to the repayment of fully paid-up shares and alter it in this manner—namely, that only five-sixths should be paid for certain, and that with regard to the other one-sixth the payment should be dependent upon the financial prosperity of the society. I do not think that they have any power under section 18 to make any such rule. In my judgment, to use the language of Lord Selborne, such a rule is 'repugnant to the express provisions to the Act of Parliament,' which appear to me to contemplate that fully paid-up shares shall be paid. The society may make any rules with reference to the repayment. But it may not say, 'We will not repay you at all, or we will only pay you a part of a fully paid-up share.' Nor, in my judgment, may they say, as they have said: 'We will only pay you a certain part, and, as to the rest, you must trust to get that back from the profits of the society, if any are made.' That appears to me to be repugnant to the express provision of the Act that fully paid-up shares are to be repaid."

Now, that decision was given on a case stated by an arbitrator, and it was afterwards held by the Court of Appeal (41 W. R. 35, [1892] 2 Q. B. 613) that that decision could not be appealed from. It is possible, therefore, that it is not binding on me, but I do not see my way to differ from that portion of Charles, J.'s, judgment in which he says that section 18 does not give the society power to make any such rule, and that it would be repugnant to the express provisions of the Act that fully paid-up shares are to be repaid. I think, therefore, that the plaintiff is entitled to the injunction asked for, but it must be limited to the alteration of rule 72.

Injunction granted to restrain the society and its officers from acting on the alteration of rule 72.

Solicitors, *Dod, Longstaffe, Son, & Fenwick; Boulton, Sons, & Sandeman.*

Chan. Div. }
Kekewich, J. } June 15.

HALL & CO. v. TRIGG. (*a*.)

Practice—Contempt—Breach of injunction—Attachment—Service of copies of affidavits with notice of motion—Proof of service of order—Consent order—Ord. 52, r. 4.

Upon a motion to commit for breach of an injunction the fact that the injunction was granted upon a consent order agreed to by the defendant's counsel will not relieve the plaintiff from the necessity of proving either that such order has either been served upon, or has been otherwise brought to the knowledge of, the defendant.

Motion.

The plaintiffs, who were lime and cement merchants, brought an action against the defendant, who formerly had been their traveller, to restrain him from soliciting their customers and from acting in contravention of the terms of his agreement for service with them.

On the 19th of February, 1897, the plaintiffs moved for an interim order to restrain the defendant, and by consent a perpetual injunction was granted upon the motion, which was treated as the trial of the action.

The plaintiffs now moved for the committal of the defendant, or for liberty to issue a writ of attachment against him for alleged disobedience to the order.

The notice of motion gave notice of the plaintiffs' intention to read certain affidavits which did not, however, include the affidavit of service of the order of the 19th of February, 1897.

Warrington, Q.C., and *Whinney*, for the plaintiffs.

Beaumont, for the defendant.—I take the preliminary objection that ord. 52, r. 4, has not been complied with; there is no affidavit of service of the order, and therefore the notice of motion is irregular: *In re Dunning*, 71 L. T. Rep. 57; *Taylor* v. *Roe*, 68 L. T. Rep. 213, 41 W. R. Dig. 171; and *Rendell* v. *Grundy*, 43 W. R. 50, [1895] 1 Q. B. 16.

Warrington, Q.C.—I submit that as this was a consent order an affidavit of service was not necessary; it was in effect an undertaking on the part of the defendant, and no notice to him is required.

Beaumont, in reply.—The defendant is entitled to have the order served on him, notwithstanding the fact that his counsel consented to the order. No doubt if the defendant had argued his own case in person it would be different; but that is not so in the present case; there is nothing to show that the defendant was present on the hearing of the former motion or knew of the order.

KEKEWICH, J.—The object of an affidavit of service is to satisfy the court that it can do justice between litigants who, if not fully forearmed, are at least fully forewarned, and this applies equally well whether the application to the court is for a writ of attachment or for any other purpose where an affidavit of service is necessary. The affidavit of service must show that the order has been brought to the notice of the defendant. That is the object of an affidavit of service. If that object is fulfilled to the satisfaction of the court in any other way than by the service of the order, then service becomes unnecessary. You can get over the necessity of service in cases where the man either conducts his own case in person or is present in court during the application; in such cases a mere reference to the fact of his presence may be sufficient upon a subsequent application to commit. I know of many cases where the court was satisfied that the respondent was present in court in person upon the hearing of the prior application, and has held him bound by the order then made. The question, however, which I have now to consider goes a step further, for the order was made by the consent not of the man himself, but of his counsel, who consented to what he thought was a proper order. But now, is there any difference between these cases? Can I assume that the man knew of this order? What could be done in cases

(*a*.) Reported by R. J. A. MORRISON, Esq., Barrister-at-Law.

where the liberty of the subject was not concerned I do not now consider; but where the liberty of the subject is concerned I think the strictest proceeding should be enforced. In substance I see no difference between an ordinary order and an order by consent. I think, therefore, that the preliminary objection is good, and must be upheld.

Solicitors, *Foster, Spicer, & Foster; Rawlings & Butt.*

Prob. Div. & Adm. Div. Probate. } Feb. 18.

In the Goods of SUAREZ. (*a.*)

Probate—Administration—Persons entitled abroad—Urgency—Limited grant to stranger—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

Where the next-of-kin of an intestate resided in the interior of Bolivia where a communication would take two months by letter and six weeks by telegram to reach them, and there were heavy transactions (shipments and bills) of the deceased's firm requiring to be immediately dealt with, the court, under section 73 *of the Court of Probate Act,* 1857, *made a limited grant to a member of the firm of chartered accountants in whose hands the books of the firm of the deceased had been placed.*

Motion for grant of letters of administration under section 73 of the Court of Probate Act, 1857, of the estate of Francisco Suarez (deceased) to C. L. Nichols, a chartered accountant, until the next-of-kin obtain a general grant.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

The deceased died intestate on the 10th of February, 1897, in London, where, and in Brazil, he carried on business as a merchant and agent, dealing principally in the sale of indiarubber consigned from Bolivia, and heavy shipments were arriving on which he had advanced money, £40,000 worth of rubber having just arrived in Liverpool, whilst £80,000 worth of bills against shipments were current; these required to be immediately dealt with.

The deceased died a bachelor, leaving his mother, three brothers, and two sisters surviving him.

The mother and eldest brother reside at Trinidad Beni, in Bolivia. The other brother at Rio Beni, in Bolivia; and the two sisters at Santa Cruz.

It would take two months for a letter and six weeks for a telegram to reach Rio Beni, and still longer to communicate with the mother and elder brother.

The only relative in this country was a nephew of the deceased (son of a brother who died in 1878), he supported the application as, being here temporarily and not having traded here he would have had difficulty in getting security if he had been the applicant.

The applicant was a member of a firm of chartered accountants in whose hands the books of the firm had been placed.

Inderwick, Q.C., and *Barnard*, in support of the motion.—It is a case of great urgency; great damage will be done to the deceased's business unless someone can act immediately, dispose of the shipments, and meet the bills arriving daily.

BARNES, J., allowed the motion on the applicant giving justifying security.

Motion allowed.

Solicitors, *Goldberg, Langdon, Barrett, & Newall.*

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

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FROM THE 24TH OF OCTOBER, 1896, TO THE 12TH OF AUGUST, 1897.

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1897.

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*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH D., the Chancery Division; Q.B.D., the Queen's Bench Division; BKCY., the Queen's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved; C.A. (Ir.), the Court of Appeal in Ireland; M.R. (Ir.), the Master of the Rolls in Ireland; V.C. (Ir.), the Vice-Chancellor of Ireland; Q.B.D. (Ir.), the Queen's Bench Division, Ireland; P.D. & AD.D. (Ir.), the Probate and Matrimonial Division, Ireland.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1897, *as well in this Volume* (45) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports will be found in the Tabular Index to the Names of Cases.*

ACCUMULATIONS.—See Settlement, 9.

ADMINISTRATION:—

1. *Annuity payable during life or until alienation —Administration action—Valuation of annuity—Payment into court—Annuitant entitled to payment out of whole fund.*—Where an annuity, payable to the annuitant for life or until alienation, had been valued in a creditor's action for the administration of the grantor's estate and the amount of such valuation paid into court to the account of the annuitant,

Held, that, notwithstanding the condition relating to alienation, the annuitant was entitled to have the whole fund in court paid out to him.—SINCLAIR, RE, ALLEN *v.* SINCLAIR, *Ch.D. Kekewich, J.*, 596.

2. *Assets — Colonial assets — Colonial duties — Pecuniary and residuary legatees—Costs of realization.*—A testator domiciled in England, whose

assets consisted of considerable personalty in England and also of realty, leaseholds, and personalty in Australia, by his will, after bequeathing pecuniary legacies of considerable amount, gave his residuary real and personal estate upon trust for such of his five children as should be living at his death in equal shares, the share of each child being settled upon him or her for life with remainder to his or her children, with power for his trustees to manage and cultivate his real and leasehold estates until sold.

Held, that the duties due to the Government of South Australia were not, like the duties due to the English Government, payable out of the share of each child; but were part of the costs of realization, and were, therefore, payable out of the testator's general assets before distribution.—MAURICE, RE, BROWN *v.* MAURICE, *Ch.D. North, J.*

3. *Assets—Crown debt—Specialty and simple contract creditors—Hinde Palmer's Act*, 1869 (32 & 33 *Vict. c.* 46).—The object of Hinde Palmer's Act, 1869, is only to put specialty and simple contract creditors on an equal footing *inter se* for purposes of distribution, but it does not affect any other rights and priorities that may exist, nor does it bind the Crown in any way. Where, therefore, a testator died leaving assets sufficient, after the payment of his specialty debts in full, to pay a simple contract debt due to the Crown which before the statute would have had priority over other simple contract debts, but been postponed to the specialty debts,

Held, that the assets ought, in the first place, to be divided rateably between the specialty and simple contract creditors, and that the payment of the Crown debt ought to be borne by the fund for the payment of the simple contract creditors.

In re Jones, Calver v. *Laxton*, 34 W. R. 249, 31 Ch. D. 440, followed.

In re Williams, Williams v. *Williams*, 21 W. R. 160, 15 Eq. 270, distinguished.—BENTINCK *v.* BENTINCK, *Ch. D. Stirling, J.*, 397.

4. *Costs—Administrator—Rights of administrator—Disallowance of charges—Interest on balances—Debt due from next-of-kin—Set-off by administrator—R. S. C.*, 1883, *ord.* 65, *r.* 1.—Where, in an administration action brought by the next-of-kin against an administrator the greater part of the administrator's claim for expenses of realization had been disallowed, but the administrator had acted *bonâ fide* throughout,

Held, that the administrator should be allowed his general costs of an administration action, notwithstanding the disallowance of a portion of his claim for expenses of realization, inasmuch as his claim was neither dishonest, improper, nor monstrous; and also that he should not be ordered to pay interest on balances of the estate which he had retained to meet such claim.

Some of the next-of-kin in the above administration action had brought an action against the administrator in his capacity of executor in another estate. This action had failed, and the next-of-kin were ordered to pay the costs, but had not done so.

Held, that the administrator was entitled to set off this debt due for costs against the shares in the intestate's estate due from him to such next-of-kin.—JONES, RE, CHRISTMAS *v.* JONES, *Ch.D. Kekewich, J.*, 598.

5. *Costs—Excessive costs—Disallowance—Trustee.*—In an administration action relating to an estate of about £10,000 in value an order had been made for the trustees to raise the sums necessary for payment of the costs, when taxed, of the trustees and their solicitor of instituting and defending various actions in the Queen's Bench Division relating to part of the estate, and to pay such sums when raised into court to the credit of the action. The costs were taxed at upwards of £3,580, which sum was raised by the trustees, under the advice of their solicitor, by mortgages of an irregular kind, and which ultimately appeared to have been quite unnecessary. The £3,580 was never paid into court by the trustees pursuant to the order, and was in fact received by the solicitor himself. Subsequently the trustees obtained an order for taxation and payment of further costs, amounting to about £200, which were claimed to be due to the estate of the solicitor, who had in the meantime died.

Held, that the estate had been improperly wasted by useless actions and proceedings, and that the court had jurisdiction to make a supplementary order, directing that the trustees (both impecunious persons) should not be paid any part of their £200 costs until they had first complied with the order for payment into court of the £3,580.—SCOWBY, RE, SCOWBY *v.* SCOWBY, *C.A.*

6. *Practice—Insolvent estate—Interest—Surplus—Incorporation of rules of bankruptcy—Judicature Act*, 1875, *s.* 10—*R. S. C.*, 1883, *ord.* 55, *rr.* 62, 63.—H. died in 1882. In 1883 an order was made for the administration of his estate in a creditor's action. The estate was then insolvent, consisting of shares in a company which were worthless. These shares afterwards became valuable. In 1896 the chief clerk made a certificate stating the amount of the debts, in which he calculated interest on the debts carrying interest only down to the date of the judgment. The estate turned out more than sufficient to pay the certified debts.

Held, that the questions as to which the rules of bankruptcy are incorporated by section 10 of the Judicature Act, 1875, were all settled by the certificate, and those rules had nothing to do with the distribution of the surplus; the surplus must be distributed according to the rules of the Chancery Division—viz., in paying first interest on the debts which at law carried interest down to the date of payment, at the rates fixed by their contract, and subject thereto in paying interest at 4 per cent. to the other creditors on their debts.—HENLEY, RE, ALCOCK *v.* HENLEY, *Ch.D. North, J.*

7. *Widow—Charge on estate of intestate—Intestates Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *s.* 2.—The widow of an intestate, entitled under the Intestates Estates Act, 1890, to a charge upon his real and personal estate, has a sufficient interest in the real estate to entitle her to have it administered.—MCFERRAN *v.* MCFERRAN, *V.C.* (*Ir.*).

See also Conflict of Laws; County Court, 2; Mortgage, 1; Partnership, 1; Practice, 1, 34.

ADMIRALTY:—

1. *County court—Jurisdiction—Subjects or objects of salvage—Ship—Gas float—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 476—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3.—The subjects or objects in respect of the saving of which the High Court of Admiralty has jurisdiction by the common law are confined to a ship, her apparel, her cargo, including flotsam, jetsam, and lagan, or the wreck of them, and to freight in danger and saved by reason of the saving of the ship or cargo; and the subjects or objects of salvage are not enlarged by the Merchant Shipping Act, 1854, or by any of the preceding statutes, or by the County Courts

Admiralty Jurisdiction Act, 1868, with the sole exception that the saving of lives of persons in danger from being on board ship have been added to the list of such subjects or objects.

The plaintiffs claimed a salvage award in a county court having Admiralty jurisdiction for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat shaped, and contained gas, which supplied the light raised above it.

Held, that the gas float was not a "ship" or a "wreck" within the meaning of sections 2 and 458 of the Merchant Shipping Act, 1854, and could not be the subject of salvage.

Decision of the Court of Appeal, 44 W. R. 263, [1896] P. 42, affirmed.—GAS FLOAT "WHITTON," THE, *H.L.*

2. *County court—Practice—Action* in rem—*Mode of trial—Right to jury—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2.—In an action *in rem* brought to recover freight in the county court under the County Courts Admiralty Jurisdiction Acts, 1868 and 1869, a defendant is not entitled to trial by a jury under the County Courts Act, 1888, s. 101.—"THEODORA," THE, *P.D. & Ad.D.*

3. *Practice—Damages—Limitation of liability—Right of plaintiffs to claim in respect of amount of damages already paid—Adjustment of claims between defendants, some of whom have recovered damages under order of foreign tribunal—Practice—Bail for interest on amount required exclusively to answer life and personal injury claims—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504.—The owners of a vessel who have obtained a decree limiting their liability under the Merchant Shipping Act, 1894, for damage to goods, loss of life, or personal injury, are entitled to put in at the reference in the limitation suit a claim for such sums not exceeding the value of their vessel as they may have been compelled to pay under the order of a foreign court in respect of such damage, loss of life, or personal injury, and in regard to such claim to receive or have distributed to them the same dividend out of the amount in court or otherwise secured, as the plaintiffs in the foreign court would have received if execution on the judgment pronounced by the foreign court had been stayed and such plaintiffs had themselves sued here and brought in their claim in the limitation proceedings.

Those foreign plaintiffs who have not been paid abroad the full amount which they would have received if plaintiffs here, can come against the fund in court or otherwise secured for the balance of the dividend due to them.

By the practice of the Admiralty Division the plaintiffs in a limitation of liability suit brought for the purpose of limiting their liability in respect of damage to goods, loss of life, and personal injury arising from a collision for which their vessel is to blame, are required before a decree is pronounced in their favour, in addition to paying into court the statutory amount to which their liability for damage to goods is limited, together with interest, to give bail not only for the loss of life and personal injury claims for which they are liable, but also for interest on such claims calculated from the date of the collision until payment. —"CRATHIE," THE, *P.D. & Ad.D.*, 631.

4. *Practice—Salvage—Right of owners, masters, and crews of salving vessels to institute one action of salvage* in rem *against salved property—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 21—*Rules of the Supreme Court, ord.* 72, *r.* 2.—The procedure and practice in force in the High Court of Admiralty at the time of the passing of the Judicature Act entitled the owners, masters, and crews of different vessels who have rendered salvage services to a vessel, freight, or cargo in need of salvage services to institute one suit of salvage *in rem* against the salved property; and all such salvors have now, under the procedure and practice in force in the Admiralty Division, a similar right to join in an action *in rem* to recover the salvage remuneration due to them, and are not bound to sue out in it more than one writ of summons.

Smurthwaite v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, distinguished.—"MARÉCHAL SUCHET," THE, *P.D. & Ad.D.*, 141.

See also Ship, 5.

ADULTERATION :—

1. "*Drug*"—*Beeswax—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6.—In a prosecution under section 6 of the Sale of Food and Drugs Act, 1875, of a grocer for selling beeswax adulterated by being mixed with paraffin,

Held, that beeswax, so sold, was not a drug.—FOWLE *v.* FOWLE, *Q.B.D.*

2. *Food—Butter—False warranty*—Scienter—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 27.—By section 27 of the Sale of Food and Drugs Act, 1875, every person who shall give a false warranty in writing to any purchaser in respect of an article of food or drug sold by him as principal or agent shall be guilty of an offence under this Act and be liable to a penalty.

Held, that no offence was committed within that section by D., who had given a warranty in writing that butter sold by him was pure, although in fact it was adulterated, because it was not proved that at the time D. gave the warranty he had reason to know or knew that it was false.—DERBYSHIRE *v.* HOULISTON, *Q.B.D.*, 527.

3. *Milk—Certificate of analysis, Form of—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.—In a prosecution under the Sale of Food and Drugs Act, 1875, for selling adulterated milk to the prejudice of the purchaser, the certificate of the analyst which was given in evidence stated, as his opinion, that the sample submitted to him "contained the parts as under—milk, 94 per cent.; added water, 6 per cent. This opinion is based on the fact that the sample contained 7·97 per cent. solids, not fat, whereas genuine milk contains not less than 8·5 per cent. solids, not fat."

Held, that the certificate was good as evidence of adulteration.

Fortune v. *Hanson*, 44 W. R. 431, [1896] 1 Q. B. 202, distinguished.—BRIDGE *v.* HOWARD, *Q.B.D.*, 78.

4. *Milk—Knowledge of purchaser—Justices—Costs—Sale of Food and Drugs Act*, 1875, *s.* 6.—W. was charged before justices with selling for new milk an article not of the nature, substance, and quality demanded, contrary to section 6 of the Food and Drugs Act, 1875. A sergeant of police, acting under H.'s orders, who was an inspector under the Act, purchased the milk from W., who, when he was asked for new milk, sold skimmed, and charged a penny a pint, the usual price for skimmed. The justices differed, one being of the opinion that only a penny a pint being asked, the purchaser must have been aware it was skimmed milk he was buying.

Held, that the knowledge of the purchaser was immaterial, and case remitted to the bench to convict.

The respondent W. did not appear, but the magistrates did.

Held, that costs in such a case could be given against them.—HEYWOOD *v.* WHITEHEAD, *Q.B.D.*

ADVANCEMENT.—See Will, 13.

AGENT.—See Company, 7, 21, 22; Contract, 7; Principal and Agent; Solicitor, 2.

ANNUITY.—See Administration, 1; Apportionment; Inland Revenue, 15, 23.

APPOINTMENT.—See Power, 1-3.

APPORTIONMENT :—

Annuity—Annuity payable in advance—Payment under separation deed—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 7.—By a separation deed the husband agreed to pay to the wife an annuity of £150, payable half-yearly in advance on the 1st of March and the 1st of September, in every year during their joint lives. An instalment of £75 was paid on the 2nd of March, 1896, and the husband died on the 13th of March. The executrix of the husband sued the wife to recover back the sum of £75, less an apportioned part for the period from the 1st of March to the 13th of March.

Held, that the sum of £75 was not apportionable, and no part thereof could be recovered back from the defendant.—TREVALION *v.* ANDERTON, *C.A.*

APPROPRIATION of PAYMENTS :—

Debtor and creditor—Rule in Clayton's case—*Right to appropriate.*—The rule in *Clayton's case,* 1 Mer. 572, does not apply where there is no account current between the parties, nor where, from the nature of the transactions or other circumstances, it is clear that the creditor intended that it should not.

Where there has been no appropriation by the debtor the creditor has the right of election up to the last moment.—"MECCA," THE, *H.L.* 667.

ARBITRATION :—

1. *Contract — Master and servant — Arbitration clause—Wrongful dismissal—Stay of proceedings—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—By a contract in writing the defendants agreed to employ the plaintiff for five years, but it was provided that the defendants might at any time dismiss the plaintiff if he were guilty of gross misconduct. It was also provided that any dispute should be referred to arbitration. The defendants having dismissed the plaintiff for alleged gross misconduct, the plaintiff brought an action for wrongful dismissal.

Held, that the action ought to be stayed under section 4 of the Arbitration Act, 1889.

Davis v. *Starr,* 37 W. R. 481, 41 Ch. D. 242, distinguished.—RENSHAW *v.* QUEEN ANNE RESIDENTIAL MANSIONS CO., *C.A.*, 487.

2. *Practice—Special case—Power of court to order—Question of law—No decision by arbitrator—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 19.—The court or a judge has power under section 19 of the Arbitration Act, 1889, to order an arbitrator to state a case for the opinion of the court on questions of law submitted to the arbitrator by one of the parties to the arbitration, although the arbitrator has not given any decision on the question of law, and has not indicated what his decision will be.—SPILLERS AND LEETHAMS' ARBITRATION, RE, *C.A.*, 241.

See also Lands Clauses Acts, 1, 2; Local Government, 1.

ASSIGNMENT.—See Bankruptcy, 1-3, 5; Contract, 1; Copyright, 1; Landlord and Tenant, 1; Patent, 3; Practice, 6.

ATTACHMENT. — See Contempt; Divorce. 1; Practice, 8.

AUCTIONEER.—See Vendor and Purchaser, 5.

AUDITOR.—See Company, 36.

AUTRE VIE.—See Will, 6.

BANKER :—

1. *Bill of exchange—Cheque—Forged indorsement—Liability of banker—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *ss.* 24, 60, 79, *sub-sections* 2, 80, 82.—The defendant bank carried on business in London and had a branch in Paris. A cheque was drawn on the defendant bank in London in favour of the plaintiffs specially indorsed by the plaintiffs to a firm in London and posted for collection to that firm, but it never reached them. After the posting a forged indorsement was put on the cheque, and it was presented at the defendants' bank in Paris by a person purporting to be the last indorsee, who had no account at defendants' bank. The defendants paid the cheque and sent it to their bank in London, who credited their bank in Paris with the value. The London bank refused to deliver the cheque to the plaintiffs. The cheque, when it reached the defendants, was crossed generally.

In an action for conversion of the cheque,

Held, that the defendants, by paying the cheque and forwarding it to their London bank and crediting their Paris bank with the value, were guilty of a conversion of the cheque in England, and therefore the case was governed by English law; that the person who obtained payment of the cheque was not a "customer" of the defendants within the meaning of the Bills of Exchange Act, 1882, s. 82; that the defendants, having paid the cheque on a forged indorsement, were not protected by any of the provisions of the Bills of Exchange Act, but were liable, under section 24, for the value of the cheque.

Kleinwort, Sons, & Co. v. *Comptoir National d'Escompte de Paris,* [1894] 2 Q. B. 157, followed.—LACAVE & CO. *v.* CRÉDIT LYONNAIS, *Q.B.D.*

2. *Customer—Trust money—Notice of trust—Payment of trust money to private account of trustee.*—A bank credited a trustee's (J. G.) private account with moneys received by him as a trustee, he having no other account at the bank. The trust money had been received by the bank from their London agents with an advice note stating that it had been paid to the account "J. G. Trust," but the bank had no other knowledge of the trust. The trustee, J. G., was advised of the payment by the bank manager, but gave no direction as to opening a trust account. The trustee's private account having been overdrawn, and the trust money being lost,

Held, that the bank was not liable to replace it.—COLEMAN *v.* BUCKS AND OXON UNION BANK, *Ch.D.* *Byrne, J.*, 616.

See also Bankruptcy, 7; Bill of Exchange, 2, 3.

BANKRUPTCY :—

1. *Act of bankruptcy—Estoppel—Assignment for benefit of creditors — Acquiescence by petitioning creditor—Supply of goods to trustee—Fresh act of bankruptcy—Notice of intention to suspend payment.* —A creditor, without executing or expressly assenting to a deed of assignment for the benefit of creditors, may be estopped by his conduct from setting up the deed as an act of bankruptcy. A creditor so estopped cannot set up the circular convening the meeting of creditors as a notice of intention to suspend payment, if the circular formed part of the scheme.—WOODROFF, RE, WOODROFF, EX PARTE, *Bkcy.*

2. *Act of bankruptcy—Estoppel—Deed of assignment for benefit of creditors—Acquiescence by petitioning creditor—Notice of intention to suspend payment.* —A creditor who has acquiesced in a deed of assignment for the benefit of creditors is estopped from relying on its execution as an act of bankruptcy; or from relying on the circular convening a meeting at which a composition was voted, as a notice of an intention to suspend payment, so as to constitute another act of bankruptcy.

In re Stray, L. R. 2 Ch. App. 374, followed.—HAWLEY, RE, RIDGWAY, EX PARTE, *Bkcy.*

3. *Act of bankruptcy—Assignment for benefit of creditors—Proof—Registered deed—Office copy—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 6, 11.—Upon the hearing of a bankruptcy petition, the only evidence adduced to prove the act of bankruptcy alleged—that the debtor had executed an assignment of all his property for the benefit of his creditors—was an office copy of a deed, registered under the Deeds of Arrangement Act, 1887, purporting to be executed by the debtor.

Held, that the office copy was, by reason of the provisions of section 11 of the Act, sufficient *primâ facie* evidence of the execution of the registered deed by the debtor, and of its execution on the date appearing in the office copy.—SLATER *v.* SLATER, *C.A.*

4. *Act of bankruptcy—Notice of intention of suspension of payment of debts—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* (1) (b).—Words, which in themselves do not amount to a notice of intention of suspension of payment of debts, cannot by reason of their effect on the mind of the person to whom they are addressed constitute such a notice so as to create an act of bankruptcy.—PHILLIPS, RE, THOMAS, EX PARTE, *Bkcy.*

5. *Assets—Property of bankrupt*—Choses in action —*Assignment of interest in contract—Validity of assignment as against trustee.*—A theatrical costumier entered into a contract to supply a theatre with dresses and keep them in repair during a certain period in consideration of certain weekly payments. She assigned all her interest in the contract to the plaintiff by way of mortgage, and she subsequently became bankrupt.

Held, that the assignment did not transfer to the plaintiff, as against the trustee in bankruptcy, any of the payments becoming due under the contract after the bankruptcy.

Decision of Lord Russell of Killowen, C.J., *ante*, p. 12, affirmed.—WILMOT *v.* ALTON, *C.A.*, 113.

6. *Assets—Relation back of trustee's title—Protected transaction—Charging order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 45, 46, 49—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 23.—A charging order under section 23 of the Partnership Act, 1890, being a proceeding *in invitum*, is not a "contract, dealing, or transaction" protected under section 49 of the Bankruptcy Act, 1883 (compare *Courage* v. *O'Shea*, 43 W. R. 232, [1895] 1 Ch. 325).

Where the proceeds of an execution have been ordered into court, the creditor cannot be held to have completed his execution by seizure and sale within the meaning of section 45 of the Bankruptcy Act, 1883.—WILD *v.* SOUTHWOOD, *Bkcy.*, 224.

7. *Banker—Banking account opened by debtor in name of wife—Payments out by bank to wife after receiving order—Intervention of trustee*—Res judicata —*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44. —The bankrupt had opened a banking account in his wife's name before receiving order, all her cheques to be initialled by him. After receiving order the bank continued to honour the wife's cheques until the trustee moved for a declaration that the account was in fact the bankrupt's. The trustee, having obtained such declaration, moved again for the repayment by the bank of moneys paid out since receiving order.

Held, that the bank was bound to honour the wife's cheques until the trustee intervened; and that, had the trustee been entitled to have the amount of such cheques repaid to him, he ought to have asked for it upon his first motion.—MONTAGU, RE, WARD, EX PARTE, *Bkcy.*, 384.

8. *Bankruptcy notice—Issue of notice—Foreign debtor out of jurisdiction at date of issue—Subsequent return—Service in England—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g); *s.* 6, *sub-section* 1 (d).—A bankruptcy notice was issued under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, against a debtor who was a foreign subject and out of the jurisdiction, and who, at the date of the issue of the notice, had not "ordinarily resided or had a dwelling-house or place of business in England" within the preceding year. He subsequently returned within the jurisdiction, and whilst there was served with the bankruptcy notice.

Held, that the issue of the bankruptcy notice was good, and could not be set aside.—CLARK, RE, BEYER, EX PARTE, *C.A.*, 118.

9. *Bankruptcy notice — Service — Partnership — Receiver and manager appointed by the court—Service of notice on receiver—Construction of rule* 260 *of General Rules of* 1886, 1890.—A bankruptcy notice in respect of a judgment debt against a partnership cannot be served under rule 260 of the Bankruptcy General Rules of 1886, 1890, upon a person who has been appointed receiver and manager of the partnership business by order of the court in an action for dissolution of the partnership. The words "person having the control or management of the partnership business" mean a person having such control or management by the authority of the partners, and acting as their servant or agent. —FLOWERS & Co., RE, WARE, EX PARTE, *C.A.*, 118.

10. *Beneficed clergyman—Sequestration of income of benefice—Discharge of bankrupt—Continuance of sequestration.*—On the application of the trustee in bankruptcy of a beneficed clergyman of the Church of England, the bishop of the diocese issued a sequestration of the income of the living, by virtue of which a portion was paid to the debtor while performing the duties of the benefice under order of the bishop, and the residue, after paying thereout the costs and expenses of the sequestration, was handed over to his trustee in bankruptcy. Subsequently the debtor obtained an order of discharge, the whole of his property available for dividend,

other than the moneys obtained by means of the sequestration, having been realized and distributed, but the sequestration was not relaxed by the bishop, the trustee in bankruptcy having refused to take any steps to obtain the relaxation on the ground that the bankruptcy had not been closed, that a dividend of only 8s. 9d. in the pound had been paid, and that the sequestration ought not to be relaxed until the whole of the debts were satisfied. In an action by the debtor against the trustee in bankruptcy for an injunction to restrain him from receiving the residue of the income of the benefice, a declaration that the debtor was entitled after his discharge to receive the income, and an order on the trustee in bankruptcy to take steps to obtain the relaxation of the sequestration,

Held, that the order of discharge did not entitle the debtor to the income of his benefice, and the action was dismissed.—LAWRENCE *v.* ADAMS, *Ch.D. North, J.*

11. *Bill of sale—Trade goods—Order and disposition of the bankrupt with consent and permission of the true owner—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—The construction of the Bankruptcy Act, 1883, s. 44, is unaffected by the Bills of Sale Act, 1882, and the possession by the bankrupt of goods used in trade, which he has assigned by a bill of sale, under circumstances such as to raise a reputation of ownership, is a possession by the bankrupt with the consent and permission of the true owner.—GINGER, RE, LONDON UNIVERSAL BANK, EX PARTE, *Bkcy.*

12. *Composition with creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126—*Default—Determination of deed—Right of creditors to prove in subsequent bankruptcy of the debtor—Statute of Limitations.*—Creditors accepted a deed of composition in 1881, determinable by the trustees upon default. Default was made, and the debtor became bankrupt in 1889, and the trustee of the deed determined it in 1896. The creditors then proved in the 1889 bankruptcy.

Held, that they were entitled to prove, and were not barred by the Statute of Limitations, as the deed of composition was to be treated as an acknowledgment taking the debt out of the statute. —STOCK, RE, AMOS, EX PARTE, *Bkcy.*, 480.

13. *Costs—Security for—Appeal from receiving order—Application to increase security for costs—"Special circumstances"—Bankruptcy Rules*, 1886, *r.* 131.—Where a debtor appeals from a receiving order made against him and lodges in court the sum of £20 prescribed by rule 131 as security for the costs of the appeal, the fact that the respondent's costs of the appeal out of pocket will alone exceed £20 is not a special ground for increasing the amount of the deposit.

In re McHenry, 17 Q. B. D. 351, distinguished.—PHILLIPS, RE, TREBOETH BRICK CO., EX PARTE, *Bkcy.*

14. *Discharge—Suspension—Exercise of discretion—Right to review—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8.—Suspension of discharge for five years is a severe sentence which should be reserved for very bad cases.—SWABEY *v.* SWABEY, *Bkcy.*

15. *Fraudulent preference—Bill of exchange—Payment of overdue acceptance—Onus of proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.—When a bill of exchange is not presented for payment at maturity, but is held over at the request of the acceptor and subsequently paid, such a payment is not within the principle of *In re Clay & Sons*, (1895) 3 Manson 31, and may be a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

When a trustee in bankruptcy proves that the debtor was insolvent at the time when he made the payment that is impeached as a fraudulent preference, the *onus* of proof shifts, and the party supporting the payment must show that it was not made with the view of preferring him.—EATON, RE, VINEY, EX PARTE, *Bkcy.*

16. *Fraudulent preference—Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 37, 48.—B. gave the debtor his accommodation acceptance for £20, which the debtor discounted at his bankers. Within three months of the presentation of the petition the debtor paid in £20 to his bankers to meet the bill.

Held, that the payment was a fraudulent preference of B.; for though he was not actually a creditor at the date of the receiving order, he would have been one had it not been for such payment.—PAINE, RE, REED, EX PARTE, *Bkcy.*, 190.

17. *Fraudulent preference — Non-trader — Postnuptial settlement of settlor's own property—Limitation to settlor for life determinable on alienation—*Bonâ fide *purchaser for valuable consideration—Defeating and delaying creditors—*13 *Eliz. c.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47, *subsection* 1.—A settlor who was entitled under the will of his father to a sum of £12,000 on attaining his majority, and a further sum on the death of his mother, made the day before coming of age a postnuptial settlement of all his interest under his father's will, upon trust to pay the income to himself for life or until he should charge the same, and then upon the determination of his interest upon trust for his wife. At the time of executing this settlement a sum of £3,000 was expressly set aside for the payment of debts incurred during his minority. The settlor was a man of very extravagant habits, and the members of his family were anxious that his property should be made secure from the claims of future creditors. Acting on the advice of counsel, the settlor's mother and brother became parties to the settlement, and the mother covenanted during her life to pay him £50 a year, and his brother £25 a year repayable with 4 per cent. compound interest on the death of his mother.

Held, that the settlement was a settlement for valuable consideration, and that notwithstanding the fact that the consideration was given for the express purpose of protecting the settlor's property from the claims of future creditors, for the benefit of the settlor, his wife and family, it was not intended to defeat and delay creditors.—TETLEY, RE, JEFFERY, EX PARTE, *Bkcy.*

18. *Life interest — Forfeiture on bankruptcy — Colonial bankruptcy—English domicil—Property not "vested in or payable to" colonial trustee.*—A colonial bankruptcy, where the debtor still retains his English domicil, will not of itself be sufficient to work a forfeiture of his life interest under an English will determinable on his becoming bankrupt or doing or suffering something whereby his interest, if belonging absolutely to him, would become vested in, or payable to, some other person or persons.

In re Blithman, L. R. 2 Eq. 23, 14 W. R. Dig. 51, followed.—HAYWARD *v.* HAYWARD, *Ch.D. Kekewich, J.*, 439.

19. *Partnership—Infant partner—Bankruptcy of adult and solvency of infant partner—Infant partner not entitled to administer the partnership assets—Mis-*

application of assets by liquidator — Dealing with liquidator with knowledge of misapplication.—The rule which allows the solvent partner of a firm which has been dissolved by the bankruptcy of one of its members to administer and liquidate the partnership assets is a mere rule of administration, and has no application where such solvent partner is an infant.

The liquidator only holds the partnership assets upon trust for the purpose of discharging the partnership liabilities, and whoever deals with the liquidator with a knowledge of a misapplication of those assets must account for any part of the estate he may have received.

Quære, when the solvent partner is an infant the court may appoint his next friend to act as liquidator of the partnership assets.—BEAUCHAMP, RE, CARR, EX PARTE, *Bkcy.*

20. *Pensions—Officer retired from the Army—Appropriation of pay or salary—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 53, *sub-sections* 1, 2.—An officer who has retired from the Army with permission, and who is placed on the reserve list and receives retired pay under Article 1057 of the Royal Warrant, 1887, is in receipt of a salary or income within the meaning of sub-section 2, and not within sub-section 1 of section 53 of the Bankruptcy Act, 1883, and therefore, in the event of his bankruptcy, the court may order so much of such pay as it thinks just to be distributed amongst the creditors without obtaining the consent of the chief officer of the department under which the pay is enjoyed, as required by sub-section 1.

Sub-section 1 relates to the case where a bankrupt is in receipt of pay for services which he is still rendering, while sub-section 2 relates to the case where he is in receipt of pay for services which he has already performed.—WARD, RE, WARD, EX PARTE, *C.A.*, 329.

21. *Practice—Appeals—Date of receiving order made on appeal.*—When an appeal against a refusal to grant a receiving order is allowed, the receiving order shall date from the day of the hearing of the petition in the court below.—RAATZ, RE, CARLHIAN, EX PARTE, *Bkcy.*, 480.

22. *Practice—Equitable execution—Appointment of receiver—Jurisdiction—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* (8)—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 93—*Bankruptcy Rules*, 1886, *r.* 93.—The Court of Bankruptcy has jurisdiction to appoint a receiver by way of equitable execution for the purpose of enforcing orders of the court for the payment of money; but such jurisdiction should rarely be exercised.—GOUDIE RE, OFFICIAL RECEIVER, EX PARTE, *Bkcy.*, 80.

23. *Principal and surety—Indemnity—Composition of principal—Certificate in bankruptcy—Debtor and creditor.*—C. being indebted to H. in an unascertained sum accepted a bill for £64 drawn by H. H. negotiated the bill with a bank. Subsequently the amount due by C. to H. was ascertained and paid by C., and H. thereupon undertook to indemnify C. against all liability on the bill. H. carried an arrangement with his creditors, paying 4*s.* in the £, and obtained his certificate of conformity. The bank proved in the arrangement for their debt, and received the dividend, but C. had no notice of the arrangement proceedings. The bank then sued C. on his acceptance for the balance due on the bill, giving credit for the dividend received. C. paid the bank, and then brought an action against H. upon the indemnity to recover the amount so paid to the bank.

Held, that C. had no right of action against H. —CAREY *v.* HARPER, *C.A.* (*Ir.*).

24. *Proof—Agreement to allow discount—Expiration of period of credit—Bankruptcy Act*, 1883, *Schedule II.*, *r.* 8.—D. was a retailer of beer, and traded for some time with C. & Co. During that time they had invariably allowed him 20 per cent. off invoices when settled in full. On the invoices it was stated that no discount would be allowed unless the account was settled in three months, but in the case of D. it had been allowed whenever the account was settled. The whole of the claim of C. & Co. being more than three months overdue, in October, 1896, D. made an assignment to the defendants of all his property as trustees to administer the estate under the Bankruptcy Act, 1883. This was an action to recover the dividend on the difference between the full invoice price and the price with the discount deducted, as a dividend had only been paid on the latter. The defendants contended that they need only pay the former owing to Schedule II., r. 8, of the Bankruptcy Act, 1883, and the county court judge was of that opinion. The plaintiffs appealed.

Held, that the rule applied, and that the judge was right.—CHAMBERS *v.* GUNSTONE, *Q.B.D.*

25. *Proof—Composition—Amendment of proof—Liability of guarantors—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.—A scheme provided for the payment of 7s. 6d. in the £ to the creditors on the amount of their unsecured debts by three instalments of 2s. 6d. each. The trustees under the scheme guaranteed the composition by the deposit of their promissory notes for 7s. 6d. in the £ on the amount of the unsecured debts proved at the date of the approval of the scheme.

After two instalments had been paid a creditor whose securities had fallen in value claimed to raise his proof from £285 to £611, and also to be entitled to the benefit of the guarantee on the larger amount.

Held, by Vaughan Williams, J., that he was entitled to have his proof admitted for the larger amount; but that the guarantee of the trustees was limited to their liability on the promissory notes they had signed, and that there was no further contractual or statutory obligation which could be enforced against them.

The Court of Appeal (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.) affirmed this decision.—MORTER, RE, NICHOLLS, EX PARTE, *C.A.*, 593.

26. *Proof—Partnership—Loan to trader—Fixed weekly payment out of profits—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 2, *sub-section* 3 (d); *s.* 3.—J. advanced £500 to the bankrupt under an agreement which gave J. the sum of £3 per week out of the profits of the bankrupt's business, if any, and £3 per week as payment for his services. Further, he was to have for seven months from the date of the loan a large control over the business, and the option of entering into partnership with the bankrupt. He never exercised this option, and proved in the bankruptcy for the £500.

Held, that, by the terms of the agreement, he was not a partner of the bankrupt, but that the loan was a loan to a trader within section 2, sub-section 3 (*d*), of the Partnership Act, 1890, and must be postponed until all other creditors of the bankrupt were paid in full.—YOUNG, RE, JONES, EX PARTE, *Bkcy.*, 96.

27. *Proof — Principal and surety — Joint and several promissory note—Payment at maturity by surety—Interest—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5—*Rule* 20, *Schedule II.*,

of Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52).—A claim for interest on the amount of a joint and several promissory note paid by a surety at maturity is a claim on an instrument in writing, viz., on the promissory note, within the meaning of rule 20 of the rules of the 2nd schedule of the Bankruptcy Act, 1883, which embodies the provisions of section 28 of the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42).—EVANS, RE, DAVIES, EX PARTE, *Bkcy.*

28. *Proof — Secured creditor — Amendment of valuation of security—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Schedule II., rr.* 11, 12 (a), 13.—By the Bankruptcy Act, 1883, Schedule II., r. 11: "If a secured creditor does not either realize or surrender his security, he shall . . . state in his proof . . . the value at which he assesses it."

By rule 12 (*a*): "Where a security is so valued, the trustee may at any time redeem it on payment of the assessed value."

By rule 13: "Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing . . . that the security has . . . increased in value."

The creditor in this case stated in his proof the value at which he assessed his security. The security increased in value, and the trustee tendered to the creditor the amount at which he had assessed it. The creditor refused the offer, and moved to amend the valuation and proof. The trustee opposed, on the ground that he had redeemed the security by tender of its assessed value.

Held, that tender was not equivalent to payment; therefore the security had not been redeemed, and the creditor still had a right to amend.—NEWTON, RE, NATIONAL PROVINCIAL BANK, EX PARTE, *Bkcy.*, 63.

29. *Purchase by a partner of a member of the committee of inspection of part of the bankrupt's estate—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *r.* 316.—A sale by the trustee in bankruptcy of part of the estate to a partner of one of the members of the committee of inspection cannot be set aside as being either directly or indirectly a sale to a member of the committee of inspection within rule 316; nor can it be set aside as being contrary to the earlier practice in bankruptcy laid down in *Ex parte Moore*, 30 W. R. 123, which did not allow a trustee to sell any part of the estate to his own partner.—GALLARD, RE, GALLARD, EX PARTE, *Bkcy.*, 556.

30. *Receiving order—Debtor an undischarged bankrupt—No assets—Discretion of court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 5, 7, *sub-section* 3.—A debtor, against whom a bankruptcy petition was presented, was an undischarged bankrupt, and the court came to the conclusion that there were no assets, and no probability of any assets, available for distribution in a second bankruptcy.

Held, that, as the only effect of making a receiving order would be a waste of money in costs, the court would, in the exercise of its discretion, refuse to make a receiving order.—BETTS, RE, BETTS, EX PARTE, *C.A.*, 98.

31. *Receiving order—Petitioning creditor's debt—Bills of exchange—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6 (1) (b).—When a creditor has taken bills from a debtor in lieu of payment, and that debtor commits an act of bankruptcy, the creditor is thereupon entitled to treat the bills as dishonoured, and may present a petition in bankruptcy upon the original debt.—RAATZ, RE, RAATZ, EX PARTE, *Bkcy.*, 666.

32. *Receiving order — Refusal to make order — "Sufficient cause"—Destruction of bankrupt's assets by bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.—The fact that the assets of the debtor are likely to be absorbed in the costs of the bankruptcy is not "sufficient cause" for refusing to make a receiving order within section 7, sub-section 3, of the Bankruptcy Act, 1883: "If the court . . . is satisfied that the debtor is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

Ex parte Betts, In re Betts, ante, p. 98, [1897] 1 Q. B. 50, distinguished.—JUBB, RE, BURMAN, EX PARTE, *Bkcy.*, 479.

33. *Set-off — Marine insurance — Bankruptcy of underwriter—Insurance brokers—Claim by trustee against brokers for salvage—Right of brokers to set off unpaid losses.*—An underwriter carried on an underwriting business with insurance brokers, who effected policies of marine insurance with the underwriter in their own names and for principals, to whom they guaranteed the solvency of the underwriter. The underwriter became bankrupt, and at the date of his bankruptcy he owed a balance to the brokers in respect of losses upon policies. After the bankruptcy the brokers received various sums by way of salvage upon losses which had been settled with the brokers by the underwriter before his bankruptcy. The trustee in the bankruptcy claimed from the brokers the sums so received as salvage, but the brokers claimed to set off against the salvage the larger sum due to them from the bankrupt for the unpaid losses.

Held, that the brokers were not entitled to set off their unpaid losses against the sums received by them as salvage after the bankruptcy.—ELGOOD *v.* HARRIS, *Q.B.D.*, 158.

34. *Voluntary conveyance—Making good breaches of trust—Revocable deed—Fraudulent preference—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.—A bankrupt, a few days before his bankruptcy, executed a deed conveying certain real estate to a trustee upon trust to raise thereout a certain sum and to apply the same in making good divers breaches of trust which he had committed as trustee of certain specified estates. The deed, which contained recitals that the bankrupt was desirous of executing the deed to rectify the breaches of trust and thereby to shield and exonerate himself from liability to proceedings to which he might be exposed, charged the real estate with the payment of the said sum, and conferred upon the trustee, his executors and administrators, power to appoint new trustees for the purpose of carrying into effect the trusts of the deed. The deed was not communicated to any of the beneficiaries or creditors.

Held, first, that the intention of the bankrupt was to execute a deed, which should be binding upon him, in favour of his *cestuis que trustent*, and that therefore the deed was irrevocable; and, secondly, that the deed was not a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

The bankrupt, before his bankruptcy, deposited certain share certificates in the boxes in his office in which the documents relating to the trust estates were usually kept, along with a memorandum that the certificates were deposited as security for the moneys owing to the trust estates. The trustee in bankruptcy claimed the certificates.

Held, that there was a valid appropriation of the certificates to the particular trusts, and that the trustee was not entitled to them.

Middleton v. *Pollock*, 2 Ch. D. 104, 24 W. R. Dig.

88, approved.—NEW'S TRUSTEE *v.* HUNTING, *C.A.*, 577.

35. *Voluntary settlement—Life interest defeasible on bankruptcy—Damages in divorce suit—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 33.—A settlement of damages obtained by the settlor in a divorce suit cannot be set aside as voluntary or as made with intent to defeat creditors.—STEPHENSON, RE, BROWN, EX PARTE, *Bkcy.*, 416.

36. *Voluntary settlement — Right of settlement trustees to surplus after payment of debts in full—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47 (1). —When a voluntary settlement is declared void as against the trustee in bankruptcy under section 47 (1), such avoidance only operates to the amount of the debts and costs of the bankruptcy, the surplus of the settled property reverts to the trustees of the settlement, subject to the trusts thereof.—SIMS, RE, SHEFFIELD, EX PARTE, *Bkcy.*, 189.

See also Administration, 6; Criminal Law, 1; Married Woman, 1; Solicitor, 1; Vendor and Purchaser, 12.

BETTING.—See Gaming, 1-4.

BILL of EXCHANGE:—

1. *Acceptance with blank spaces—Alteration—Forgery—Negligence—Stamp — Liability of acceptor—Bill of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 64, *sub-section* 1.—The acceptor of a bill of exchange does not become liable to an indorsee for value for a sum beyond the amount of his acceptance because the form of the document and the stamp used admit of a forgery in the hands of a dishonest person.

Young v. *Grote*, 4 Bing. 253, considered and commented upon.

Decision of the Court of Appeal, 43 W. R. 331, [1895] 1 Q. B. 536, affirmed.—SCHOLFIELD *v.* LONDESBOROUGH, *H.L.*, 124.

2. *Cheque—Liability of bankers—Collecting crossed cheque for customer—Cheque applied to payment of overdraft—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.—A banker who receives payment of a crossed cheque for a customer is protected by section 82 of the Bills of Exchange Act, 1882, notwithstanding that the account of the customer was overdrawn at the time when the cheque was paid in.—CLARKE *v.* LONDON AND COUNTY BANK, *Q.B.D.*, 383.

3. *Cheque—Payee a fictitious or non-existing person—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 2, 7, *sub-section* 3.—Cheques payable to the order of a fictitious or non-existing payee, signed by the drawer and handed by him to his clerk to be posted, must be considered as issued by the drawer, and should they be received by a *bonâ fide* holder for value the drawer will be liable on them as payable to bearer. And this is so although the drawer was unaware that the payee was a fictitious or non-existing person, and was misled by the fraud of his clerk, who stole the cheques and having indorsed them in the name of the fictitious or non-existing payee handed them to the holders for value.

Decision of the Court of Appeal, 44 W. R. 114, [1895] 2 Q. B. 707, affirmed.—CLUTTON *v.* ATTENBOROUGH, *H.L.*, 276.

See also Banker, 1; Bankruptcy, 15, 31; Principal and Surety.

BILL of SALE:—

1. *Affidavit of execution—Sworn before solicitor of grantee—Validity of bill—Practice—Ord.* 38, *r.* 16—"*Party.*"—Rule 16 of order 38 applies to affidavits of execution of bills of sale, and consequently, if an affidavit of execution be sworn before the solicitor acting for the grantee in the preparation of the bill, the bill of sale will be void.—BAKER *v.* AMBROSE, *Q.B.D.*

2. *Attestation—Description of witness—Statutory form—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—A bill of sale which does not contain the description of the attesting witness is void for non-compliance with the statutory form, even though the witness has no business or occupation.

Parsons v. *Brand* and *Coulson* v. *Dixon*, 38 W. R. 388, 25 Q. B. D. 110, followed.—SIMS *v.* TROLLOPE, *C.A.*, 97.

3. *Consideration — True statement—Consideration under £30—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 12.—A bill of sale was expressed to be given in consideration of the sum of £13 12s. then owing by the grantors under a promissory note, and of £16 8s. then paid to the grantors, making together the sum of £30, the receipt of which the grantors acknowledged.

The promissory note, which was given in consideration of an advance of £10, was for £14 3s. 4d. payable by weekly instalments of 11s. 4d. each, the whole balance to become payable on default in payment of any instalment. At the date when the bill of sale was given the first instalment of 11s. 4d. had been paid, and the second instalment was not yet due. The sum of £16 8s. was in fact paid on the execution of the bill of sale.

Held, that the bill of sale was void, on the grounds—(1) that it did not truly set forth the consideration for which it was given within the meaning of section 8 of the Bills of Sale Act, 1882; (2) that it was given in consideration of a sum under £30 within the meaning of section 12.—DARLOW *v.* BLAND, *C.A.*, 177.

4. *Specific description—Substituted chattels—Plant—Cab-horse—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 6, *sub-section* 2.—Cab-horses are not "plant" within the meaning of section 6, sub-section 2, of the Bills of Sale Act, 1882.

Yarmouth v. *France*, 36 W. R. 281, 19 Q. B. D. 647, distinguished. — LONDON AND EASTERN COUNTIES LOAN CO. *v.* CREASEY, *C.A.*, 497.

5. *Validity—Registration—Defeasance — Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10.—A bill of sale was given to secure repayment of £140 at the expiration of one month. At the same time the grantor of the bill of sale gave to the grantee a mortgage to secure repayment of £440, which included the £140, and covenanted to pay the same on demand.

Held, that the covenant in the mortgage was a defeasance of the bill of sale within the meaning of section 10 of the Bills of Sale Act, 1878.—ELLIS *v.* WRIGHT, *C.A.*

See also Bankruptcy, 11; Landlord and Tenant, 4.

BUILDING SOCIETY:—

Alteration in rules—Ultra vires—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16 (2) (4), 18.—In contracts between a building society and one of its members the rights will be governed by the rules from time to time in force, and the member will be bound by any alterations in the rules, provided that such alterations are within the power

of the society to make. But where a society which was subject to the provisions of the Building Societies Act, 1874, in order to meet losses incurred by the society, passed a resolution under section 18 of the Act to alter the rules so that the amount due from the society to each member in respect of the shares held by him on a certain date should be taken to be thirty-three-fiftieths of the net amount paid on such shares,

Held, that the Act of 1874 contemplated that fully paid-up shares should be repaid, and that therefore a rule that fully paid-up shares should only be repaid in part was *ultra vires*, though in the event of a member wishing to withdraw it would be competent for the society to prescribe the terms of his withdrawal.—STROHMENGER *v.* FINSBURY BUILDING SOCIETY, *Ch.D. Stirling, J.*, 700.

See also Inland Revenue, 8; Vendor and Purchaser, 2.

BYE-LAW.—See Local Government, 3, 4; Metropolis Management, 5.

CANADA, LAW of:—

1. *British Columbia—Consent judgment with intent to delay creditors—Consolidated Statutes*, c. 51, s. 1.—Under section 1 of chapter 51 of the Consolidated Statutes of British Columbia a consent judgment obtained by the respondent bank against the insolvent respondent tramway company, with intent to defeat or delay the creditors of the latter, was held to be null and void against them. So long as the intent is proved it is immaterial whether consent was given under pressure.—EDISON GENERAL ELECTRIC CO. *v.* WESTMINSTER AND VANCOUVER TRAMWAY CO., *P.C.*

2. *British Columbia — Mines and minerals — Precious metals—Free miner's certificate—Construction—Law of British Columbia—Act* 47 *Vict.* c. 14, *s.* 3—*Act* 54 *Vict.* c. 26.—By section 3 of the British Columbia Act (47 Vict. c. 14), land was granted to the Dominion Government, the appellant company's predecessor in title, "including all mines, minerals, and substances whatsoever thereupon, therein, and thereunder."

Held, in an action for wrongful ejectment by the holder of a free miner's certificate under the "British Columbia Placer Mining Act, 1891" (54 Vict. c. 26), applicable to a part of the land granted, that he was entitled to mine for gold and other precious metals thereon, the above words not being sufficiently precise to transfer to the appellants' predecessor the right of the provincial legislature to administer the precious metals in the lands assigned.—ESQUIMALT AND NANAIMO RAILWAY CO. *v.* BAINBRIDGE, *P.C.*

3. *Manitoba—Dominion railway—Section capable of sale—Jurisdiction of provincial court—Part of section outside jurisdiction of court—Construction of mortgage—Revenues—Practice—Issues not raised in courts below.*—In a suit by the appellants, being mortgagees of a division of 180 miles of the respondents' railway and of its revenues subject to working expenses, for a sale of the division and for a receiver and other relief,

Held, (1) that this division of 180 miles is by the law of Canada applicable to the railway a section capable of sale in its entirety, but that the provincial court had no power to order a sale, part of the section being within and part without its jurisdiction; (2) that so long as the railway was worked as a whole the revenues of the division are subject along with other revenues to the working expenses of the whole line, and that the receiver was only entitled to the net earnings of the division so ascertained.

Their lordships declined to hear argument as to the validity of the mortgage or of the power of sale, or of the mortgagees' right of entry, the pleadings and evidence not raising those issues, and the courts below not having adjudicated thereon.—GREY *v.* MANITOBA AND NORTH-WESTERN RAILWAY CO. OF CANADA, *P.C.*

4. *Nova Scotia—Provincial Parliament—Immunity of members—Revised Statutes, 5th series*, c. 3.—The Nova Scotia House of Assembly has statutory power to declare that wilful disobedience to attend the House in reference to a libel on its members is a breach of privilege, and can punish that breach by imprisonment.

In an action for assault and imprisonment against members of the Assembly who had voted for the plaintiff's imprisonment,

Held, that the sections of the Local Revised Statutes, 5th series, c. 3, which create the jurisdiction of the House and indemnify its members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except so far as they may be deemed to confer any criminal jurisdiction, otherwise than as incident to the protection of members, are *intra vires* of the local Legislature, as relating to the constitution of the province within the meaning of section 72 of the British North America Act, 1867, or under the authority of section 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63), which was recognized by the Act of 1867, s. 88.

Barton v. *Taylor*, 11 App. Cas. 197, distinguished.—FIELDING *v.* THOMAS, *P.C.*

5. *Ontario—Brewers' licences—Revised Statutes of Ontario*, c. 194, *s.* 51, *sub-section* 2—*Direct taxation—British North America Act*, 1867 (30 & 31 *Vict.* c. 3), *s.* 92, *sub-sections* 2, 9—*Powers of provincial Legislature.*—Held, that the Liquor Licence Act (Revised Statutes of Ontario, c. 194), s. 51, sub-section 2, which requires every brewer and distiller to obtain a licence thereunder to sell wholesale within the province, is *intra vires* of the provincial Legislature—

(*a*) as being direct taxation within sub-section 2 of section 92 of the British North America Act, 1867.

Bank of Toronto v. *Lambe*, (1887) 12 App. Cas. 575, followed.

(*b*) as comprised within the term "other licences" in sub-section 9 of the same section.—BREWERS' ASSOCIATION OF ONTARIO *v.* ATTORNEY-GENERAL OF ONTARIO, *P.C.*

6. *Ontario—British North America Act*, 1867 (30 & 31 *Vict.* c. 3), *ss.* 109, 111, 112—*Indian reserves—Liability to pay annuities in respect thereof.*—By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities.

Held, that, these lands being within the limits of the Province of Ontario, created by the British North America Act, 1867, the beneficial interest therein vested under section 109 in that province.

The perpetual annuities having been capitalized on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under section 111. Thereafter the amounts of

these annuities were increased according to the treaties.

Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under section 109. They must be paid by the Dominion with recourse to the provinces of Ontario and Quebec conjointly, under sections 111 and 112; in the same manner as the original annuities. — ATTORNEY-GENERAL OF CANADA *v.* ATTORNEY-GENERAL OF ONTARIO, *P.C.*

7. *Railways—Imported steel rails—Street railways—Tramways — Law of Canada — Construction — Dominion Act* (50 & 51 *Vict. c.* 39), *s.* 1, *item* 88; *s.* 2, *item* 173.—Although there may be in various Canadian Acts and for other purposes substantial distinctions between railways or railway tracks and street railways and tramways, yet for the purpose of separating free and dutiable articles, such distinction is not maintained in Canadian Act 50 & 51 Vict. c. 39 and its three predecessors.

According to the true construction of that Act (see section 1, item 88, and section 2, item 173), the question whether imported steel rails are taxed or free depends solely upon their weight, not upon the character of the railway track for which they are intended.—TORONTO RAILWAY CO. *v.* REGINA, *P.C.*

CANAL:—

Special Act—Owners of adjacent and subjacent minerals—Right to support—Compensation—Statutory company—Undertaking not to sue—Ultra vires.—Where the Act of Parliament under which a canal was made and maintained contains provisions as to working the adjacent and subjacent minerals similar to or identical with the provisions of the Acts in the cases of *Knowles* v. *Lancashire and Yorkshire Railway Co.*, 14 App. Cas. 248, and *Chamber Colliery Co.* v. *Rochdale Cana Co.*, [1895] A. C. 564, the owner of the adjacent minerals may work them without regard to the security of the canal, notwithstanding the fact that he is also owner of subjacent minerals. And if both parties admit that any damage which might result to the canal from the working of the subjacent minerals would be very trifling compared with the amount of the compensation payable to the mine owners in case they were left unworked, and if the canal owners give an undertaking that they will not claim any damages by reason of the working of such subjacent mines, and at their own expense will repair any damage thereby caused to the canal, the court will refuse to make a declaration that the mine owners are entitled to such compensation upon leaving the subjacent mines unworked.

Semble, that such an undertaking is not *ultra vires* the canal company.

Decision of the Court of Appeal in *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1894] 2 Q. B. 632, 43 W. R. Dig. 119, followed.—NEW MOSS COLLIERY CO. *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO.—*Ch.D. Byrne, J.*, 493.

CAPE COLONY, LAW of:—

Pondoland Annexation Act, 1894, *No.* 5, *s.* 2—*Construction—Extent of legislative power conferred on the governor—Illegal proclamation of arbitrary arrest, conviction, and punishment.*—Section 2 of the Pondoland Annexation Act, 1894, gives authority to the governor to add to the existing laws, already proclaimed and in force in the territories annexed, such laws as he "shall from time to time by proclamation declare to be in force in such territories."

Held, that this section did not, according to its true construction, authorize the governor to make new laws, but only to transplant to the new territories and enact there such laws as were already in force in other parts of the colony.

In 1895 the governor, "in virtue of powers vested in me by law," including the Act above mentioned, issued a proclamation which set aside the established law of Pondoland with respect to arrest, trial, conviction, and punishment, and condemned the respondent untried and unheard to imprisonment, the place and duration of his captivity being left to the will of the governor.

Held, that the proclamation was *ultra vires* of any authority conferred upon the governor by section 2, or of any authority at all except that of an irresponsible sovereign or a supreme Legislature. —SPRIGG *v.* SIGCAU, *P.C.*

CERTIORARI:—

Thames Watermen — Court of company of — Judicial Order—Applications for licences—Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 56 (*Local*).—*Certiorari* will not lie to remove an order, made by the court of the Company of Watermen and Lightermen of the River Thames under section 56 of the Watermen's and Lightermen's Amendment Act, 1859 (Local), granting a licence to act as a waterman or lighterman within the limits of the Act.—REG. *v.* COMPANY OF WATERMEN AND LIGHTERMEN OF THE RIVER THAMES, *Q.B.D.*

CEYLON, LAW of:—

Will—Jus accrescendi—Fidei commissum.—The law of *fidei commissum* is not altered by Ceylon Ordinances No. 21 of 1844, No. 10 of 1863, and No. 7 of 1871.

Two spouses by joint will directed that after the death of the survivor certain lands should be created *fidei commissum*, so as not to be sold, aliened, or mortgaged, and that the "three children of their deceased daughter and their surviving daughter shall divide into two and inherit according to custom, and they and their descendants possess without interruption."

Held, that, by the true construction of the will, the moiety devised to the three grandchildren was burdened with one *fidei commissum*, and not with three *fidei commissa* separately applicable to the three shares. Accordingly, one-third share of such moiety did not vest absolutely in each institute so as to pass to his heir-at-law not in the direct line of descent from the testators; but the whole vested in the three institutes jointly with benefit of survivorship and with substitution of their descendants.—HAMINI *v.* TILLEKERATNE, *P.C.*

CHARITY:—

1. *Commissioners—Scheme under Endowed Schools Acts—Recommendation of woman as almoner—Refusal of Commissioners to appoint*—Mandamus—*Discretionary power of court to grant prerogative writ—Alternative remedy—Christ's Hospital Foundation Administration Scheme*, 1890, *clauses* 19 *and* 143.—An application by the London School Board for a *mandamus* directing the Charity Commissioners to determine under clause 43 of Christ's Hospital Administration Scheme, 1890, the validity of the proceedings of the governors of the hospital in refusing to appoint as almoner a lady nominated by the applicants, was refused, the court being of opinion that *mandamus* was not the only and more

convenient means of remedy open to the applicants. —REG. v. CHARITY COMMISSIONERS, *Q.B.D.*, 336.

2. *Friendly society—Poverty—Failure of objects—Lapse*—Cy-près.—A testator who died in 1893 bequeathed a legacy of £500 to a friendly society. This society was formed in 1800 for the relief of sick and distressed members, their widows and children. It was supported by subscriptions of members and outside donations, and was not maintained on strictly actuarial principles. Poverty was a necessary qualification to obtain relief. At the testator's death only one member and three annuitants were alive, and two of the latter had since died. The annuity of the last annuitant was fully covered by funds of the society in court.

Held, that the society was a charity, and was in existence at the date of the testator's death; that the legacy had not lapsed, and was applicable *cy-près* for charitable purposes.

Cunnack v. *Edwards*, *ante*, p. 99, [1896] 2 Ch. 679, distinguished.—BUCK, RE, BRUTY v. MACKEY, *Ch.D. Kekewich, J.*, 106.

3. *Will—Option to invest on Government or rea securities—Exercise of option to invest on real securities—Validity of gift.*—The validity of a charitable gift by will is not affected by the trustees exercising an option to invest in real security.

A testatrix disposed separately of all such parts of her personal estate "as could not by law be devoted to charitable purposes." She then gave the residue of her personal estate to trustees upon trust to convert it into money, invest the proceeds on Government or real securities, pay the income to her daughter for life, and after her death to apply the capital for the benefit of certain charities. The trustees during the life of the tenant for life invested out of the pure personalty two sums of £350 and £100 in real securities, and they remained so invested at the death of the tenant for life.

Held, by the Court of Appeal (reversing the decision of Kekewich, J.), that the charitable gifts were not made *pro tanto* invalid by the investment in real securities.

In re Corcoran, 62 L. J. Ch. 267, distinguished.—HAMILTON, RE, CADOGAN v. FITZROY, *C.A.*

4. *Will — Gift to purchase advowsons — Valid charitable gift—General charitable intention.*—A testator gave the proceeds of conversion of his residuary, real, and personal estate to special trustees upon certain trusts for the promotion of "true Protestant and Church of England principles," which he explained as being the principles known as Evangelical.

Held, upon the construction of the whole will, that there was such a general charitable intention as made the gift a good charitable gift, notwithstanding difficulties raised by the language in which the trusts were declared.

Semble, the trustees under such a will could be restrained by injunction from applying any of the trust property in the promotion of views inconsistent with those prescribed by the testator.

Decision of Romer, J., *ante*, p. 344, reversed.—HUNTER, RE, HOOD v. ATTORNEY GENERAL, *C.A.*, 610.

5. *Will—"Philanthropic" purpose—Bequest for "purposes charitable, philanthropic, or . . . " —Validity.*—A testator having bequeathed a sum of money for "some one or more purposes charitable, philanthropic, or . . . ,"

Held, that the gift was to be read as for "purposes charitable or philanthropic"; but that the word "philanthropic" was wide enough to include purposes not "charitable" in the technical sense; and that therefore the gift failed as being too indefinite.

Decision of Stirling, J., 44 W. R. 344, affirmed. —MACDUFF v. MACDUFF, *C.A.*, 154.

See also Friendly Society, 3; Mortmain; Rentcharge; Will, 4.

CHEQUE.—See Bankruptcy, 7; Bill of Exchange, 2, 3; Mortgage, 8.

COAL.—See Weights and Measures.

COMMON:—

Right of highway authority to take gravel—Order of justices—Discretion to make or refuse order—Commons Act, 1876 (39 & 40 *Vict. c.* 56), *s.* 20.—Under the Commons Act, 1876, s. 20, the justices to whom application is made for an order under the section have a discretion to make or refuse such order.—HAYES COMMON CONSERVATORS v. BROMLEY DISTRICT COUNCIL, *Q.B.D.*, 207.

COMPANY:—

1. *Articles of association—Annual general meeting—Dividend—Accounts.*—The articles of a company provided for the submission of accounts up to a date within three months and reports thereon, the sanction of a dividend, and the transaction of the ordinary business at the annual general meeting.

Held, that a final dividend could not be sanctioned except at an annual general meeting at which accounts up to the prescribed date and reports thereon were submitted.—NICHOLSON v. RHODESIA TRADING CO., *Ch.D. North, J.*

2. *Board of Trade—Inspector—Examination of affairs of company—Prohibition—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 56, 57, 58, 59, 60, *and* 61.—An examination into the affairs of a joint-stock company by an inspector appointed by the Board of Trade under section 56 of the Companies Act, 1862, is not a proceeding of such a nature that prohibition can lie in respect of it either to the Board of Trade or to the inspector.—GROSVENOR RAILWAY HOTEL CO., RE, *C.A.*

3. *Capital—Reduction—Capital "in excess of the wants of the company"—Return to shareholders—Issue of debentures—Companies Acts*, 1867 *and* 1877. —The court, upon the requirements of the Companies Act, 1867, ss. 13 and 14, being satisfied, confirmed a scheme of reduction under which a portion of the capital of a company was to be returned to the shareholders, although a part of the portion so returned was to be immediately borrowed from them by the company on debentures.—NIXON'S NAVIGATION CO., RE, *Ch.D. Stirling, J.*

4. *Capital—Reduction of capital—Different classes of shareholders—Reduction of capital affecting class prejudicially—Alteration of voting rights.*—The court sanctioned a reduction of capital notwithstanding that the voting powers of a class of shareholders was thereby affected.

Semble, now that *Hutton* v. *Scarborough Cliff Hotel Co.* (*No.* 2), 13 W. R. 1059, 2 Dr. & Sm. 521, has been overruled by *Andrews* v. *Gas Meter Co.*, *ante*, p. 321, *In re Continental Union Gas Co.*, 7 T. L. R. 476, is no longer an authority. — COLMER, RE, *Ch.D. Romer, J.*, 343.

5. *Company incorporated for the benefit of one person — Debentures — Statutory requirements—Preponderance of one shareholder—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 8.—By complying with the requirements of the Companies Act, 1862, any lawful business may be converted into a limited

liability company, and it is immaterial that an overwhelming number of shares are held by one person (the vendor to the company), or that debentures were issued in part payment of the purchase-money, or that the object of incorporation was to prevent the creditors of the company from obtaining more than the statutory liability of the shareholders imposes.

Decision of the Court of Appeal (*Broderip* v. *Salomon*, 43 W. R. 612, [1895] 2 Ch. 323) reversed. —SALOMON *v.* SALOMON (BRODERIP *v.* SALOMON), *H.L.*, 193.

6. *Debentures — Charge on uncalled capital — Property—Liquidation.*—Where a company having power to charge its uncalled capital, by a debenture charges "the undertaking and all the property of the company whatsoever and wheresoever, both present and future," such a charge does not include uncalled capital got in during liquidation.—STREATHAM AND GENERAL ESTATES CO., RE, *Ch.D. Chitty, J.*, 105.

7. *Debenture—Debenture stock certificate—Agent—Authority — Purchaser for value — Mortgagee.*—A company applied to P., who had acted as its broker, for a loan of £3,000 on the security of £8,000 of its debenture stock, which was by the trust deed assignable free from equities. P. asked G. to lend £6,000 on the stock, and he consented to do so on the certificate for the £8,000 stock being deposited. After P. had communicated with the company, its secretary deposited as required a certificate under its seal stating that G. was the registered holder of £8,000 debenture stock of the company, and that the stock was only transferable by deed registered in the company's books. G. then paid £6,000 to P., who paid the company only £3,000.

Held, that, although the certificate was not a negotiable instrument, G. was entitled to assume that P. had full authority from the company to deal with it, and was not concerned to see that P. paid the £6,000 to the company; and that in an action to enforce the rights of the debenture stock-holders, G. could prove for £8,000 provided he did not receive dividends exceeding £6,000 and interest. — ROBINSON *v.* MONTGOMERYSHIRE BREWERY CO., *Ch.D. Vaughan Williams, J.*

8. *Debentures — Floating security — Condition allowing company to carry on business until default for certain period—Subsequent issue of bonds—Priority.*—A company issued debentures "by way of floating security," and subject to conditions, one of which was that, notwithstanding the charge, the company should be at liberty, for the purpose of its business, to deal with any part of its property until default should be made in payment of any interest thereby secured for a period of three months, or until the company should be wound up. After interest had been more than three months in arrear, but before the debenture-holders had taken any step to enforce their security, the company issued bonds covered by a trust deed, which recited the issue of the debentures and that default had been made in the payment of interest.

Held, that, although the three months' period of grace had elapsed before the issue of the bonds, yet the debentures then still remained a floating security only; and, consequently, that the bonds had priority over the debentures.

Decision of the Court of Appeal, 44 W. R. 166, [1895] 2 Ch. 551, affirmed.—GOVERNMENT STOCK INVESTMENT CO. *v.* MANILA RAILWAY CO., *H.L.*, 353.

9. *Debenture — Floating security — Foreclosure — Debenture-holders' action for foreclosure—Absence of one debenture-holder.*—In a debenture-holders' action the court will not make an order for foreclosure where one of the debenture-holders has neither been made a party nor given his consent.

Sadler v. *Worley*, 42 W. R. 476, [1894] 2 Ch. 170, distinguished.—CONTINENTAL OXYGEN CO., RE, ELIAS *v.* CONTINENTAL OXYGEN CO., *Ch.D. Kekewich, J.*, 313.

10. *Debenture — Floating security — Protection of security—Receiver—Manager.*—Where a petition had been presented to wind up a company, and a holder of debentures of the company of the nature of a floating security moved, before any winding-up order had been made, for the appointment of a receiver and manager, although no such default had been made by the company in payment of interest as to cause the principal money to become payable,

Held, that, although the debentures had not crystallized, they were in jeopardy, and the court had jurisdiction to appoint a receiver and manager. —VICTORIA STEAMBOATS CO., RE, SMITH *v.* WILKINSON, *Ch.D. Kekewich, J.*, 135.

11. *Debenture—Interest—Statutes of Limitations—Debenture stock—Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *ss.* 22, 27—*Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4), *c.* 27, *s.* 3.—A railway company—incorporated by a special Act, authorizing it to issue debenture stock, bearing interest, subject to Part III. (which includes sections 22 and 27) of the Companies Clauses Act, 1863—in 1885 issued debenture stock, for which it gave certificates under its common seal, and also a warrant for interest under the signature of the secretary. The warrant was never presented for payment, and in 1896 the company went into voluntary liquidation under another Act.

Held, that, the liability being statutory, the period of limitation was twenty years, and the claim for interest mentioned in the warrant was therefore not statute-barred. — CORNWALL MINERALS RAILWAY CO., RE, *Ch.D. Vaughan Williams, J.*

12. *Debentures—Payment by instalments—Specific performance of agreement—Damages.*—The defendant applied for and was allotted sixteen debentures in the plaintiff company upon the terms that the amount thereof should be payable by instalments, and that the principal moneys secured should be repaid at a future named date. The defendant made default in the payment of the instalments.

Held, that specific performance of the agreement to pay the instalments would not be granted, and that the company was only entitled to such damages as had been suffered by reason of the defendant's default, and that as there was no evidence of any damage the company was entitled to nominal damages only.—SOUTH AFRICAN TERRITORIES *v.* WALLINGTON, *C.A.*, 467.

13. *Debenture-holder's action—Practice—Judgment—Certificate—Uncalled capital—Liability of plaintiff—Shareholder.*—In an action against a limited company by one debenture-holder on behalf of himself and all other debenture-holders, the chief clerk may, under an inquiry directed by the judgment as to the property charged by the debentures, find what uncalled capital is due from the several shareholders (where uncalled capital is part of the security), notwithstanding that no calls can actually be made in such an action; and where the plaintiff is himself a shareholder and is found indebted in a sum of uncalled capital, he, being a party to the

action, is bound by that finding, unless varied by the judge, the court having jurisdiction to decide in that action the question of the plaintiff's liability without leaving it to be decided by other proceedings.—MADELEY *v.* ROSS, SLEEMAN, & Co., *Ch.D. Kekewich, J.*

14. *English company trading in colony—Preference and ordinary stockholders—Dividend duty imposed by Colonial Legislature—Incidence of duty.*—An English company originally formed in 1841 by a contract of copartnership, and afterwards incorporated under the Joint-Stock Companies Act, 1856, carried on business in a colony; and, under the powers conferred on it by its original contract of copartnership, created guaranteed 5 and 6 per cent. preference stock entitled to cumulative payment of interest in priority to its ordinary stock.

The Colonial Legislature imposed a "dividend duty" on the dividends and interest paid on the capital of the company employed in the colony.

Held, that the contract between the various classes of shareholders was an English contract, and therefore that an Act passed by the Colonial Legislature would not affect the rights of the preference stockholders not domiciled in the colony, and that, consequently, the preference stockholders were entitled to receive their interest in full, and that the duty thereon must be paid out of the general assets of the company.—SPILLER *v.* TURNER, *Ch.D. Kekewich, J.*, 549.

15. *Meeting—Adjournment—Chairman's authority—Articles giving power to adjourn—Leave to appeal.*—Where the articles of association of a company provided that the chairman might, with the consent of the members present at any meeting, adjourn the same from time to time and from place to place in P.,

Held, that the chairman was not bound to adjourn the meeting, even though a majority of those present desired the adjournment.

Under the special circumstances of the case special leave to appeal was given at the hearing.—SALISBURY GOLD MINING CO. *v.* HATHORN, *P.C.*, 591.

16. *Meeting of shareholders—Special resolution—Proxies—Mode of counting votes—Show of hands—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51—*Blanks in proxy—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 80.—At a meeting of the shareholders of a company, the articles of which provided that every motion submitted to a general meeting should be decided, in the first instance, by a majority to be ascertained by a show of hands; that every member should have one vote for every share he should hold in the company; and that votes might be given either personally or by proxy, the chairman of the meeting refused to count proxies on taking votes by show of hands.

Held, that the chairman was right in so refusing.

In re Caloric Engine and Siren Fog Signals Co., 52 L. T. N. S. 846, approved.

In re Bidwell Brothers, 41 W. R. 363, [1893] 1 Ch. 603, overruled.

By a printer's error, the day and hour appointed for a meeting of shareholders had been omitted from the proxy which was sent to each shareholder with the notice convening the meeting. The secretary of the company, having discovered the error, sent a postcard to each member saying that, if the proxy had already been returned to him, he should assume that he had authority to fill in the blanks, and accordingly did so.

Held, that the proxies were valid, and had been duly stamped within the meaning of the Stamp Act, 1891.

Decision of Chitty, J. (*ante*, p. 45, [1896] 2 Ch. 572), affirmed on both points.—ERNEST *v.* THE LOMA GOLD MINES, *C.A.*, 86.

17. *Memorandum of association—Alteration—Advertising petition—Advertising order on petition—Practice—Companies Acts*, 1862 *to* 1890—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-section* 3.—There is no established practice as to the advertising of the order made on a petition confirming a special resolution under the Companies (Memorandum of Association) Act, 1890, but the court has jurisdiction in its discretion to direct or dispense with advertisements of such an order.—LANCASTER BANKING CO., RE, *Ch.D. Stirling, J.*

18. *Memorandum of association—Alteration of articles—Increase of capital—Preference shares—Rights of shareholders—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 12, 50, 51.—There is no condition implied in a memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary.

Held, consequently, that a limited company, not being expressly prohibited from so doing by its memorandum of association, might, under section 12 of the Companies Act, 1862, make provision, either in its original articles of association or by alteration, under sections 50 and 51 of the same Act, of the original articles, for the increase of its capital by the issue of shares bearing a preferential dividend.

Decision of Kekewich, J. (*ante*, p. 46), reversed.

Hutton v. *Scarborough Cliff Hotel Co.* (*No.* 2), 13 W. R. 1059, 2 Dr. & Sm. 521, overruled.—ANDREWS *v.* GAS METER CO., *C.A.*, 321.

19. *Prospectus—Contract to take shares—Rescission—Non-disclosure of material facts.*—A person who has contracted to take shares in a company cannot avoid his contract on the ground that the prospectus did not set forth all the facts which were known to the directors, and which might induce a person to apply or not apply for shares. In order to avoid the contract, a misstatement or concealment of facts must be of such a character as to make the prospectus as it stands misleading.

Decision of Romer, J. (44 W. R. 664), affirmed.—MCKEOWN *v.* BOUDARD PEVERIL GEAR CO., *C.A.*, 152.

20. *Register of mortgages—Right of creditor to inspect and take copies—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.—A creditor of a company registered under the Companies Act, 1862, is entitled not only to inspect, but also to take copies of, the register of mortgages of the company kept in pursuance of section 43 of that Act.

Semble, should the addresses of the mortgagees have been also registered, these too can be copied.

Mutter v. *Eastern, &c., Railway Co.*, 36 W. R. 401, 38 Ch. D. 92, considered.—NELSON *v.* ANGLO-AMERICAN LAND CO., *Ch.D. Stirling, J.*, 171.

21. *Shares—Contract—Acceptance of offer—Notice of such acceptance—Underwriting letter.*—S. signed a letter addressed to A. whereby he undertook to underwrite, on or before the day after the day appointed for the closing of the list for subscriptions for shares—viz., the 20th of September, 1895—10,000 shares, or such less number as might be accepted by A., in the C. Co., and he thereby, in the event of his failing to comply with the terms therein contained, authorized A. as his agent, on

his behalf and in his name, to apply for such shares.

On the 12th of September A. accepted the offer of S. for the whole 10,000 shares, but gave no notice of this acceptance to S. On the 29th of September A. applied in S.'s name to the C. Co. for 10,000 shares, and was allotted 9,000. On the 28th of September A. informed S. of this allotment, but S., on the 30th of September, repudiated his offer. S. had not paid any deposit money for the shares.

Held, (1) that A.'s authority to apply for shares in S.'s name only arose in case of failure by S. to apply for shares after he had been informed that his offer had been accepted, and the extent to which it had been accepted; that, S. not having been informed of the acceptance of his offer, A.'s authority never arose; and (2) that S. was not estopped from showing that A.'s authority had never arisen.

Decision of North, J. (*ante*, p. 227), reversed.

Ex parte Harrison, 69 L. T. N. S. 204, distinguished.—CONSORT DEEP LEVEL GOLD MINES, RE, STARK AND ELLISTON'S CASE, *C.A.*, 420.

22. *Shares—Contract—Authority to apply for shares—Authority coupled with an interest.*—P. promoted a company for the purpose of purchasing from him and working a mining property. On the 21st of February, 1896, C. signed an underwriting letter addressed to P. by which he agreed, in consideration of a commission, to subscribe for 1,000 shares in the company, such number to be reduced according to the number of shares taken by the public. C. further agreed that the agreement and application should be irrevocable, and, notwithstanding any repudiation by him, should be sufficient to authorize P. to apply for shares on behalf of C. and the company to allot them. P. by letter accepted these terms. The company was incorporated on the 24th of March, and the subscription list was advertised to open on the 27th of March, and close on the 30th. On the 27th of March, C., who had applied for 1,000 shares, stopped the cheque he had given for the deposit, and on the 30th wrote to P. and to the secretary of the company repudiating the agreement. P., however, on the 2nd of April, applied on behalf of C. for 980 shares, which, in the events which had happened, was the number he was bound to take, according to the terms of the letter, and the company allotted these shares to C., and put him on the register in respect of them,

Held (affirming the decision of Stirling, J.), that C. was rightly placed on the register, and was not entitled to have his name removed, for that the authority given to P. by the underwriting letter to apply for shares on behalf of C. was an authority coupled with an interest, and therefore not revocable.—HANNAN'S EMPRESS GOLD MINING AND DEVELOPMENT CO., RE, CARMICHAEL'S CASE, *C.A.*

23. *Shares—Contract—Misrepresentation—Rectification—Payment—Adoption of contract—Delay.*—A., a widow, applied for shares in a company connected with the manufacture of cycles, on the faith of the name Dunlop appearing in the prospectus. On finding that the person mentioned in the prospectus was not the Dunlop of the Dunlop Pneumatic Tyre Company, Limited, she, on the 23rd of May, wrote a letter repudiating her contract. On the 27th of May she paid £62 10s. on allotment, and on the 20th of June £125, payable within one month after allotment. On the 13th of July she served notice of motion to strike her name off the register of shareholders.

Held, that the applicant was entitled to rescind the contract on the ground that she was deceived by the use of the name Dunlop in the prospectus; but that by her delay and the payment of the two sums of money she had acted in a manner inconsistent with repudiation of the contract, and the motion must be dismissed with costs.—DUNLOP-TRUFFAULT CYCLE AND TUBE CO., RE, SHEARMAN'S CASE, *Ch.D. Kekewich, J.*

24. *Shares—Contract—Payment in Cash—Promoters—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—Although an arrangement between promoters and a company that the former should sell property to be acquired by the latter for so much cash and so many shares is in contravention of section 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), still there may be an independent agreement on the part of the promoters to take so many shares presently payable in cash, and an independent agreement by the company to purchase the property for so much money down which would be perfectly legitimate, provided the shareholders are fully informed and a fair price is given.

Anything which would be sufficient evidence to support a plea of payment would be payment in cash within section 25 of the Companies Act, 1867.

Spargo's case, 21 W. R. 306, L. R. 8 Ch. App. 407, approved.—LAROCQUE *v.* BEAUCHEMIN, *P.C.* 639.

25. *Shares—Contract—Registration of contract—New South Wales Companies Act*, 1874, *s.* 57—*Companies Act*, 1867 (30 & 31 *Vict. c.* 89), *s.* 25.—The contract in writing to be filed with the Registrar of Joint-Stock Companies at or before the issue of shares under section 57 of the New South Wales Companies Act, 1874, and the 25th section of the Companies Act, 1867, so as to avoid the liability of payment in full on such shares, must be a document creating legal rights, duties, and obligations as between the parties to it. A mere resolution between certain persons interested in a property setting forth the manner in which they propose to put the property before the public is insufficient, though registered under the statute.

Hartley's case, 23 W. R. 203, L. R. 10 Ch. App. 157, considered and explained.—SMITH *v.* BROWN, *P.C.*, 132.

26. *Shares—Contract—Underwriting—Application for shares on behalf of underwriter—Condition precedent—Invalid allotment of shares—Rectification of register—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.—An underwriting letter, in the ordinary form, for shares in a company in course of formation, addressed to the promoters, contained a clause whereby the underwriter agreed that he would sign and lodge with the promoters, whenever called upon, the necessary application for the number of shares underwritten, with cheque for the deposit attached thereto, and that, if he failed to do so, the agreement, which was irrevocable on his part, should, notwithstanding any withdrawal on his part, or repudiation of his responsibility thereunder, be sufficient to authorize the promoters, if and when they thought fit, in his name to apply for, and the directors of the company to allot to him, the said shares, either with or without any further application either from the underwriter or the promoters for the said shares.

Held, that, assuming that the offer contained in the underwriting letter was accepted by the promoters before it was repudiated, and that conse-

quently a binding contract between the underwriter and them was constituted, yet, a request by the promoters to the underwriter to apply for shares was a condition precedent to the obligation on his part to sign and lodge the application for the shares with a cheque for the deposit; and that, without such a request and a failure to comply with it, the promoters had no authority to make any application for shares in the underwriter's name.—BULTFONTEIN SUN. DIAMOND MINE, RE, *C.A.*

27. *Shares — Issue of shares at a discount — Winding-up—Adjustment of rights of contributories* inter se—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89) —*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 24, 25.—Under no circumstances, and for no purpose whatever, can a company incorporated with limited liability under the Companies Acts issue shares at a discount, or on any terms relieving the shareholders from payment in full. The issue of such shares does not therefore constitute a contract between shareholders, even for the purpose of adjusting their rights among themselves, although this is expressly authorized by the articles of association, and the creditors and costs of winding up have been provided for.

Decision of the Court of Appeal, 43 W. R. 117, [1895] 1 Ch. 255, affirmed; Lord Herschell dissenting.

Per Lord Davey.—The obligation to contribute to the assets of the company in one way or another the nominal amount of the shares is part of the statutory constitution of every joint-stock company limited by shares embodied in its memorandum of association, and therefore not alterable by the company or by the unanimous consent of all the shareholders.—WELTON *v.* SAFFERY (RAILWAY TIMETABLES, &c., CO., RE), *H.L.*, 508.

28. *Shares—Shares paid up in advance of calls—Payment of interest out of capital as such prepayments —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 14, *Table A, clause* 7.—Where one of the articles of association of a company authorized the directors to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms as they thought fit, and also to pay out of the capital of the company interest on sums paid up on shares in advance of calls,

Held, that the above article, being in substance Table A, clause 7, of the Companies Act, 1862. was not *ultra vires*; that advances obtained from shareholders under it were in the nature of a debt due to an ordinary creditor of the company; and, consequently, it was lawful to pay the stipulated interest out of capital, though the company had made no profits.

Decision of Court of Appeal, 44 W. R. 257, [1896] 1 Ch. 397, affirmed.—LOCK *v.* QUEENSLAND INVESTMENT CO., *H.L.*, 65.

29. *Shares—Transfer—Estoppel—Certification on transfer.*—Where a transfer for value purporting to relate to fully-paid shares in a company bears on the face of it a certification by the secretary of the company that the share certificate has been lodged with the company, the certification amounts to a statement that a certificate of the shares described in the transfer has been lodged, and the company is estopped from denying that the shares are fully paid up, even though no certificate has been lodged with the secretary or the certificate lodged does not say whether the shares are fully paid up or not.

Bishop v. *Balkis Consolidated Co.*, 25 Q. B. D. 512, observed upon.—CONCESSIONS TRUST, RE, MCKAY'S CASE, *Ch.D. Vaughan Williams, J.*

30. *Winding up—Assets—Substratum of business gone—Special object stated in memorandum of association—General objects ancillary thereto—Failure of special object—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* 5.—Where a company puts in the forefront of its memorandum of association a special object, as to which definite information can be obtained by intending subscribers for shares, and the subsequent clauses of the memorandum contain a list of general objects, the reasonable mode of construing the memorandum in ordinary cases is to say that the object first stated is the paramount object of the company, and that the other objects are ancillary and subservient to that object.

Where, therefore, the paramount object of a company was to work gold mines in the colony of West Australia, the promoters of the company having in view one particular mine near Coolgardie in that colony, although the memorandum of association specified as one of the objects of the company to acquire and work mines "in West Australia or elsewhere," the acquiring and working a mine in the colony of Victoria was held not to be a carrying out of the objects of the company; and the real object for which the company was formed having therefore failed, and its substratum having gone, an order for winding up the company was made.

In re The Haven Gold Mining Co, 20 Ch. D. 151, approved. — COOLGARDIE CONSOLIDATED GOLD MINES, RE, *C.A.*

31. *Winding up — Assets — "Surplus assets"— Construction of articles of association.*—The term "surplus assets," when used in articles of association providing for distribution among the shareholders on a winding up taking place, has no such recognized technical meaning that the court is bound to construe it as referring to the assets after providing only for debts, liabilities, and costs, without recouping paid-up capital.

The capital of a company was £100,200, in 100,000 ordinary shares and 200 founders' shares respectively of £1 each, all of which (except one founders' share) were issued and fully paid up.

One of the articles of association was as follows: "If the company shall be wound up, one-fifth of the surplus assets (if any) shall belong to and be divided among the holders of founders' shares, and the remaining four-fifths of such surplus assets shall belong to and be divided among the holders of ordinary shares in proportion to the amount of capital paid up on the shares held by them."

Another article had provided that the profits in each year should be applicable in or towards payment of a dividend of 8 per cent. on the amount paid up on the ordinary shares, and that the surplus (if any) should be divided, as to one-fifth among the holders of founders' shares, and as to the other four-fifths among the holders of ordinary shares in proportion to the amounts for the time being paid up thereon.

The company went into voluntary liquidation, and, after providing for all debts, costs, and liabilities, a sum of about £90,000 remained for distribution among the shareholders.

Held, that, having regard to both articles, "surplus assets" meant the assets remaining after providing for debts, costs, and liabilities, and also recouping the paid-up capital subscribed by all the shareholders.—NEW TRANSVAAL CO., RE, *Ch.D. Vaughan Williams, J.*

32. *Winding up — Borrowing powers — Common officers—Irregularity—Notice—Proof in winding up.* —At a general meeting of a company—which by its articles was not allowed to borrow money to an amount greater than its paid-up capital, unless the borrowing of a larger amount should have been previously authorized by a general meeting—a resolution was passed purporting to authorize the directors to borrow £30,000 when the paid-up capital was only £10,000. The articles also required that notices convening general meetings should specify the general nature of any special business to be transacted at the meeting, but the notices convening the meeting at which the above-mentioned resolution was passed did not refer to the intended loan. The money was borrowed from a building society that had its offices in the same building as the company, and the company and the society had four directors and a secretary in common. The society claimed to prove for the whole loan in the winding up of the company.

Held, that the knowledge of the officers of the company as to the irregularity in summoning the meeting could not be imputed to the society; that the society was justified in assuming that all affairs relating to the internal management of the company had been properly carried out; and that the society was entitled to prove for the loan in the winding up of the company.—HAMPSHIRE LAND CO., RE, *Ch.D. Vaughan Williams, J.*, 136.

33. *Winding up—Contract with vendors—Payment in fully paid-up shares—Property sold of less than nominal value of shares—Stamp duty—Apportionment of value of items of property sold—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—Where a limited company purchased property, and paid the agreed price in fully paid-up shares, the contract of sale being duly registered before the issue of the shares pursuant to section 25 of the Companies Act, 1867, the vendors cannot be made liable as contributories in the winding up of the company merely on the ground that the value of the property sold was less than the full nominal value of these shares.—WRAGG, RE, *C.A.*, 557.

34. *Winding up—Contributory—Paid-up shares—Bonus shares—Companies Act,* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—By a preliminary agreement made before the incorporation of a company, it was agreed that seventy-five shares fully paid up should be allotted to the vendors as the purchase price of the property to be sold to the company, leaving twenty-five shares in the company to be subscribed for in cash. This agreement was adopted by the company after incorporation, with the modifications that £5,000 in cash, omitted by mistake from the preliminary agreement, should be paid to the vendors in addition to the seventy-five shares, and that the vendors should distribute twenty-five out of the seventy-five shares rateably among the cash subscribers of the first-mentioned twenty-five cash shares. The company accordingly allotted twenty-five of the seventy-five vendors' shares to the cash subscribers, the certificates of title stating that the shares were fully paid up. There was no question of section 25 of the Companies Act, 1867, not being complied with.

In the winding up of the company the liquidator applied to have the allottees of the twenty-five distributed shares placed on the list of contributories. There was no question of any fraud or impropriety having been committed.

Held, that the holders of the twenty-five distributed shares were liable to contribute the full nominal amount of such shares in cash.—ALKALINE REDUCTION SYNDICATE, RE, *Ch.D. Vaughan Williams, J.*, 10.

35. *Winding-up—Creditor's petition — Opposition by majority of other creditors—No tangible assets—Discretion of the court.*—A winding-up petition was presented by a debenture-holder of a company which was opposed by the great majority of the other debenture-holders, on the ground that their only prospect of recovering anything on account of their security would be ruined by a winding-up order being made. The whole of the assets of the company were covered by the debentures, and the debenture-holders practically represented its only creditors. There was evidence, which was uncontradicted, to the effect that the company had no tangible assets. Romer, J., however, decided to make a winding-up order, being of opinion that there would be assets forthcoming if the company was ordered to be wound-up. On appeal:

Held, that, as the official receiver (according to a statement confidentially made by a representative of his to the court) was not satisfied that the company had no assets which could be reached in the winding-up, the order of Romer, J., ought not to be disturbed, notwithstanding the wishes of the great majority of the creditors.—INTERNATIONAL COMMERCIAL CO., RE, *C.A.*

36. *Winding up — De facto auditor — Officer — Misfeasance—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—An auditor may or may not be an officer of a limited company; *primâ facie* he is not. If he is appointed to an office under the company and acts in that office he will be liable under a misfeasance summons under section 10 of the Companies (Winding-up) Act, 1890. But a person is not an "officer" who fills no position either *de jure* or *de facto*, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word.

So held by the Court of Appeal (reversing Stirling, J., *ante*, p. 263)—WESTERN COUNTIES STEAM BAKERIES AND MILLING CO., RE, *C.A.*, 418.

37. *Winding up—Judgment creditor—Receivership order, effect of—Companies Act,* 1862 (25 & 26 *Vict. c.* 88), *ss.* 87, 163.—A judgment creditor of a company who, at the commencement of the winding up of the company, has obtained a receivership order against the company but has taken no steps under that order, has not acquired anything in the nature of a charge, but is in a position analogous to that of an execution creditor where the execution is incomplete, and accordingly will not be allowed to proceed further by the court in the absence of special circumstances, and gains no priority over the other creditors by virtue of the order.

In re Potts, [1893] 1 Q. B. 648, applied.—CROSHAW *v.* LYNDHURST SHIP CO., *Ch.D. Stirling, J.*, 570.

38. *Winding up—Liquidator—Litigation—Authority of the court or of the committee of inspection—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63) *s.* 12, *sub-sections* 1-4.—An order to the liquidator of a company directing him to call up all uncalled capital, and "for that purpose to take all necessary proceedings for enforcing such call," is not an authority to him under section 12, sub-sections 1-4, of the Companies (Winding-up) Act, 1890, either to commence actions against such contributories or to employ a solicitor without further authority of the court or of the committee of inspection.

But where such unauthorized actions have been

commenced the committee of inspection may sanction subsequent proceedings in such actions, and such proceedings are then authorized within the meaning of section 12 of the Act.—LONDON METALLURGICAL CO., RE, *Ch.D. Vaughan Williams, J.*, 601.

39. *Winding up—Mortgage—Interest accrued after winding-up order—Distress—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 163.—The liquidators and receivers of the H. Co. entered into possession of their mills and kept them in working order, so as, if possible, to sell them as a going concern at an enhanced value. The mortgagees having applied for leave to distrain, for interest accrued due after the date of the entering into possession, were refused leave, on the ground that the possession of the liquidators was as beneficial to the mortgagees as to the company and to all its other creditors.

It is easier for a landlord to obtain leave to distrain for rent than for a mortgagee to obtain leave to distrain for interest accrued since the date of the winding up.

In re Lancashire Cotton Spinning Co., 36 W. R. 305, 35 Ch. D. 656, followed.—HIGGINSHAW MILLS CO., RE, MANCHESTER COUNTY BANK *v.* HIGGINSHAW MILLS CO., *C.A.*, 56.

40. *Winding up—Practice—"Just and equitable"—Substratum gone—Fraud—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-section* 5.—A company fraudulent in its inception, carrying on a small business at a loss, having no capital of its own—all the subscribed capital having found its way into the hands of the real, though not the ostensible, promoters—and hopelessly embarrassed by numerous actions brought by shareholders on the ground of fraud, was ordered by the Court of Appeal (affirming Vaughan Williams, J.) to be wound up, the court holding that the case was one in which it was "just and equitable," within section 79, sub-section 5, of the Companies Act, 1862, to make the order, that being the most effective means for recovering for the shareholders the money dishonestly retained by the real promoters.—BRINSMEAD (T. E.) & SONS, RE, *C.A.*

41. *Winding up — Private company — Debentures issued to vendors—Debentures covering all assets—Right of unsecured creditors to winding-up order.*—Where the available assets of a private company are insufficient to satisfy debentures which have been issued to the vendors of property to the company, in payment of the agreed price thereof, and which cover all the assets, the unsecured creditors of the company are not entitled to a winding-up order, as they could not get anything thereby.—LONDON ELECTRICAL INSTITUTE, RE, *C.A.*, 566.

42. *Winding up—Shares—Contributory—Estoppel—Certificate—Fully paid-up shares.*—A company borrowed money from the appellant on the security of certain fully paid-up shares, and delivered to him certificates under their common seal to the effect that on each of these shares the full amount had been paid, and this was believed to be so by the appellant. As a matter of fact these shares were not paid up at all, neither had any contract been registered under section 25 of the Companies Act, 1867.

Held, that the company were estopped from alleging that the shares were not fully paid up, although upon inquiry and investigation the appellant would have discovered otherwise; and, consequently, that he was not liable to be placed on the list of contributories.

Decision of the Court of Appeal, 44 W. R. 577, [1896] 2 Ch. 525, reversed.—BLOOMENTHAL *v.* FORD, *H.L.*, 449.

43. *Winding up—Voluntary winding up—Distress put in before commencement of winding up—Staying proceedings—Companies Act*, 1862, *ss.* 87, 134.—The rules laid down in the case of the compulsory winding up of a company in *In re The Great Ship Co.*, 12 W. R. 139, 4 De G. J. & S. 63, and *In re Lancashire Cotton Co.*, 36 W. R. 305, 35 Ch. D. 656—that if an execution is issued or a distress levied before the commencement of the winding up, permission will be given to proceed to sale unless there are special reasons rendering such a course inequitable, while, in the absence of special reasons such permission will be refused where the execution is issued or the distress levied after the commencement of the winding up—apply to the case of a voluntary winding up.

The commencement of a voluntary winding up is the time of the passing of the second or confirmatory resolution.—ROUNDWOOD COLLIERY CO., RE, LEE *v.* ROUNDWOOD COLLIERY CO., *Ch.D. Stirling, J.*, 217.

44. *Winding up—Voluntary winding up—Transfer of shares after commencement of winding up with consent of liquidator—Alteration of status—Contributories—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 131, 153.—After the commencement of the voluntary winding up of a limited company T., the holder of certain shares not fully paid up, transferred them, with the consent of the liquidator, to P., whose name was substituted for that of T. on the register of members, and P. afterwards, with the like consent, transferred them to R., whose name was substituted for his on the register. It subsequently became necessary to make calls in respect of the shares.

Held, that R. was the proper person to be upon the register of members; that he alone should be upon the A list of contributories; and that T. and P. ought both to be on the B list.—NATIONAL BANK OF WALES, RE, TAYLOR AND PHILLIPS' CASES, *C.A.*, 401.

See also Inland Revenue, 16; Landlord and Tenant, 4; Practice, 18; Probate, 5; Trustee, 5.

COMPENSATION.—See Canal; Landlord and Tenant, 10; Lands Clauses Acts, 2; Railway, 3, 4.

COMPROMISE.—See Solicitor, 2, 5.

CONFLICT of LAWS:—

Administration—Scotch will—General power of appointment—English appointor—Assets for creditors.—The exercise by an Englishman of a general power of appointment conferred by the will of a Scotchman is governed by Scotch law, and consequently the fund appointed does not become assets for the payment of the debts of the appointor.—BALD *v.* BALD, *Ch.D. Byrne, J.*, 499.

CONSENT.—See Practice, 35, 44; River, 2.

CONSPIRACY.—See Trade Union.

CONTEMPT:—

Injunction—Breach by person not enjoined—Jurisdiction to commit.—A person not himself included in an injunction, or a party to the action, who knowingly aids and abets a defendant in a breach of it, may be committed for contempt.—SEAWARD *v.* PATERSON, *C.A.*, 610.

See also Practice, 8.

CONTRACT:—

1. *Author and publisher—Agreement with a limited company—Assignability of contract.*—The principle laid down in *Stevens* v. *Benning*, 3 W. R. 149, 6 De G. M. & G. 223; *Reade* v. *Bentley*, 6 W. R. 240, 4 K. & J. 656; and *Hole* v. *Bradbury*, 28 W. R. 39, 12 Ch. D. 886, that a contract between an author and a publisher is of a personal nature, and therefore not assignable, is not affected by the publisher being a limited company instead of an individual or a partnership firm consisting of individuals.—GRIFFITHS *v.* TOWER PUBLISHING CO., *Ch.D. Stirling, J.*, 73.

2. *Building contract—Construction of—Clause as to penalties for delay—Extras ordered by architect.*—A builder entered into a contract to carry out certain specified works and to complete them by a stipulated date, and there was a provision that the whole of the works were to be completed by that date under a penalty of £2 per week for every week that any part of the works remained unfinished after that date, as liquidated damages. By the contract the building owner had the right to call upon the builder to do extra works, and this right he exercised. By one of the clauses in the agreement it was provided that any authority given by the architects for any alteration or addition in or to the works should not vitiate the contract. Owing to the ordering of extra works the whole work was not completed until some time after the stipulated date, and the building owner claimed to recover from the builder the penalties provided for as liquidated damages for the delay in completion.

Held, that the building owner was not entitled to claim the penalties for non-completion within the specified time, as he had ordered the builder to carry out extra works whereby it was impossible for the builder to complete the entire works within the time specified in the contract.

Westwood v. *Secretary of State for India*, 11 W. R. 261, followed.

Jones v. *St. John's College*, 19 W. R. 276, L. R. 6 Q. B. 115, distinguished.—DODD *v.* CHURTON, *C.A.*, 490.

3. *Delivery as escrow—Evidence to show no contract.*—Where an agreement for a lease had been signed by the plaintiff, and was subsequently signed by the defendant, but not in the presence of the plaintiff, and the defendant subsequently never delivered the agreement to the plaintiff,

Held, that evidence might be admitted to show that there was no true *animus contrahendi* between the parties.

Pym v. *Campbell*, 4 W. R. 528, 6 E. & B. 370, followed.—PATTLE *v.* HORNIBROOK, *Ch.D. Stirling, J.*, 123.

4. *Master and servant—Personal service—Agreement by employed to "act exclusively for" employers—Absence of negative covenant—Breach—Injunction.*—In a contract of personal service a stipulation by the employed to "act exclusively for" his employers does not, in the absence of a negative covenant, express or implied, which is sufficiently clear and definite, confer upon the employers a right to obtain an injunction against the employed to restrain him from entering into the employment of other persons.

The Whitwood Chemical Co. v. *Hardman*, [1891] 2 Ch. 416, considered and applied.

Lumley v. *Wagner*, 1 De G. M. & G. 604, distinguished.—MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* NEW YORK LIFE ASSURANCE CO., *C.A.*

5. *Memorandum in writing—Letter—Envelope—Statute of Frauds, s.* 4—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.—Where a letter, which is relied on as a memorandum in writing of a contract to satisfy section 4 of the Statute of Frauds or section 4 of the Sale of Goods Act, 1893, does not itself contain the name of the person to whom it is written, but is proved to have been sent enclosed in an envelope addressed to that person, the letter and the envelope ought to be considered as one document.—PEARCE *v.* GARDNER, *C.A.*, 518.

6. *Restraint of trade—Partnership subsequently entered into by covenantee—Death of covenantee—Right of surviving partner to sue for breach of agreement.*—The defendant entered into a written agreement with W., in consideration of being employed as assistant-master, not to carry on the business of a school within nine miles of the place where W.'s school was carried on for twelve years after leaving the school. Subsequently, and while the defendant was in his service, W. entered into a partnership agreement with the plaintiff who was on his death to succeed to the business. W. died, and thereupon the defendant commenced a school in the same place.

On a motion on behalf of the plaintiff to restrain the defendant from so doing:

Held, (1) that the defendant's agreement was not limited to the life of W.

(2) That though goodwill was not mentioned in the partnership agreement, the benefit thereof did pass so as on the death of W. to vest in the plaintiff, and that, following *Jacoby* v. *Whitmore* (49 L. T. Rep. 355), the defendant's agreement formed part of such goodwill; and

(3) That the plaintiff was therefore entitled to the benefit thereof, and to the injunction asked for.—SMITH *v.* HAWTHORN, *Ch.D. Stirling, J.*

7. *Specific performance — Undisclosed vendor — Acceptance by agent—Reference in contract to an unsigned document—Terms of contract—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—Acceptance of an offer by the agent of a vendor whose name is not at the time known to the purchaser, is a sufficient acceptance on the part of such vendor to satisfy the Statute of Frauds.

If a signed memorandum of agreement refers definitely to an unsigned contract in which all the terms of the contract are definitely stated, such memorandum constitutes a binding contract, and is not conditional on the drawing up of a formal agreement.—FILBY *v.* HOUNSELL, *Ch.D. Romer, J.*, 232.

8. *Vendor and purchaser—Specific performance—Letters—Inquiry as to time for completion—Open term.*—A party (the purchaser) to a contract for the sale of real estate, in a letter accepting the vendor's offer added the words, "I should like to know from what time Mr. Hughes (the vendor) wishes the purchase to date."

Held, by Romer, J., *ante*, p. 221, that on the letter as a whole these words were merely a courteous way of asking the vendor the time at which he wished to complete, and in no way added a fresh term, or prevented the agreement from forming a binding contract.

The Court of Appeal affirmed this decision.—SIMPSON *v.* HUGHES, *C.A.*

See also Arbitration, 1; Company, 19, 21-26; Guarantee, 1, 2; Insurance, 1, 3, 12; Poor Law, 4; Principal and Agent; Railway, 6; Vendor and Purchaser, 4, 5.

CONVEYANCING ACTS.—See Divorce, 17; Land-

lord and Tenant, 1, 2, 8; Married Woman, 7, 8; Vendor and Purchaser, 1.

COPYHOLD:—

Heriot—Heriot custom—Power to seize beast off manor.—The lord of the manor has a right to seize a heriot, due by heriot custom, wherever it may be found, as well off as on the manor.—WESTERN *v.* BAILEY, *C.A.*, 115.

COPYRIGHT:—

1. *Infringement—Assignment—Right of unregistered assignee to sue—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 13, 24.—The assignee of a copyright under 5 & 6 Vict. c. 45, must be registered before he can maintain an action for its infringement.—LIVERPOOL GENERAL BROKERS' ASSOCIATION *v.* COMMERCIAL PRESS TELEGRAM BUREAUX, *Q.B.D.*

2. *Infringement—Copy of central figure—Sentiment of picture.*—Where a picture contains a direct copy of a substantial portion of a copyright work, that substantial portion constitutes an infringement if it is a copy in the ordinary sense, and particularly where the sentiment expressed in the copyright picture has also been embodied.—BROOKS *v.* RELIGIOUS TRACT SOCIETY, *Ch.D. Romer, J.*, 476.

3. *Infringement—Injunction—Exclusive information—Right of property.*—Information acquired by the expenditure of labour and money becomes a valuable property in the hands of the person so acquiring it, and can be communicated upon such terms as he thinks fit. Any person inducing anyone to whom the information is communicated to break the contract under which such information is received will be restrained by injunction. It is immaterial that the information so acquired has already been partly published so long as it has not been published to the whole world and there are persons who are willing to pay to acquire it.

Exchange Telegraph Co. v. *Gregory*, [1896] 1 Q. B. 147, 44 W. R. Dig. 44, followed.—EXCHANGE TELEGRAPH CO. *v.* CENTRAL NEWS, *Ch.D. Stirling, J.*, 595.

4. *Registration—Validity—Literary Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 13, 24—*Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1-4.—The managing director of a limited company, having prepared the letterpress of a trade catalogue, ordered two drawings to illustrate it to be made by a firm of lithographers. The drawings were made and were paid for and used by the company. The managing director was registered as proprietor of the copyright in the drawings under the Fine Arts Copyright Act, 1862, s. 4, and of the copyright in the catalogue under the Literary Copyright Act, 1842, s. 13. There was no entry of any agreement in writing vesting the copyrights in him. The managing director and the company having brought an action as co-plaintiffs to restrain an alleged infringement of the copyrights,

Held, that the managing director had acted throughout only as the nominee of the company; that he was not a trustee for the company, and was not, therefore, in fact, proprietor of the copyrights under either of the Copyrights Acts; and that the registrations were bad.

Held, further, that, assuming the managing director to be entitled to be registered as proprietor of the letterpress of the catalogue, the drawings illustrating it would not be protected by such registration.

Held, therefore, that although the company, who were in fact the proprietors of the copyrights, were joined as co-plaintiffs, the action was not sustainable, because the company were not registered as the proprietors.—PETTY *v.* TAYLOR, *Ch.D. Kekewich, J.*, 299.

5. *Work first published abroad—Copies lawfully printed in country where work first published—Importation into United Kingdom for sale or hire—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 15, 17—*International Copyright Act*, 1844 (7 & 8 *Vict. c.* 12), *ss.* 2, 3, 10.—Section 10 of the International Copyright Act, 1844, does not prohibit the importation into the United Kingdom for sale or hire of copies of a copyright work lawfully printed in the country where the work was first published. That section, however, is not a complete code on the subject; and sections 15 and 17 of the Copyright Act, 1842, read together with section 3 of the Act of 1844, do prohibit such importation unless it take place with the authority of the owner of the copyright. The owner of the English copyright in a German piece of music is therefore entitled to an injunction to restrain the importation into this country, for sale or hire, of copies lawfully printed in Germany.

Decision of Kekewich, J., reversed (Lopes, L.J., dissenting).—PITT PITTS *v.* GEORGE, *C.A.*, 164.

CORONER:—

Inquest—Criminal law—Inquisition—Validity of—Quarries Act, 1887, *s.* 3.—An inquisition finding that the deceased met his death from injuries to his head and back caused by a fall into a quarry, and that, by "the neglect of" three specified persons "to fence or cause to be fenced the said quarry, the said" deceased person "fell therein, and that therefore the said" three specified persons "did feloniously kill the said" deceased, is bad upon the face of it, on the ground that, although it stated certain facts, it had not stated any facts showing that there was a duty on the part of the three specified persons to fence the quarry.—REG. *v.* OXFORD ASSIZE CLERK, *Q.B.D.*, 543.

CORPORATION:—

1. *Association of nurses—Proprietors of class journal—Alleged libel by editor published by instructions of association—Action for libel against editor personally—Defence undertaken by association—Principal and agent—Indemnity*—Ultra vires—*Injunction.*—An association of nurses, incorporated by Royal Charter, were the proprietors and publishers of a journal published for the information and benefit of their members. An action having been brought against the editor of the journal to recover damages for an alleged libel contained in an article inserted in the journal by the instructions of the association, they resolved to undertake the defence of the action and to pay any costs and expenses which might be incurred therewith.

Held, that, under the circumstances, to undertake the defence was not a misapplication of the funds of the association.—BREAY *v.* ROYAL BRITISH NURSES' ASSOCIATION, *C.A.*

2. *Borough funds—Chief constable respondent in licensing appeals—Power to pay costs—Municipal Corporation Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140.—On the 13th of August the Watch Committee resolved to authorize the chief constable to obtain legal assistance at the licensing sessions. On the 21st of August the council passed a like resolution. The chief constable successfully opposed some licensees, five of whom appealed to quarter sessions. On the 10th of October the Watch Committee, having taken the opinion of counsel, refused to authorize the chief constable to act as respondent.

On the 15th of October the council resolved to allow him to so act, and to pay his costs. When the appeals came on he appeared and opposed them, and they were dismissed with costs. The amount recovered on taxation was £132 5s. less than he had to pay. On the 19th of November the Watch Committee resolved to pay these costs. This action was brought by the plaintiffs as ratepayers to restrain this payment.

Held, that, under these circumstances, there was no right to use the borough funds for this purpose, for one Watch Committee has no power to apply to the council to pay certain moneys which a former Watch Committee has said ought not to be paid.

Semble, that in certain cases a Watch Committee may have power to incur legal expenses in connection with the opposition to licences either at brewster or quarter sessions.—ATTORNEY-GENERAL *v.* TYNEMOUTH (MAYOR), *Q.B.D.*

3. *Municipal corporation—Burgess—Minutes of proceedings of council—Right to inspect—Committees—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 233.—By section 233 of the Municipal Corporations Act, 1882, a burgess has the right to inspect minutes of proceedings of the municipal council, but the Act does not give the right in terms to a burgess to inspect minutes of proceedings of a committee appointed by the council.

Burgesses of the city of M., being dissatisfied that on the minutes of the council no particulars appeared of the proceedings of committees approved by the council, claimed the right to inspect all minutes of such committees.

Held, that the burgesses had the right to inspect only such minutes of committees as were actually laid before the council for their approval.—WILLIAMS *v.* MANCHESTER (MAYOR OF), *Q.B.D.*, 412.

See also Local Government, 4.

COSTS.—See Administration, 4, 5; Bankruptcy, 13; County Court, 1, 2; Divorce, 15, 16; Executor, 3A; Justices, 5; Lands Clauses Act, 1, 2; Married Woman, 2; Metropolis Management, 11; Mortgage, 1; Poor Law, 1, 3, 6; Practice, 1, 9-17; Probate, 7, 9, 11; Settlement, 2; Solicitor, 3-13, 18-22.

COUNTY COURT:—

1. *Appeal—Costs—Security.*—If it appears to the High Court that there is reasonable ground for an appeal from a county court, the High Court will not order the appellant to give security for the costs of the appeal merely on the ground that he has no visible means of paying the respondent's costs should the appeal fail.—PRITCHETT *v.* POOLE, *Q.B.D.*

2. *Costs—Administration suit—Insolvent estate—Taxation—Discretion of registrar—County Court Rules*, 1889, *ord.* 50a, *r.* 20.—In an administration suit in the county court the costs of the administrator are within the discretion of the registrar as discretionary "fees or allowances" under ord. 50*a*, r. 20, of the County Court Rules, 1889, and in disallowing certain costs the registrar may take into consideration the fact that the estate is insolvent, in which case only such costs as are strictly necessary for the protection of the estate should be allowed.—PAIN *v.* BOWDEN, *Q.B.D.*, 48.

3. *Execution—Claim to goods seized—Sale by bailiff—Title of purchaser—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.—Where good are seized in execution under a judgment of a county court, and a claim is made to them, but the claimant fails to comply with any of the three conditions laid down by section 156 of the County Courts Act, 1888, a sale by the bailiff under that section confers on the purchaser a good title the goods, although the claimant may afterwards prove that they belonged to him at the time of the seizure.

Judgment of Wills and Wright, JJ., *ante*, p. 303, affirmed.—GOODLOCK *v.* COUSINS, *C.A.*, 369.

4. *Execution—Distress for rent—Poundage of high bailiff—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 154, 160—*County Court Rules*, 1889, *Schedule A.*—Where a high bailiff seizes goods on any premises under a warrant of execution, and then seizes further goods on the same premises under a claim made by the landlord for rent, he is entitled to a separate set of fees in respect of each seizure.—BROSTER, RE, PRUDDAH, EX PARTE, *Bkcy.*, 576.

5. *Practice—Employers' liability—Want of due notice of injury—Statutory defence—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 4—*County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18a.—In an action in the county court for compensation under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), the defence that the plaintiff has not given due notice of the injury as required by section 4 of that Act is a statutory defence within the meaning of the County Court Rules, 1889, ord. 10, r. 18a, and unless the defendant has duly filed a notice of his intention to rely upon such statutory defence he cannot avail himself thereof at the trial.—CONROY *v.* PEACOCK, *Q.B.D.*, 502.

6. *Practice—Service out of the jurisdiction—Transfer of action to High Court—County Courts Act*, 1888, *ss.* 67, 68, 164—*County Court Rules*, 1889, *ord.* 51, *r.* 23—*Judicature Act*, 1875, *s.* 17—*Ord.* 11, *rr.* 1 (d), 2.—Service in an action commenced in the county court having been effected out of the jurisdiction,

Held, that such service was authorized by ord. 51, r. 23, of the County Court Rules, 1889, and that though such rule was wider than the corresponding High Court rule, it was, nevertheless, a rule which might lawfully be made by the proper authorities under section 164 of the County Courts Act, 1888, and that, therefore, no objection to the jurisdiction could be raised in the county court.

But the action having been transferred to the High Court,

Held, that the person served ought to have an opportunity of raising the objection that it could not have been lawfully entertained there.—WOOD *v.* MIDDLETON, *Ch.D. Stirling, J.*, 184.

7. *Practice—Summons out of the district—Discretion of judge to grant leave for such summons to be issued—County Court Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 74—*Ord.* 5, *r.* 9a, *of County Court Rules*, 1889.—By section 74 of the County Court Act, 1888, an action may be commenced by leave of the judge against a defendant resident out of the district if the cause of action arose wholly or in part within the district.

Held, that the words of the section were permissive only, and that the judge therefore had discretion to refuse leave for such a summons to issue, although he was satisfied that the cause of action was such as to give him power to grant the summons if he had thought fit to do so.

Julius v. *The Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214, considered and applied.—REG. *v.* TURNER, *Q.B.D.*, 316.

See also Admiralty, 1, 2; Metropolis Management, 11; River, 2.

CRIMINAL LAW:—

1. *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11—*Public examination of bankrupt — Admissions — Parol evidence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 17.—At the public examination of a bankrupt under section 17 of the Bankruptcy Act, 1883, a shorthand writer took down the evidence given by him, and made a transcript of it; the transcript was not read over to or by or signed by the bankrupt, and the public examination was adjourned *sine die*. The bankrupt was afterwards tried upon an indictment charging him with misdemeanours under section 11 of the Debtors Act, 1869, and at the trial the shorthand writer gave parol evidence of admissions made by the bankrupt at the public examination tending to establish the misdemeanours with which he was charged.

Held, that the evidence was rightly admitted.—REG. *v.* ERDHEIM, *C.C.R.*

2. *Embezzlement—Assistant overseer—Rural parish —Form of indictment—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 5 (1), (2) (c); *s.* 6 (1); *s.* 81 (3). —Notwithstanding that under the Local Government Act, 1894, an assistant overseer in a rural parish is appointed by the parish council, he is the servant of the inhabitants of the parish, and not of the parish council; and in an indictment for embezzling the moneys collected by him from the ratepayers he is well described as the servant of the inhabitants, and the moneys embezzled are rightly alleged to have been received by him on account of such inhabitants, his employers.—REG. *v.* SMALLMAN, *C.C.R.*, 249.

3. *Evidence—Abortion—Statement by woman to police officers in absence of accused—Statement subsequently read over to accused—Admissibility.*—On the trial of a person for using an instrument with intent to procure miscarriage, it was proposed to put in evidence a statement made by the woman, upon whom the instrument was alleged to have been used, to the police officers in the absence of the accused, but which was subsequently read to the accused by the police.

Held, that the course adopted by the police was an exceedingly objectionable one, and that the statement should not be put in.—REG. *v.* SMITH, *Q.B.D.*

4. *False pretences—Evidence—Letter written by defendant—Opinion of witness as to meaning.*—Upon the trial of an indictment for obtaining goods by false pretences, a letter written by the defendant to the prosecutor respecting the goods was put into the hands of the prosecutor, who was asked what opinion he formed as to the position or occupation of the defendant upon the receipt of the letter,

Held, that, although the question of the proper inference to be drawn from the letter was for the jury, the question was admissible to show the inference in fact drawn from it by the prosecutor.

A defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods.—REG. *v.* KING, *C.C.R.*

5. *Foreign Enlistment Act*, 1870 (33 & 34 *Vict. c.* 90), *ss.* 2, 3, 11—*Operation of Act—Pleading.*—If there be an unlawful preparation of a naval or military expedition against any friendly state by some person within her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence under section 11 of the Foreign Enlistment Act, 1870, even though he renders the assistance from a place outside her Majesty's dominions.

By section 2 of the said Act, "This Act shall extend to all the dominions of her Majesty." And by section 3, "This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation."

An indictment alleged that "within the limits of her Majesty's dominions and after the coming into operation therein of the Act called 'The Foreign Enlistment Act, 1870,'" certain offences against the said Act were committed.

Held, that the indictment sufficiently alleged the Act to have been in operation in that part of her Majesty's dominions in which the alleged offences were committed.—REG. *v.* JAMESON, *Q.B.D.*

6. *Practice—Writ of error—Dispensing with attendance of plaintiff in error in cases of felony.*—Where a person convicted of felony alleges error upon the record, the court may, if the plaintiff in error be in custody, dispense with his attendance in court upon the argument of the writ of error.—RICHARDS *v.* REG., *Q.B.D.*

See also Coroner.

CROWN:—

1. *Civil servant—Officer of Inland Revenue—Appointment during pleasure of commissioners—Reduction in rank—Malice—Cause of action—Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *s.* 4.—A supervisor of Inland Revenue was appointed in 1881 to hold office "during the pleasure of the Commissioners of Inland Revenue." By section 4, sub-section 3, of the Inland Revenue Regulation Act, 1890, the commissioners have power to reduce or discharge any such officer as they see cause.

The commissioners directed the supervisor to collect statistics for the Board of Agriculture. The supervisor refused to comply with the order as being one which did not concern his duties as an official of Inland Revenue. The commissioners thereupon reduced him in rank. In an action against the commissioners to recover damages,

Held, that no cause of action was shown, and that, in the exercise of the inherent jurisdiction of the court the action should be stayed.—WORTHINGTON *v.* ROBINSON, *C.A.*

2. *Civil servants—Power to dismiss at pleasure—Law of New South Wales—Civil Service Act*, 1884 (48 *Vict. No. XXIV.*).—The Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided,

But held, that certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the officer, are inconsistent with such a condition, and consequently restrict the power of the Crown in that respect.—GOULD *v.* STUART, *P.C.*

See also Injunction; Practice, 23; Principal and Agent.

DAMAGES:—

Measure of damages—Trespass—Injury to land—Deposit of spoil on land.—The defendants, who were colliery owners, had committed a trespass on the plaintiff's land by depositing spoil thereon from their colliery for a number of years. Further

tipping having been restrained by injunction, and an inquiry as to damages having been directed,

Held, that the true measure of damages was the value of the land to the trespasser for the purposes for which he had used it.

The principle of the wayleave cases—*Jegon* v. *Vivian*, 19 W. R. 365, L. R. 6 Ch. 742; *Livingstone* v. *Rawyards Coal Co.*, 28 W. R. 357, 5 App. Cas. 25; and *Phillips* v. *Homfray*, L. R. 6 Ch. 770, 20 W. R. Dig. 121—applied.

Decision of Chitty, J. (44 W. R. 459), affirmed.—WHITWHAM *v.* WESTMINSTER BRYMBO COKE AND COAL CO., *C.A.*

See also Bankruptcy, 35; Company, 12; Divorce, 13; Landlord and Tenant, 15; Ship, 19; Vendor and Purchaser, 1.

DEBTORS ACT.—See Criminal Law, 1.

DEED:—

Presumption of law—Deed more than thirty years old—Marriage settlement purporting to exercise power of appointment—Execution by attorney of appointor—Mere production of deed insufficient evidence—Invalid exercise.—On the mere production of a deed more than thirty years old purporting to exercise a power of appointment, and executed by the attorney of the appointor, the presumption of law that a deed more than thirty years old and produced from an unsuspected repository proves itself does not, in the absence of other evidence, warrant the court in coming to the conclusion that the attorney was properly constituted and authorized to execute the deed, and, consequently, the power of appointment will not be deemed to have been validly exercised.—AIREY, RE, AIREY *v.* STEPHENSON, *Ch.D. Kekewich, J.*, 286.

See also Bankruptcy, 3; Settlement, 4.

DENTIST:—

Medical practitioner — Registration — Pupil — Declaration—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 37.—A person who, at the date of the passing of the Dentists Act, 1878 (22nd of July, 1878), was a pupil to a dental practitioner, but whose articles as a pupil expired in October, 1878, is not entitled to be registered under section 37 of the Dentists Act, 1878, unless he has complied with section 7.

So held by the Court of Appeal, affirming the Queen's Bench Division (*ante*, p. 526).—REG. *v.* GENERAL MEDICAL COUNCIL, *C.A.*

DIVORCE:—

1. *Attachment—Order to deliver up child—Evasion of service within the jurisdiction—Knowledge of contents of order—Order for attachment upon* ex parte *application.*—An order was made in a divorce suit that "the child, issue of the marriage between the petitioner and respondent, be forthwith delivered up to and remain in the custody of the petitioner until further order of the court, but . . . that such child be not removed out of the jurisdiction of the court without its sanction."

This order was brought to the knowledge of the respondent, who took the child out of the jurisdiction and retained its custody. Legal service was not effected upon him.

The court, upon *ex parte* application by the petitioner, ordered a writ of attachment to issue against the respondent.—FAVARD *v.* FAVARD, *P.D. & Ad.D.*

2. *Judicial separation — Husband and wife — Separation deed—Covenant not to sue for greater allowance—Permanent alimony—Matrimonial Causes Acts*, 1857, 1859, 1866 (20 & 21 *Vict. c.* 85, *ss.* 32, 35; 22 & 23 *Vict. c.* 61, *s.* 4; 29 & 30 *Vict. c.* 32, *s.* 1.)—Although under a separation deed a wife may have agreed to accept a certain sum as maintenence from her husband, and may have covenanted not to sue for any further allowance, yet if the circumstances be altered to divorce or judicial separation by reason of subsequent adultery or otherwise the court has power to order a larger sum to be paid to the wife by the husband by way of permanent alimony and for the maintenance of her children.

Gandy v. *Gandy*, 30 W. R. 673, 7 P. D. 168, 33 W. R. 803, 30 Ch. D. 57, explained.—BISHOP *v.* BISHOP, JUDKINS *v.* JUDKINS, *C.A.*, 567.

3. *Nullity—Fraud inducing marriage.*—A marriage is not rendered null and void by concealed unchastity or pregnancy on the part of the wife at the time of the marriage.—MOSS *v.* MOSS, *P.D. & Ad.D.*, 635.

4. *Permanent maintenance—Full inquiry on petition for alimony* pendente lite—*Procedure—Husband's income—Voluntary allowance to husband.*—Where alimony *pendente lite* has been fixed after a full inquiry, the facts so elicited constitute the grounds on which the amount of permanent alimony or permanent maintenance should be determined; and

Semble, if alimony *pendente lite* has been awarded, no evidence can be given on the application for permanent alimony or maintenance, except to show alteration in means since the first inquiry

In estimating the husband's income, the court can take into calculation income to which he may have no legal claim.

In this case the court calculated in the respondent's income a monthly allowance made to him by his brother, to whom he was largely indebted, "so long as he remained out of the country."

Haviland v. *Haviland*, 11 W. R. 550, 3 Sw. & Tr. 114, considered.—BONSOR *v.* BONSOR, *P.D. & Ad.D.*, 304.

5. *Practice — Co-respondent — Necessary party—Leave to proceed without—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 27, 28—*Divorce Rules*, 2, 4, 5, 6.—The court has a discretion, under section 28 of the Matrimonial Causes Act, 1857, as to whether the petitioner may present a petition for divorce without adding a co-respondent. Such discretion is to be exercised having regard to the facts of each particular case, and it would be wrong in principle for the court to impose fetters upon the exercise of the powers which are left by law to its discretion in each case as it arises.

So held by the Court of Appeal (Lindley and Rigby, L.JJ.; A. L. Smith, L.J., dissenting as to the exercise of the discretion in this particular case).—SAUNDERS *v.* SAUNDERS, *C.A.*, 583.

6. *Practice—Death of alleged adulterer before suit—Motion to dispense with making co-respondent.*—Where, in a petition for dissolution of marriage, adultery is charged against a person who died before the institution of the divorce proceedings, the petitioner must apply to the court for an order to be excused from making him a co-respondent, even though adultery be charged against a second person who has been made a co-respondent in the suit.—SLAYTOR *v.* SLAYTOR, *P.D. & Ad.D.*

7. *Practice—Discretion of court—Misconduct of petitioner—Adultery—Wife's petition—Wilful neglect or misconduct of husband conducing to wife's adultery—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—The circumstances to be considered by the court in exercising its discretion under section 31 of

the Divorce and Matrimonial Causes Act, 1857, to grant a divorce to a wife who has been guilty of adultery, include the case of the husband causing or conducing to her adultery by his own wilful neglect or misconduct.

A husband, who had treated his wife with great cruelty during cohabitation, finally deserted her and went to live with another woman. More than seven years after the desertion the wife, not knowing whether her husband was alive, and without making inquiry, commenced to live with another man; the cohabitation continued long after the time when it came to the wife's knowledge that her husband was alive. Subsequently, and after the wife had ceased to live in adultery, her husband was convicted, under the Criminal Law Amendment Act, 1885, of an aggravated offence on a young girl not amounting to rape.

Held, that under the circumstances the wife's adultery did not disentitle her to a decree for dissolution of marriage.—SYMONS *v.* SYMONS, *P.D. & Ad.D.*

8. *Practice—Order for costs—More than six years' delay in issuing execution—Application to the court—R. S. C., ord.* 42, *r.* 23.—Where on a husband's petition for dissolution of his marriage a decree *nisi* is granted with costs against the co-respondent, and the husband does not issue execution for more than six years, application should be made to the court for leave to issue execution.—GOODWIN *v.* GOODWIN, *P.D. & Ad.D.*, 656.

9. *Practice—Judicial separation—Wife's petition—Counter-charge of adultery—No relief sought—Alleged adulterer—Application for leave to intervene—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 22—*Practice—Leave refused.*—A petition by a husband claiming a divorce from his wife and damages against the co-respondent, was dismissed, by consent, before trial. Thereupon the wife filed a petition claiming a judicial separation, and the husband, in his answer, counter-charged the adultery which he had alleged in the former suit, but he asked for no relief. The alleged adulterer applied for leave to intervene and defend.

Held, that the practice of the Ecclesiastical Courts governed the case, and, that as that practice afforded no precedent for allowing an intervention in such circumstances, the application must be refused.—FARRELL *v.* FARRELL, *P.D. & Ad.D.*

10. *Practice—Nullity suit—Summons for directions—Notice to Queen's Proctor before setting down.*—The President, upon a summons for directions in a nullity suit by a husband, the case being undefended, directed the solicitors for the petitioner to give information of the facts of the case to the Queen's Proctor, before setting the case down for hearing, under 23 & 24 Vict. c. 144, s. 7, as amended by 36 Vict. c. 31. Upon receipt by the petitioner's solicitors of an intimation from the Queen's Proctor that he did not intend to intervene at this stage of the proceedings,

The President allowed the case to be set down forthwith, and to be added to the supplemental list of undefended causes just published.—M—— *v.* M——, *P.D. & Ad.D.*

11. *Practice—Restitution of conjugal rights*—Bonâ fides *and conduct of petitioner—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.—Conduct of a petitioner, though falling short of a matrimonial offence for which relief could be obtained, may yet be a good and sufficient ground for refusing a decree for restitution of conjugal rights.—OLDROYD *v.* OLDROYD, *P.D. & Ad.D.*

12. *Practice—Restitution of conjugal rights—Written demand for cohabitation—Substituted service—Rule* 175.—Where a wife posted a written demand for restitution of conjugal rights to the husband addressed to him at his business and private address, and both letters were returned unopened through his solicitors, who refused all information about him, but it was believed he had left the country, the court allowed substituted service of the demand on the husband's solicitors.—TUCKER'S PETITION, RE, *P.D. & Ad.D.*, 656.

13. *Practice—Sequestration—Damages against co-respondent—Interest of co-respondent in settlement—Motion against the trustees.*—The right of sequestrators to attach moneys alleged to be held by third persons for the judgment debtor, but denied by them to be so held, cannot be determined upon a motion in the suit to which the the third persons are not parties, unless they appear and submit to the jurisdiction of the court.

So held, on a motion by sequestrators against the trustees of a co-respondent's marriage settlement to enforce payment of damages ordered to be paid by the co-respondent to the petitioner in a suit for dissolution of marriage.—CRAIG *v.* CRAIG, *P.D. & Ad.D.*, 64.

14. *Practice—Trial—Notice of setting down for—New trial—Surprise—Divorce Court Rules, rr.* 44, 47.—The solicitor of the petitioner for a divorce wrote to the respondent's solicitor a letter, headed with the title of the cause, in which he said, "I have set this cause down for trial." No other notice was served.

Held, that this letter was a sufficient notice, within rule 44 of the Divorce Court Rules, of the cause having been set down for trial.

The respondent's solicitor, in the belief that a more formal notice ought to be given, did not watch the cause list, and the cause came on for trial without his knowledge, and a decree for a divorce was made in the absence of the respondent. She applied for a new trial on the ground of surprise.

The court ordered a new trial on the undertaking of the solicitor personally to pay the costs thrown away.—FLUISTER *v.* FLUISTER, *C.A.*

15. *Practice—Wife's costs—Husband's suit—Wife's solicitor.*—To warrant a petitioner (husband) in opposing, and the court in refusing, the usual order for a wife's costs, it is not necessary to show "misconduct" on the part of the wife's solicitor.

A solicitor acting for the wife in a matrimonial case is not entitled to rely upon his client's instructions, but, in order to entitle him to look to the husband for payment of the wife's costs, he must fairly investigate for himself the various points put forward by the wife as a defence, and must satisfy himself in regard to their reasonableness.

Under the particular circumstances of the case, the usual order for the wife's costs was refused, and the amount in court was ordered to be paid out to the husband (the petitioner).—WALKER *v.* WALKER, *P.D. & Ad.D.*

16. *Practice—Wife's costs.*—Upon a husband's petition for divorce, the solicitor for the wife incurred costs which were taxed and ordered to be paid; but after the pleadings were closed, and before the cause was set down, the petitioner, without paying them, applied for and obtained leave to proceed *in formâ pauperis.* The wife's solicitor thereupon took out a summons before the judge in chambers, calling upon the petitioner to show cause why further proceedings should not be stayed by reason of the petitioner not having com-

plied with the order dated the 8th of February, 1897, for payment of £20 11s. 6d. for the respondent's taxed costs. The registrar who taxed the bill had refused to order a stay of proceedings in the event of the amount not being paid by the petitioner.

The judge ordered proceedings to be stayed until payment of the wife's taxed costs.—JOSEPH *v.* JOSEPH, *P.D. & Ad.D.*

17. *Variation of settlement—Death of petitioner after decree absolute—Matrimonial Causes Act,* 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act,* 1878 (41 *Vict. c.* 19), *s.* 3—*Conveyancing and Law of Property Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 39.—A petitioner (the husband) having obtained a decree absolute for dissolution of marriage, presented a petition to vary the trusts of the marriage settlement and to carry out the terms of an agreement which had been made with his wife on the hearing of the suit. Shortly afterwards the petitioner died. An application was made by his legal personal representative to be made a party in order to continue the proceedings.

Held, that the court has no jurisdiction, under section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Matrimonial Causes Act, 1878, to order the legal personal representative of a deceased petitioner to be made a party for the purpose of continuing proceedings for the variation of the settlement. The Act of 1859 was intended for the benefit of living persons only.—THOMSON *v.* THOMSON, *C.A.*, 134.

18. *Variation of settlements and permanent maintenance — Report of registrar — Unsettled property squandered—Income from settled property—Large proportion awarded.*—Where a respondent (husband) had recently squandered the bulk of the property over which he had free control, the court awarded to the petitioner more than one-third of the income from the property which had been brought into settlement by the respondent upon the marriage, and further ordered that, after the respondent's death, the award should be increased to more than one-half of that income, but limited *dum sola vixerit.*—BASHALL *v.* BASHALL, *P.D. & Ad.D.*

See also Bankruptcy, 35; Married Woman, 4.

DONATIO MORTIS CAUSÂ:—

Essentials to gift—Delivery antecedent to gift.—The rule that delivery of a chattel is essential in order to constitute a valid *donatio mortis causâ* is satisfied by an antecedent delivery of the chattel *alio intuitu* to the donee.—CAIN *v.* MOON, *Q.B.D.*

EASEMENT:—

Right of way—Easement in gross—Covenant with yearly tenant and "his heirs and assigns"—Alteration of grantee's interest in dominant tenement—Estoppel.—A grant by deed of a right of way to a yearly tenant of the dominant tenement and his heirs and assigns, will not determine by reason of the fact that the yearly tenant of the dominant tenement subsequently acquires the fee in the dominant tenement.—RYMER *v.* MCILROY, *Ch.D. Romer, J.*, 411.

ECCLESIASTICAL LAW:—

1. *Benefice — Vacancy — Sequestration — Profits accrued during vacancy.*—The incumbent succeeding to a vacant benefice has a right of action against the sequestrator of such benefice for the balance of profits accrued during the vacancy.—RUSSELL *v.* LAY, *Q.B.D.*

2. *Brawling in churchyard—"Any person"—Clergyman*—23 & 24 *Vict. c.* 32, *s.* 2.—The preamble to 23 & 24 Vict. c. 32 recites that, "Whereas it is expedient to abolish the jurisdiction of the Ecclesiastical Courts of England and Ireland over persons not in holy orders in suits for brawling." Section 2 enacts that "any person who shall be guilty of riotous, violent, or indecent behaviour . . . in any churchyard" shall be liable to a penalty.

Held, that section 2 applies to persons in holy orders as well as to laymen.—VALLANCEY *v.* FLETCHER, *Q.B.D.*, 367.

3. *Churchwarden—Criminal suit—Duty of churchwarden with respect to collections at morning and evening service—Alms dish—Usage of church—Control of churchwardens over moneys collected for church expenses.*—By the accustomed practice of a parish church, when collections from the congregation were made either at the morning or the evening service on Sundays, the collecting bags were brought after the collection up to the chancel steps and placed in the alms dish there held by the minister for the purpose of receiving the same and placing them on the Communion Table. One of the churchwardens of the parish was charged in a criminal suit with having committed offences against ecclesiastical law in that during the time he held office he had at the morning service on one Sunday and the evening service on another Sunday vexatiously refused to place the bag in which he had collected money from the congregation in the alms dish in accordance with the above practice. At the hearing these charges were sufficiently proved.

Held, that, in so deviating from the practice in use in the matter, the respondent had offended against the laws ecclesiastical, and that he ought to follow such practice for the future unless otherwise ordered by the bishop.

Where collections for ordinary church expenses are made at the morning and evening services in parish churches, the churchwardens are the proper custodians of the moneys collected, and such moneys should be placed by them at a bank to an account in their joint names.—HOWELL *v.* HOLROYD, *P.D. & Ad.D.*

4. *Clergy — Discipline — Deprivation — Bishop's jurisdiction.*—The jurisdiction of a bishop to depose a clergyman from holy orders under section 8 of the Clergy Discipline Act, 1892, is distinct from the jurisdiction of the court which pronounces the sentence of deprivation under that Act. — REG. *v.* DURHAM (BISHOP), *Q.B.D.*

5. *Diocesan archives — Document of historical interest to foreign State—Delivery up.*—A manuscript book called the "Log of *The Mayflower*," containing a history of the voyage of that vessel to America in 1620, together with entries of births, marriages, and deaths of many of the first settlers in New England, was amongst the archives of the Diocese of London at Fulham Palace.

Upon petition of the Ambassador of the United States the MSS. was ordered to be delivered up to the United States upon certain conditions.—"MAYFLOWER" (LOG OF THE), RE, *P.D. & Ad.D.*

6. *Faculty—Chancel screen—Confirmatory faculty for retention of chancel screen of carved figures representing our Lord on the Cross, the Virgin Mary, and St. John—Representation of historical scene not likely to be object of superstitious reverence.*—A figure of our Lord upon the Cross was in 1880 placed in a parish church above, and on the centre of the screen separating the chancel from the nave; and in 1893 there were placed on one side thereof a figure of

the Virgin Mary, and on the other side thereof a figure of St. John. All the figures were carved in wood, were about 2ft. 9in. in height, the central figure being rather higher than the two others, and all had been placed in the church without the sanction of a faculty. There was not in the church anything of the nature of a rood-loft or rood-stairs, and no candles were round or in front of the figures. In 1896 the rector and churchwarden of the parish instituted a cause of faculty praying the Ordinary to authorize by faculty the retention of the three figures on the screen, and filed affidavits stating that the services of the church had been conducted in accordance with the directions of the Book of Common Prayer, and that there was not and had not been anything in the said services or in the attitude of those attending the services to indicate or suggest any probability of worship, adoration, or any superstitious reverence being paid to the figures on the screen. No person appeared to oppose the grant of the faculty.

The Chancellor of the Diocese of Norwich ordered the faculty to issue as prayed.—BARSHAM (RECTOR) *v.* PARISHIONERS OF SAME, *P.D. & Ad.D.*

7. *Faculty — Discretion — Refusal of faculty — Chancel screen gates — Figures on chancel screen representing our Lord upon the Cross, the Virgin Mary, and St. John — Evidence — The Church Building Act*, 1845 (8 & 9 *Vict. c.* 70), *s.* 7—*Select vestry—Effect of resolution of meeting of pew-renters of parochial chapel of ease.*—A petition by the vicar and churchwardens of the parish church of R., and the chapelwardens of a chapel of ease in the parish of R., asking for a faculty to authorize the erection in the chapel of a chancel screen with gates, and with a crucifix and figures of the Virgin Mary and St. John placed on top of the screen, was supported by a resolution of a meeting of the pew-renters of the chapel. The vestry for ecclesiastical purposes of the parochial area in which both the parish church and the chapel of ease were situate, was a select vestry of the whole civil parish of R., which comprised a larger area than the parochial area above mentioned, and the vestry had passed no resolution either in favour of or against the grant of the faculty.

Held, (1) that a resolution of the select vestry might be dispensed with; (2) that a faculty for chancel screen gates ought not to be granted; (3) that a faculty for a crucifix with or without figures on either side placed on a chancel screen ought not to be granted. — RICHMOND (VICAR OF) AND CHAPELWARDENS OF ST. MATTHIAS, RICHMOND *v.* ALL PERSONS HAVING INTEREST, &c., *Q.B.D.*

8. *Faculty — Jurisdiction — Affixing of military colours to walls of chancel of parish church—Interest —Member of Parliament—St. Margaret's, Westminster — Churchwardens — Confirmatory faculty.* — The Ordinary has jurisdiction to authorize by faculty the affixing of military colours as church ornaments to the walls of the chancel of a parish church where it appears that a former rector of the church has approved of their being placed in the chancel.

The rector of a parish church has no legal right without the sanction of a faculty to remove out of the chancel church ornaments, such as military colours, placed there without a faculty in a permanent position with the concurrence of a former rector and former churchwardens.

A member of the Commons House of Parliament has a sufficient interest to institute a faculty suit in respect of alterations in or additions to the parish church of St. Margaret's, Westminster.

Semble, the churchwardens of a parish church to which military colours, no longer required for use in her Majesty's service, have been presented, have vested in them the legal property in the colours for the purpose of safe custody in all cases where the colours are not affixed to the freehold.—VINCENT *v.* EYTON, *P.D. & Ad.D.*

9. *Faculty—Restoration of chancel screen—Figures of our Lord upon the Cross, St. Mary, and St. John—Architectural decorations not likely to be abused by superstitious reverence.*—A crucifix with the accompanying figures of the Virgin Mary and St. John is not forbidden by law to be erected on a chancel screen, but may be placed in that position in a parish church under a faculty where the Ordinary is satisfied that it is not likely to be abused by superstitious reverence being paid to it.

A faculty authorizing the restoration in a parish church of a stone chancel screen or interior chancel arch of pre-Reformation date by placing on three existing pedestals springing from ornamental tracery in the upper parts of such screen or interior arch three stone figures without gilding or painting, each two feet three inches high—one, the central figure, representing our Lord upon the Cross, and the other two representing respectively the Virgin Mary and St. John—was granted by the Consistory Court of St. Albans on the Ordinary being satisfied that the figures would be for the purpose of architectural decoration only, and that there was no ground for reasonable apprehension that they would be abused or made the subject of superstitious reverence.—GREAT BARDFIELD (VICAR OF) *v.* ALL HAVING INTEREST.—*P.D. & Ad.D.*

10. *Pew—Chancel—Ancient pew—Right appointment to parish—Prescription—Repair.*—The claimant of a right of prescription to a pew in the chancel of a parish church in respect of his ownership and occupancy of an ancient house in the parish, must, as against the Ordinary, prove, not merely exclusive possession of the pew by himself and his predecessors, but also some act of user or assertion of right inconsistent with mere possession by permission of the churchwardens. The right to such a pew is subject to the burden of repair, but it is not necessary to prove actual repair where evidence is given of other such acts of user or assertion of proprietary right, repair being only one of many possible acts of user. Upon such proof being given, a lost faculty should be presumed.

The removal of the woodwork of a pew in the chancel and the substitution of chairs for the former seats is an act of ownership or assertion of proprietary right inconsistent with any right in the Ordinary, and, together with exclusive possession, is sufficient to prove the claimant's right; such removal will not amount to an abandonment of the right, unless it be coupled with circumstances indicating an intention to abandon.

Re-lining a pew is not an act of repair.

Semble, per Charles, J.: The right of the lay rector to the chief seat in the chancel of the parish church is not confined to a single seat for his personal occupation.—STILEMAN-GIBBARD *v.* WILKINSON, *Q.B.D.*

11. *Simony—Immorality — Clerical Subscription Act*, 1865—*False declaration against simony—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *ss.* 2, 12.

Held, that in order to punish the offence of simony in a clerk, resort cannot be had to the provisions of the Clergy Discipline Act of 1892, but proceedings must still be taken under the Act of 1840. The immorality against which the Act of 1892 is directed is so defined by sections 2 and 12 as to exclude simony from its scope.

Held, also, that a false declaration against simony under the Clerical Subscription Act of 1865 cannot be isolated from the charge of simony and brought within the scope of the Act of 1892.—BENEFICED CLERK *v.* LEE, *P.C.*

12. *Use of black gown in pulpit—Conditional bequest of money—Legality.*—It is not illegal for a clergyman of the Church of England to wear the black gown while preaching; and a condition requiring him to do so attached to a bequest of property for his benefit is not an illegal or impossible condition.—ROBINSON, RE, WRIGHT *v.* TUGWELL, *C.A.*, 181.

EJUSDEM GENERIS.—See Gaming, 3, 4.

ELECTION LAW:—

1. *Registration—Parliament—Franchise—Borough vote—Disqualifying alms—Almspeople in almshouses—Lands vested in almspeople—Reform Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 36.—By a grant of lands a charity, known as the Charterhouse Hospital, was established at Hull for a number of poor men and women, and the condition for election to the charity was, and still is, that the persons should be "feeble or old, so long as they are necessitous." The lands, including the Charterhouse Hospital itself, were, and still are, vested in the master and almsmen themselves, and form the source of the revenue of the charity. Under the scheme at present in force the almsmen were appointed by the town council and were removable by them, but the power of removal had never been exercised. The almsmen receive a weekly allowance out of the revenues of the charity, and each occupy a separate room in the Hospital House, which room is separately rated, but the rates are paid out of the charity funds. The almsmen had hitherto always voted at parliamentary elections without objection.

Held, that the almsmen, the recipients of this charity, were not disqualified by the receipt of alms within section 36 of the Reform Act, 1832.

Harrison v. *Carter*, 25 W. R. 182, 2 C. P. D. 26, distinguished.—COWAN *v.* KINGSTON-UPON-HULL (TOWN CLERK), *Q.B.D.*, 413.

2. *Registration — Parliament — Franchise—Objection to name—Closing the list—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 40, *sub-sections* 8, 9, 10, 11.—A revising barrister gave notice that his court would be held on certain days, and that after the last sitting the lists would be closed. This was done, and on the day after the lists were closed the revising barrister sat for the purpose (*inter alia*) of expunging from the list the names of those persons whose names had been objected to and who had not appeared and announced their intention of contesting the objection at the previous sittings. On the name of S. being called evidence was given of the service of the notice of objection, and S. thereupon claimed to be heard in answer to the objection. The revising barrister refused to hear him and expunged his name.

Held, that a *mandamus* would not be granted to compel the revising barrister to state a case on the question whether or not he was right in expunging the name of S. from the list.—REG. *v.* SODEN, *Q.B.D.*, 234.

3. *Registration — Parliament — Franchise — Old lodger claim—Omission of part of declaration—Mistake—Power of amendment — Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 2.—Where an old lodger, whose name was on the existing register, sends in within the proper time for old lodger claims a claim in respect of the same lodgings, but by mistake omits to state in the declaration of the claim that he is on the register of electors in respect of the same lodgings, and that he desires to have his name inserted on the old lodger list, the revising barrister has power to correct the mistake by inserting in the declaration the omitted statement.—FRANCIS *v.* METCALFE, *Q.B.D.*, 174.

4. *School Board—Ballot papers—Voting by crosses—Mode of counting—Ballot papers not officially stamped or cancelled—Elementary Education Acts—General Order of Privy Council on Education*, 1*st August*, 1895—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 2.—In counting the numerical value of the crosses on the ballot papers at a school board election, at which voters can give all their votes to one candidate, or distribute them, and can vote by numbers in lieu of a cross, each cross must be counted as one vote and no more.

Ballot papers which bear no official mark, stamp, or perforation ought to be rejected under section 2 of the Ballot Act, 1872; and ballot papers which have not been cancelled ought to be rejected, as there is no evidence they were ever in the ballot boxes.—MORRIS *v.* BEVES, *Q.B.D.*, 430.

EMPLOYERS' LIABILITY ACTS.—See County Court, 5; Master and Servant, 2, 3.

ESCHEAT.—See Intestates' Estates Act.

ESTOPPEL:—

Settlement of land by grantor having no title—Acquisition of possessory title by tenant for life—Rights of remaindermen—Statute of Limitations—3 & 4 *Will.* 4, *c.* 27, *s.* 34.—A. obtained in 1867 possession of land under a settlement made in 1842 whereby an estate was limited to him for life, with remainder over. The settlor had no title to the land in question.

Held, that A., and those claiming through A., were estopped from setting up as against the remaindermen any title adverse to the deed of settlement—*e.g.*, a title by possession under the Statutes of Limitation.

Hawksbee v. *Hawksbee*, 11 Hare 230, and *Board* v. *Board*, 22 W. R. 206, L. R. 9 Q. B. 48, approved and adopted.—DALTON *v.* FITZGERALD, *C.A.*, 685.

See also Bankruptcy, 2; Company, 29, 42; Easement; Vendor and Purchaser, 9.

EXECUTOR:—

1. *Acknowledgment of debt by one of several—Statutes of Limitation*—9 *Geo.* 4, *c.* 14, *s.* 1—19 & 20 *Vict. c.* 97, *s.* 14.—An acknowledgment within Lord Tenterden's Act of a debt of a testator by one of several executors is sufficient to take the case out of the Statutes of Limitation.—MACDONALD, RE, DICK *v.* FRASER, *Ch.D. Stirling, J.*, 628.

2. *Acting before probate—Delay in proving will—Wilful default.*—A testator died in 1882, and his will was proved (by one only of three executors named in the will) in 1889. A policy on the testator's life could not be got in until probate was obtained, and meanwhile interest at the rate of 5 per cent. was paid upon the debt of the testator.

Held, that this delay in proving the will and getting in the money due upon the policy did not amount to wilful default.

Two persons named as executors in the will wrote a letter in conjunction with the executor who eventually proved asking the assurance office to pay the policy to a creditor of the testator.

Held, that all three had acted as executors.—STEVENS, RE, COOKE *v.* STEVENS, *Ch.D. North, J.*, 284.

3. *Administration—Alleged wilful default—Acting "honestly and reasonably"—"Fairly to be excused"—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—Where the executor of a deceased solicitor was *bonâ fide* and on reasonable grounds satisfied that he could not maintain an action against a client of his testator to recover costs incurred in an administration action and owing to the testator, there being an arrangement between the testator and the client to the effect that the latter should not be personally liable to the testator for the costs, except in the event of his being unable to recover the same in the administration action.

Held, that the executor was not guilty of any wilful default; but that even if the executor was technically liable for a breach of trust, then under section 3 of the Judicial Trustees Act, 1896, he, having acted honestly and reasonably, ought fairly to be excused.—ROBERTS, RE, KNIGHT *v.* ROBERTS, *C.A.*

3A. *Costs—Action against executor and residuary legatees—Separate defence by executor.*—Costs incurred by an executor, who, to meet a possible charge of *devastavit*, separately defends an action brought jointly against residuary legatees and himself, are not "an outlay in the strict line of his duty" towards his *cestui que trust*; and he cannot call upon them to indemnify him in respect of his expenditure.—HOSEGOOD *v.* PEDLER, *Q.B.D.*

4. *Deposit in Post Office Savings Bank—Nomination by a testatrix of an executor named in her will—Evidence rebutting presumption of gift—Savings Bank Act*, 1887 (50 & 51 *Vict. c.* 40) *s.* 3.—Where a testatrix subsequent to the execution of her will filled up a nomination in the prescribed form of the amount (being under £100) due to her by the Post Office Savings Bank at her decease, in favour of one of her executors, and there was sufficient evidence to rebut the presumption that such executor should receive such amount as a gift, it was held that he received the same in his capacity of executor, and he was ordered to account for the same accordingly.—READ, RE, TURNER *v.* READ, *Ch.D. Stirling, J.*

5. *Devisee—Fixtures—Tapestry.*—Tapestry on the walls of a room in a family mansion, which was called the "Tapestry Room," had about a century ago been affixed to the walls of the room in a manner that skilled witnesses said would now be used if it was required to fix tapestry permanently. The mansion-house had been settled by the will of a former owner in strict settlement, but the will made no mention of the tapestry. The tapestry was claimed as a chattel by the residuary legatee of the will as against the devisee of the mansion-house.

Held, that as regards fixtures a claim by an executor against a devisee was on the same footing as a claim by an executor against an heir; that on the evidence in this case the tapestry was a fixture and passed under the devise of the mansion; and that the case fell within the principle of the decisions relating to claims to fixtures as between executor and heir, and was covered by the decision in *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382.—NORTON *v.* DASHWOOD, *Ch.D. Chitty, J.*

6. *Injunction restraining bankrupt executor from acting—Application by co-executor—No receiver.*—Upon the application of one executor for an injunction to restrain his bankrupt and defaulting co-executor from acting, the court has jurisdiction to grant the injunction without having recourse at the same time to the appointment of a receiver of the testator's estate.—BOWEN *v.* PHILLIPS, *Ch.D. Kekewich, J.*, 286.

7. *Retainer—Legatee debtor to testator—Bankruptcy of legatee.*—A father deposited with a bank a sum of £2,400 (money of his own) as a continuing security for any amount which might from time to time be owing to the bank by a firm in which two of his sons were the only partners. Interest on the deposit was from time to time paid by the bank to the father. By his will the father gave legacies and shares of residue to the two sons. At the date of his death the sons owed £8,858 to the bank, and the sons were afterwards adjudicated bankrupts. The bank proved in the bankruptcy for the whole £8,858. No dividend having yet been paid in the bankruptcy, but it being admitted to be improbable that the estate would realize enough to pay the bank in full, and that the bank would ultimately appropriate the deposit of £2,400 towards the payment of the firm's debt,

Held, that the trustees of the father's will were not entitled to retain the legacies and shares thereby bequeathed to the sons against the liability of the father's estate as surety to the bank, but that the trustee in the bankruptcy was entitled to receive those legacies and shares.—BINNS, RE, LEE *v.* BINNS, *Ch.D. North, J.*

8. *Will—Administrator* pendente lite—*Appointment by Probate Division—Suing administrator* pendente lite *in Chancery Division—Motion to stay action—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *ss.* 70, 71.—An administrator *pendente lite* of the personal estate of a deceased appointed by the Probate Division may be sued by creditors of the estate in the Chancery Division without leave.—TOLEMAN, RE, WESTWOOD *v.* BOOKER, *Ch.D. North, J.*, 548.

See also Inland Revenue, 12.

FACTORY :—

1. *Cotton cloth factory—Justices—Mitigation of penalties—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 4—*Cotton Cloth Factories Act*, 1889 (52 & 53 *Vict. c.* 62), *s.* 13.—Section 13 of the Cotton Cloth Factories Act, 1889, enacts that, "If in the case of any cotton cloth factory there is a contravention of, or non-compliance with, any of the provisions of this Act, the inspector shall give notice in writing to the occupier of the same of the acts or omissions constituting the contravention or non-compliance, and if such acts or omissions, or any of them, are continued or not remedied, or are repeated within twelve months after such notice has been given, the occupier of such factory shall be liable, on summary conviction, for the first offence, to a penalty of not less than five pounds nor more than ten pounds, and for every subsequent offence to a penalty of not less than ten pounds nor more than twenty pounds."

On a summons taken out under the above section, justices at petty sessions convicted the defendants of a first offence, but, holding that they had discretionary power under section 4 of the Summary Jurisdiction Act, 1879, to do so, they reduced the fine to twenty shillings.

Held, that the justices had acted wrongly. Section 4 of the Summary Jurisdiction Act, 1879, does not apply to section 13 of the Cotton Cloth Factories Act, 1889. A particular and a serious offence is created by section 13, and when such offence is committed the magistrates have no power

to reduce the penalty under the provisions of section 4 of the Summary Jurisdiction Act.—OSBORN *v.* WOOD, *Q.B.D.*, 319.

2. *Dangerous machinery—Factory and Workshop Acts*, 1878 (41 & 42 *Vict. c.* 16), *s.* 5; 1891 (54 & 55 *Vict. c.* 75), *s.* 6.—Under section 5 of the Factory and Workshop Act, 1878, as amended by section 6 of the Factory and Workshop Act, 1891, "all dangerous parts of the machinery" in a factory must either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed in the factory as they would be if they were securely fenced.

Held, that, although a part of a machine might not be dangerous in the ordinary course of its working, yet it might be a "dangerous" part of a machine within the meaning of the Acts if, owing to external causes or to the negligence of a workman, it was liable to cause accidents.—HINDLE *v.* BIRTWISTLE, *Q.B.D.*, 207.

3. *Workshops—Work carried on in workshop on Sunday—"Open for traffic on Sunday"—Meaning of—Factory and Workshop Act*, 1878 (41 & 41 *Vict. c.* 16), *s.* 51.—The occupier of a workshop, who was of the Jewish religion, employed a woman of the Jewish religion to work in his workshop on Sunday. The business carried on was the making of buttonholes on garments for tailors, and garments were carried to and from the shop on Sunday in pursuance of prior arrangements; but no arrangements, payments, or settlements were made with any customers or other persons on the Sunday.

Held, that the workshop was not "open for traffic on Sunday" within the meaning of section section 51 of the Factory and Workshop Act, 1878.—GOLDSTEIN *v.* VAUGHAN, *Q.B.D.*, 399.

FINANCE ACT, 1894.—See Inland Revenue, 2-7.

FISHERY:—

1. *Licence—Profit* a prendre—*Incorporeal hereditament—Right of action by grantee.*—The plaintiffs were the lessees by deed for a term of years of "the exclusive right of fishing" in a specified part of the River Colne, with a proviso that "the right of fishing hereby granted shall only extend to fair rod and line angling, and to netting for the sole purpose of procuring fish-baits." The defendants discharged into the river water loaded with mud and sediment, which drove away the fish and injured the spawning beds.

Held, that the grant to the plaintiffs was not a mere licence to fish, but a right to fish and carry away the fish caught; that this was a profit *a prendre*, and an incorporeal hereditament; and that the plaintiffs were entitled to an injunction and damages against the defendants.—FITZGERALD *v.* FIRBANK, *C.A.*

2. *Sea fisheries—"Taking"—"Removing from the fishery"—Sea Fisheries (Shell Fish) Regulation Act*, 1894 (57 & 58 *Vict. c.* 26), *s.* 1.—The taking of shell fish from the bed in which they were found, with the intention of taking them away altogether, amounts to a removal of such shell fish from the fishery within bye-laws made under section 1 of the Sea Fisheries (Shell Fish) Regulation Act, 1894 (57 & 58 Vict. c. 26), even though, as a matter of fact, the shell fish were in the result not actually taken away.—THOMSON *v.* BURNS, *Q.B.D.*

3. *Several fishery — Tidal river — Grant from Crown—Surrender by subject—Evidence—User.*—From the finding of an inquisition in 1540 there was clear evidence of the existence at and prior to that date of a several fishery in tidal waters, which had been surrendered to the Crown. By subsequent instruments of title this several fishery was identified with that claimed by the plaintiff, who proved documentary title thereto. The evidence satisfied the court that a several fishery was in fact held and enjoyed in accordance with the documentary title.

Held, that the plaintiff had established his right to the several fishery claimed.—TIGHE *v.* SINNOTT, *M.R.* (*Ir.*).

FIXTURE:—

1. *Mortgagor and mortgagee—Gas-engine fixed to the soil—Intention of affixers, how far material—Right of owner, by contract with mortgagor, to remove engine—Mortgagee taking possession without notice of contract.*—A gas-engine which, for the purpose of convenient working, is fixed to a concrete bed by means of screws and bolts, becomes by such attachment a fixture and part of the soil. A mortgagee of the land is therefore entitled, on taking possession of the land, to take possession also of the engine, notwithstanding that the latter is the property of a third person, and that by an agreement in writing between that third person and the mortgagor (of which the mortgagee had no notice) the engine is not to become the property of the mortgagor.

Cumberland Union Banking Co. v. *Maryport Hematite Iron Co.*, 40 W. R. 280, [1892] 1 Ch. 415, questioned.

Wood v. *Hewett*, 8 Q. B. 913, and *Lancaster* v. *Eve*, 7 W. R. 260, 5 C. B. N. S. 717, discussed.—HOBSON *v.* GORRINGE, *C.A.*, 356.

2. *Tenant for life and remainderman—Mansion-house—Natural history museum—Stuffed birds and animals.*—Specimens of stuffed birds and animals which form part of a natural history collection in a museum built on to the mansion-house, are not fixtures so as to devolve with the freehold under the limitations of the settlement.—HILL (VISCOUNT) *v.* BULLOCK, *Ch.D. Kekewich, J.*, 587.

See also Executor, 5; Landlord and Tenant, 11.

FOOD.—See Adulteration, 2-4.

FOREIGN ENLISTMENT.—See Criminal Law, 5.

FRAUDS, STATUTE of:—

Absolute conveyance—Trust — Proof by parol evidence—Fraud—Laches—Delay—Frauds, Statute of, s. 7.—Certain estates in Ceylon to which the plaintiff was entitled subject to a mortgage were in 1873 sold by the mortgagees to the defendant, and were conveyed to him by a conveyance absolute in form.

Held (reversing the decision of Kekewich, J.), that upon the facts the defendant took the property as a trustee for the plaintiff.

Held, also, that, notwithstanding section 7 of the Statute of Frauds, it is competent for a person claiming land conveyed to another and alleging fraudulent breach of trust to prove by parol evidence that it was conveyed upon trust for the claimant.

Bartlett v. *Pickersgill*, 1 Eden 515, overruled.

Held, further, that, there being an express trust, mere delay by the plaintiff in seeking to enforce her rights was no bar to her claim.

Erlanger v. *New Sombrero Phosphate Co.*, 27 W. R. 65, 3 App. Cas. 1218, and *Lindsay Petroleum Co.* v. *Hurd*, 22 W. R. 492, L. R. 5 P. C. 221, discussed.—DE LA ROCHEFOUCAULD *v.* BOUSTEAD, *C.A.*, 272.

See also Contract, 5, 7; Guarantee, 1; Practice, 50; Vendor and Purchaser, 10.

FRIENDLY SOCIETY:

1. *Dispute—Expulsion of member—Jurisdiction of court—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 22—*Friendly Societies Act*, 1895 (58 & 59 *Vict. c.* 26), *s.* 10, *sub-section* 1.—Section 10, sub-section 1, of the Friendly Societies Act, 1895—which enacts that section 22 of the Friendly Societies Act, 1875, providing for the settlement of disputes between a member and the society in the manner directed by the rules of the society, shall apply to every dispute between any person aggrieved, who has for not more than six months ceased to be a member of a society, and the society—does not alter the nature of the dispute, but merely extends the time for settling disputes which come within section 22 of the Act of 1875. The dispute must still be one between the society and a member as a member.

Therefore a dispute whether the society is entitled to treat a person as no longer a member of the society is not a dispute to be settled according to the rules of the society, and the court has jurisdiction to to entertain such dispute.—PALLISER *v.* DALE, *C.A.*, 291.

2. *Dissolution—Infant members—Branch composed of minors—Governing committee—Friendly Societies Act*, 1855 (18 & 19 *Vict. c.* 63), *ss.* 9, 13, 15, 25, 27—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *ss.* 6, 15, *sub-section* 8; *s.* 25.—In 1873 a friendly society, called the "Loyal Social Design Lodge," instituted a society to be called the juvenile branch of the lodge, and drew up rules for it which were registered and certified. The society was to consist of persons between the ages of six and eighteen. By rule 3, it was to be "governed" by a committee of eight appointed by the lodge. It was provided by rule 21 that no rules should be altered without the consent of a majority of members present at a special meeting. The members having been reduced to six persons about sixteen years of age, one of the members and the fathers of the rest on their behalf, without the consent of the committee, signed an instrument for dissolution of the society and distribution of its funds under the Friendly Societies Act, 1855, s. 13, and the Friendly Societies Act, 1875, s. 25, and the dissolution was advertised. The trustees in whom the property of the society was vested brought an action to set aside the the instrument.

Held, that as the Act of 1875 preserved the rules of old societies so far as they were not contrary to the Act, rule 3 was still in force; that it was to be considered a fundamental rule of the society from which the members could not escape; that the members could not dissolve the society without the consent of the committee; and that the instrument of dissolution must be set aside.

Whether, if the infant members had power by themselves to dissolve the society by signing an instrument of dissolution, an instrument signed for them by their fathers, guardians, or agents would suffice, *quære.*—RUDD *v.* JAMES, *C.A.*

3. *Failure of objects — Unexpended fund*—Bona vacantia.—In 1810 a society consisting of honorary and ordinary members was formed for the purpose of providing annuities for the widows of deceased members. All the members and members' widows having died, and there being in the hands of the trustees unexpended funds of the society,

Held, that, upon the construction of its rules, the society was not a charity; that there was no resulting trust in favour of the representatives of deceased members; but that the Crown was entitled to the unexpended funds as *bona vacantia.*

Decision of Chitty, J. (43 W. R. 325, [1895] 1 Ch. 489), reversed.—CUNNACK *v.* EDWARDS, *C.A.*, 99.

See also Charity, 2.

GAMING:—

1. *Betting—House used for payment of bets made elsewhere—Betting House Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.—The use of a house by a person for the payment of bets made by him previously and elsewhere is not the using of the house for the purpose of betting with persons resorting thereto within the meaning of section 3 of the Betting House Act, 1853, as the payment of such a bet does not constitute the act of "betting" within the meaning of that statute.—BRADFORD *v.* DAWSON, *Q.B.D.* 347.

2. *Betting—Other place—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.—The respondent, a professional bookmaker, stood for several hours upon a certain spot near a hoarding on a piece of ground comprising about one-eighth of an acre, and surrounded on all sides by buildings or hoardings, and made bets with persons who came there.

Held, that the respondent was rightly convicted of using "a place" for the purpose of betting with persons resorting thereto under section 3 of the Betting Houses Act, 1853.—MCINANEY *v.* HILDRETH, *Q.B.D.*

3. *Betting—"Other place"—Enclosure on racecourse—User—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.—By the Betting Houses Act, 1853 (16 & 17 Vict. c. 119), s. 3, "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes" of betting with persons resorting thereto, is liable to a penalty.

The respondent, a professional betting man, was present in an enclosure known as Tattersall's Ring at Hurst Park Racecourse on the occasion of a race-meeting, and, by calling out the odds on horses, invited other persons to make bets with him, and did in fact make bets with other persons in the enclosure. The enclosure was about forty yards long and thirty yards wide, and was bounded on three sides by iron railings and on the fourth by a building which formed part of the enclosure. The respondent moved about within the enclosure, and did not confine himself to any particular spot. Upon an information preferred under section 3 of the Betting Houses Act, 1853,

Held, that the enclosure was a "place" used by the respondent for the purpose of betting with persons resorting thereto, and that the respondent was liable to a penalty under that section.—HAWKE *v.* DUNN, *Q.B.D.*, 359.

4. *Betting—"Other place"—Enclosure on racecourse — Bookmaker using enclosure — Betting Act*, 1853, *s.* 3.—Bookmakers carried on the business of betting in an enclosure on a racecourse to which they, along with other members of the public, were admitted by the owners on the same terms. The enclosure was about a quarter of an acre in extent. The bookmakers did not confine themselves to any fixed spot in the enclosure, nor did they use any apparatus such as a stool, desk, or tent, but each bookmaker was generally to be found in or about the same part of the enclosure.

Held, that the bookmakers were not within the meaning of section 3 of the Betting Act, 1853, using a place for the purpose of betting with persons resorting thereto.

Hawke v. *Dunn* (*ante*, p. 359) overruled.—POWELL v. KEMPTON PARK RACECOURSE CO., *C.A.*

5. *Common gaming house—User of house for unlawful gaming—Gaming Houses Act*, 1854 (17 & 18 *Vict. c.* 38), *s.* 4.—The defendant with three friends played for money at the defendant's house a game of cards called "German Bank," which the jury found to be an unlawful game. There was no evidence that they or anyone else had ever played an unlawful game of cards at the defendant's house on any other occasion; and there was evidence to show that the defendant's invitation to his friends to play on this occasion was a casual one.

Held, that the defendant could not be convicted under section 4 of the Gaming Houses Act, 1854, of using the house or room for the purpose of unlawful gaming being carried on therein.

Held, also, that the question whether a particular game of cards is or is not an unlawful game is not for the jury, but for the judge.—REG. v. DAVIES, *C.C.R.*

6. *Money paid in respect of wagering contract—Loan—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.—The defendant and another agreed to fight a boxing match for £500 a side, the money to be deposited with a stakeholder. The plaintiff, at the defendant's request, agreed to lend him £500 upon the terms that the money was to be repaid if the defendant won the match, but not otherwise. The plaintiff accordingly paid the £500 to the stakeholder for the defendant. The defendant won the match and received the stakes. In an action to recover the £500 as money lent,

Held, that the £500 was paid by the plaintiff in respect of a wagering contract within the meaning of the Gaming Act, 1892, and could not be recovered.—CARNEY v. PLIMMER, *C.A.*, 385.

GAS:—

Receivers and managers—Arrears during company's occupation—"Occupier"—Incoming tenant—Gasworks Clauses Act, 1847 (10 & 11 *Vict. c.* 15), *s.* 16—*Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 39—*Gas Light and Coke Co.'s Act*, 1872 (35 *Vict. c. cxxiii.*), *s.* 18.—By section 16 of the Gasworks Clauses Act, 1847, a gas company is empowered to stop the supply of gas to a consumer who shall neglect to pay the rent due for the same.

A mill company who had been supplied with gas by a gas company owed money for gas supplied. P. and S., having been appointed by the court receivers and managers of the mill company on behalf of the debenture-holders, applied to the gas company for a supply of gas as renters of the gas company, and undertook to pay for all gas consumed by them since the date of their appointment, but asked that the arrears might stand over to be dealt with by the liquidator of the company.

By virtue of section 18 of the gas company's private Act of 1872, in case a consumer should leave the premises where gas had been supplied without payment of the sum due from him, the company should not require from the next tenant payment of the arrears, unless the incoming tenant had agreed with the defaulting consumer to pay the arrears, or unless the incoming tenant should continue the trade or business of the outgoing tenant, and should have paid a consideration for so doing.

Held, that the rights of P. and S. as receivers and managers were merely those of custodians of the mill company's property; they were caretakers for the mill company, the owners, and stood in the same position to the gas company as the mill company; and therefore the gas company were within their rights in refusing a supply of gas until the arrears had been paid.

In re Smith, Ex parte Mason, 41 W. R. 159, [1893] 1 Q. B. 323, applied.—PATERSON, v. GAS LIGHT AND COKE CO., *C.A.* 39.

See also, Nuisance, 1.

GOODWILL.—See Contract, 6; Inland Revenue, 17; Partnership, 2.

GRAIN.—See Metropolis Management, 10.

GUARANTEE:—

1. *Contract—Memorandum in writing—Two documents—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4—*Construction—Assignment.*—In 1879 the defendants wrote to the plaintiff, by letter dated the 15th of September: "Burton, Balderson. Dear Sir,—We hereby guarantee the safety of the above investments"; and by letter dated the 16th of September: "We acknowledge to have received from you the sum of £710 as under: a mortgage on the estate at T. the property of Mr. Burton, £360; a mortgage on the estate at F., the property of Mr. Balderson, £350." The plaintiff A. advanced to Burton on mortgage of the estate at T. the sum of £360 through the defendants.

In 1891 the plaintiff A. conveyed and transferred to the plaintiff B., in consideration of £300, the benefit of the mortgage.

In 1896 the plaintiffs sued the defendants to recover the sum of £360 from them as guarantors of the mortgage.

Held, (1) that the two letters could be read together and were a sufficient memorandum of the contract within section 4 of the Statute of Frauds; (2) that the defendants guaranteed that the loan would be repaid; and (3) that the plaintiff B. could not sue upon the guarantee, and the plaintiff A. could recover only £60.—SHEERS v. THIMBLEBY, *C.A.*

2. *Contract—Misrepresentation—Pleading—Scotland, law of—Mercantile Law Amendment* (*Scotland*) *Act*, 1856 (19 & 20 *Vict. c.* 60), *s.* 6.—The pursuers alleged that the defenders' agent, knowing that D., R., & Co., customers of the defenders, were largely indebted to the defenders and were insolvent, conceived a fraudulent design of obtaining the pursuers' acceptances in favour of D., R., & Co., in order to apply them *pro tanto* in reducing D., R., & Co.'s debt to the defenders' bank. That in pursuance of this fraudulent scheme D., R., & Co. applied to the pursuers for accommodation, and referred them to the defenders' agent, who falsely assured the pursuers, first, that D., R., & Co. were in a thoroughly sound position financially and only required temporary accommodation; secondly, that the sum due to the defenders' bank was very trifling; thirdly, that D., R., & Co. had made up the losses which they had sustained through another company; and fourthly, that no portion of the proceeds of any acceptances by the pursuers would be applied in extinction of the bank's debt or of any obligation to them. That in reliance on these assurances the pursuers granted acceptances to D., R., & Co., which were applied to the credit of D., R., & Co.'s banking account with the defenders. D., R., & Co. were sequestrated, and the pursuers, as the bills fell due, were compelled to pay them. All the representations relied on were made orally.

Held (reversing the decision of the Second Division), that there was no cause of action; for as to the first three allegations, which undoubtedly came within the Mercantile Law Amendment (Scotland)

Act, 1856, the terms of section 6 of that Act being comprehensive and imperative that no oral representations made with the intent specified in the section should be of any legal effect, however false and fraudulent; and secondly, assuming that the fourth representation was independent of the statute, there was no relevant allegation that the bank did not give full effect to the alleged representation of their officer.—CLYDESDALE BANK *v.* PATON, *H.L.*

See also Bankruptcy, 25; Railway Company, 5.

HABEAS CORPUS.—See Practice, 33.

HACKNEY CARRIAGE.—See Metropolis Management, 9.

HEIRLOOMS.—See Settled Land, 8; Trustee, 10.

HERIOT.—See Copyhold.

HIGHWAY:—

1. *Extraordinary traffic—Person by whose order traffic conducted—Highways Act*, 1878, *s.* 23.—Where contractors have the direction and regulation of traffic upon a highway which they carry out by using traction engines, regulating the number of wagons attached to each engine and the weight of each wagon, and giving orders as to the time the vehicles shall start, they are persons "by whose order such weight or traffic has been conducted," within the meaning of section 23 of the Highways and Locomotives (Amendment) Act, 1878, notwithstanding that their employers indicate the time during which they will be ready to receive the goods which the contractors have undertaken to deliver.—COLCHESTER *v.* GLOUCESTERSHIRE COUNTY COUNCIL, *Q.B.D.*

2. *Extraordinary traffic—Person by whose order such traffic has been conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—The appellant was the owner of a house and park at which he was carrying out building and other operations. Before any materials were ordered by the appellant samples were submitted to him, and if approved the person proposing to supply the material was asked to quote a price for it delivered free at the park. Orders were then given from time to time to the person who was to supply the material to deliver it at the park in such quantities as were required, but before giving such orders there was no contract entered into for the supply of any specified quantity of materials, nor was the appellant bound to take any materials at all. The persons to whom the orders were given employed and paid traction-engine owners to haul the goods to the park. The appellant neither directed nor had any control over the mode of carriage of the materials, though he knew that the delivery would be by traction engines. The carriage of the materials along the road was extraordinary traffic within section 23 of the Highways and Locomotives (Amendment) Act, 1878, and damage was thereby caused to the road.

Held, by Lord Esher, M.R., and Rigby, L.J., Lopes, L.J., dissenting, that the appellant was not the person by whose order the traffic was conducted within the meaning of section 23, and was not, therefore, liable for the extraordinary expenses in repairing the road caused thereby.—GERARD (LORD) *v.* KENT COUNTY COUNCIL, *C.A.*, 531.

See also Nuisance, 1.

HONDURAS, BRITISH, LAW of:

Limitations, Statute of—Registered title—Adverse possession—Lands Titles Registry Act—Consolidated Laws of 1887, *c.* 106, *s.* 30; *c.* 19, *s.* 5.

Held, with regard to the British Honduras Consolidated Laws of 1887, that the provisions of the Limitation Act (c. 19) apply to lands held under a title registered under the Lands Titles Registry Act (c. 106); and that, consequently, twenty years' adverse possession extinguishes by force of section 5 of the former Act a title registered under the latter Act.—BELIZE ESTATE CO. *v.* QUILTER, *P.C.*

HOTCHPOT.—See Settlement, 4; Will, 12-14.

HUSBAND and WIFE.—See Divorce, 2; Married Woman, 4.

INFANT:—

1. *Custody—Talfourd's Act* (2 & 3 *Vict. c.* 54)—*Custody of Infants Act*, 1873 (36 & 37 *Vict. c.* 12)—*Guardianship of Infants Act*, 1886 (49 & 50 *Vict. c.* 27), *s.* 5.—Under section 5 of the Guardianship of Infants Act, 1886, the court has, after taking into account the various considerations mentioned in that section, full jurisdiction to override entirely the common law rights of a father in relation to the custody of his infant children.

In "having regard to . . . the conduct of the parents and the wishes as well as of the mother as of the father," the court will not treat the parents in an unequal manner or differently the one from the other, but will take the whole conduct and wishes of both parents into consideration.

The court will in a proper case give a mother the custody of her infant children, notwithstanding that the mother may have been guilty of matrimonial misconduct.—A. AND B., RE, *C.A.*

2. *Maintenance—Guardian and ward—Accounts.*—Where the mother is the sole guardian of the heir to large estates the sum allowed the mother for the upkeep of establishment and education of the heir ought to be such sum as prudent guardians would allow to her "as mother." To decide what is a reasonable sum all the circumstances of each case must be considered; the governing consideration being what is for the interest of the heir.

Whether the guardian of a minor heir is a relative or not, strict yearly accounts of the administration of the minor's property ought to be kept.—BARNES *v.* ROSS, *H.L.* (*Sc.*).

See also Bankruptcy, 19; Partition; Settled Land, 6; Solicitor, 4.

INJUNCTION:—

Practice—Crown, action on behalf of—Interlocutory injunction—Attorney-General—Undertaking in damages.—In granting an interlocutory injunction at the instance of the Attorney-General on behalf of the Crown, the court will not, as a general rule, require the Attorney-General to give the undertaking in damages usually required from an ordinary plaintiff as a condition of his obtaining such an injunction.—ATTORNEY-GENERAL *v.* ALBANY HOTEL CO., *C.A.*

See also Contempt; Contract, 4; Copyright, 3; Light; Metropolis Management, 13; Patent, 7, 8; Practice, 8, 43; Trade-Name, 1, 2.

INLAND REVENUE:—

1. *Account stamp duty—Voluntary disposition—Death of donor within twelve months—Incidence of duty—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *ss.* 38, 39—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11.—Account stamp duty in respect of property coming within the meaning of section 38 of the Customs

and Inland Revenue Act, 1881, is payable by the person delivering the account thereof required by section 39 of that Act, and not out of the estate of the deceased.—FOSTER, RE, THOMAS *v.* FOSTER, *Ch.D. Kekewich, J.*, 333.

2. *Estate duty—Exemption—Property settled by will or disposition—Property on which probate duty has been paid—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 21 (1).—By a marriage settlement personal property belonging to the wife was vested in trustees upon trust for the wife for life, and after her death for the husband for life, and after the death of the survivor upon trust for such persons as the wife should by deed or will appoint. The wife died before the commencement of the Finance Act, 1894, having by her will exercised the power of appointment in favour of certain beneficiaries. Probate duty was paid by her executors upon the value of the trust fund after deducting the value of the husband's life estate. On the death of the husband after the commencement of the Finance Act, estate duty was claimed by the Crown on the value of the trust fund.

Held, that the case came within the exemption from estate duty conferred by section 21, sub-section 1, of the Finance Act, and that the Crown was not entitled to estate duty in respect of the value on which probate duty had been paid.

Judgment of Vaughan Williams and Wright, JJ., *ante*, p. 476, affirmed. — ATTORNEY-GENERAL *v.* DODINGTON, *C.A.*, 657.

3. *Estate duty — Settlement — Apportionment — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 6-9, 14. —A settlor by a voluntary settlement in 1881 directed the trustees in certain events to set aside various sums out of the trust funds in their hands for the benefit of the settlor's daughters, to be held on trusts subsequently declared. On the respective marriages of his daughters these sums were settled upon them. The plaintiff was the trustee of the voluntary settlement, and was also the residuary legatee and executor of the settlor. On the settlor's death he had paid the estate duty on the whole of the funds comprised in the voluntary settlement.

Held, that he was entitled to recover from the persons taking the benefit of the various settled sums a proportionate amount of the duty paid.—MEYRICK, RE, MEYRICK *v.* HARGREAVES, *Ch.D. Chitty, J.*, 120.

4. *Estate duty—Settlement—Contingent life interest —Subsequent subsisting limitations—Property passing on death—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5.—By a marriage settlement the share of the wife in a certain trust fund, created by the will of her deceased father, was brought into settlement upon trusts to pay the income to the wife during the joint lives of herself and her husband, and after the death of either of them, then to pay the income to the survivor for life, and if the wife should survive her husband, and there should be no issue of the marriage, then upon trust for the wife, her executors, administrators, and assigns. There was no issue of the marriage, and the wife survived her husband, who died in 1895.

Held, that, on the death of the husband no estate duty was payable under sections 1 and 2 of the Finance Act, 1894, for that "subsequent limitations under the settlement continued to subsist" within section 5, sub-section 3, and therefore no property passed on the husband's death. — ATTORNEY-GENERAL *v.* WOOD, *Q.B.D.*, 663.

5. *Estate duty—Settlement estate duty—Contingent settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-section* 1 (a)—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 1.—A contingent settlement of property is a settlement within the meaning of section 5 (1) of the Finance Act, 1894, and the property so settled is liable to settlement estate duty under that section.

A testator devised his residuary estate to trustees upon trust to pay the income thereof to his wife during her life, and after her death in trust for all his children who being sons should attain the age of twenty-one, or being daughters should attain that age or marry under that age, in equal shares, and if there should be only one such child the whole to be in trust for that one child, and he directed that the trustees should retain the share of each daughter upon trust to pay the income thereof to her for her life, and after her death in trust for the children of such daughter. The testator died leaving at his death two sons and one daughter, all being under the age of twenty-one and unmarried.

Held, that settlement estate duty was payable under section 5 (1), not only upon the daughter's share, but also upon the whole residuary estate, as the whole was settled within the meaning of the section.—NEW'S TRUSTEE *v.* HUNTING, *C.A.*, 577.

6. *Estate duty—Tenant for life and remainderman —Value of estate—Deductions—Incumbrances created by tenant for life and remainderman under joint power of appointment—Annuities charged upon estate in favour of remainderman during life of tenant for life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7.—By the will of a testator who died in 1863 property was limited to trustees (subject to prior charges) upon trust for A. for life, with remainder to his sons in tail. By deed executed in 1887 A. and B. (the tenant in tail) barred the entail and reserved to themselves a joint power of appointment over the property, the limitations in default of the exercise of the power being to A. for life, with remainder to B. in tail. They then joined in creating mortgages by which in exercise of their joint power they appointed the fee simple of the property to the mortgagees to secure sums amounting at the death of A. to £230,000. Part of these sums was applied in redeeming existing incumbrances on the life estate of A. and otherwise for his benefit, the remainder being paid to or for the benefit of B. By a resettlement executed in 1888 the joint power of appointment was preserved, and certain annuities in favour of B. during the life of A. were charged upon the property, and subject thereto it was limited to A. for life, with remainder to B. for life, with remainders in tail. A. died in 1895.

Held, that, in determining the value of the property passing on A.'s death, the whole of the mortgage debt of £230,000 ought to be deducted, but that no deduction ought to be made in respect of the capital value of the annuities which ceased to be payable to B. on the death of A.

Section 7, sub-section (1), of the Finance Act, 1894, does not apply to cases falling under sub-section (7) (*b*) of the same section.—COWLEY (EARL) SETTLEMENT ESTATE DUTY, RE, *Q.B.D.*, 538.

7. *Estate duty—Will—Leaseholds specifically bequeathed—Specific bequest—General personal estate—Vesting — Executor — Assent—Assignment—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-section* 1.—Leaseholds specifically bequeathed pass to the executor as such, and consequently estate duty upon them is primarily payable out of the general personal estate of the testator, as they do not come

within the exception in section 9 of the Finance Act, 1894.

Leaseholds specifically bequeathed vest, upon the assent of the executor, absolutely in the specific legatees, and no deed of assignment by the executors is necessary.—CULVERHOUSE, RE, COOK *v.* CULVERHOUSE, *Ch.D. Kekewich, J.*, 10.

8. *Income tax—Building society—Borrowing members—Advances—Repayments—Interest and capital—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D.—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *ss.* 2, 10.—A building society received subscriptions from its investing members, and from the fund so raised advances were made to its borrowing members, secured by mortgage, and the advances were repaid to the society by instalments.

The Inland Revenue Commissioners claimed income tax under Schedule D. from the society on that portion of these repayments which represented the interest charged by the society on the respective loans.

Held, that the society was liable to pay income tax under Schedule D. upon the sums received by way of interest, although such sums were not "yearly" interest.

London County Council v. *Grove, ante*, p. 279, followed.—LEEDS BUILDING SOCIETY *v.* MALLANDAINE, *Q.B.D.*, 501.

9. *Income tax—County council—Interest received by county council on loans to other public bodies—Deductions*—16 & 17 *Vict. c.* 34, *Schedule D.*—The London County Council, under powers given them by various statutes, borrowed large sums of money and created stock on which they paid interest to the stockholders, income tax being deducted by the Bank of England on behalf of the Commissioners of Income Tax before such payment. The London County Council also, under powers given them by various statutes, advanced sums of money by way of loan to certain public bodies from whom they received interest in full without deduction of income tax. The London County Council were held liable by the surveyor of taxes to pay income tax on such last aforesaid interest, and he assessed them under Schedule D. On appeal to the Commissioners, and subsequently to the Divisional Court, but not when before the surveyor, the London County Council contended that if they were so liable they were entitled to certain deductions in respect of income tax paid by them in other transactions.

Held, that the London County Council were properly assessed, and that they were liable to pay income tax on the sums received by them in full without deduction of income tax by way of interest on loans made by them. This was the only question before the surveyor, and therefore the only question the court had jurisdiction to deal with, and any other transactions by the London County Council could not be taken into consideration.

Decision of the Divisional Court, 44 W. R. 599, affirmed.—LONDON COUNTY COUNCIL *v.* GROVE, *C.A.*, 279.

10. *Income Tax—Deduction—Assessment of profits or gains—Payment to retiring manager—"Sum employed as capital"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35) *s.* 100, *Schedule D., Cases* 1 *and* 2, *r.* 1.—Upon the transfer of an insurance business the transferees agreed to take into their service the transferors' manager at a fixed salary, with liberty to commute the same by payment to him of a gross sum to be calculated upon life tables. The transferees retained the manager's services for a short time and then paid him a gross sum in commutation of his salary. They claimed to deduct that sum in estimating their profits for income tax.

Held, that the agreement to pay the commutation money was in fact part of the consideration for the transfer of the business, that the payment was therefore a "sum employed as capital" and could not be deducted.

The decision of the Court of Appeal, [1896] 1 Q. B. 41, affirmed upon the above ground.—ROYAL INSURANCE CO. *v.* WATSON (SURVEYOR OF TAXES), *H.L.*

11. *Income Tax—Exemption—Public library—Urban authority—"Building the property of a literary or scientific institution"—Public Libraries Act*, 1892 (55 & 56 *Vict. c.* 53) *ss.* 4, 11, 12, 14—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *No. VI.*—The exemption from income tax granted by the Income Tax Act, 1842 (Schedule A., s. 61, No. VI.), to any building "the property of any literary institution" includes buildings appropriated to free public libraries and used solely for the purposes of the libraries, whoever may be the owners of the buildings, and whether they are or are not supported by rates.

So held with regard to the Manchester free public libraries, and the decision of the Court of Appeal, 43 W. R. 438, [1895] 1 Q. B. 673, reversed, Lord Halsbury, L.C., dissenting.—MANCHESTER (MAYOR, &C., OF) *v.* MCADAM, *H.L.*

12. *Probate duty—Foreign will—English company—Registration of transfer of shares to executor of testator—Executor* de son tort—"*Taking possession of and administering*"—55 *Geo.* 3, *c.* 184, *s.* 37—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 40.—A testator, the registered owner of shares and debentures in an English company, was domiciled and died in America. By his will, made according to the American law, these shares and debentures passed to his executors, who requested the company to transfer into their names on the register as holders, in place of the testator, one preference share, one ordinary share, and one debenture. The executors did not obtain probate of the will in England, nor did they intend doing so, and the company was aware of this. The transfer was duly registered in the books of the company in London.

Section 37 of 55 Geo. 3, c. 184, provides that if any person "shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased without obtaining probate of the will or letters of administration . . . within six calendar months" he shall be liable to penalties.

Held, that the company had not taken possession of and administered the deceased's estate within the meaning of that section, and that it had not so intermeddled with the estate as to constitute itself an executor *de son tort* and render itself liable to the penalty imposed by that section.—ATTORNEY-GENERAL *v.* NEW YORK BREWERIES CO., *Q.B.D.*, 606.

13. *Probate duty—Undistributed residuary estate of English testator—Residuary legatee—Foreign assets.*—A domiciled Englishman who died in 1892 (by his will which was proved in England by his executors who had an English domicil) bequeathed one-fourth of his residuary estate to his wife, who died in 1893, before her husband's estate had been fully administered. The one-fourth of the husband's residuary estate included money invested upon mortgages of real estate in New Zealand, which had not been specifically transferred or appropriated

to the wife's executors. The Crown claimed probate duty on the wife's one-fourth share in the New Zealand mortgage securities.

Held, that the right of the wife's executors was to have the administration of the husband's estate completed and to have one-fourth of the proceeds paid to them; that, consequently, the wife's interest in her husband's residuary estate was an English asset, and probate duty was payable in England by her executors on one-fourth of the value of the New Zealand mortgages.

Decision of the Court of Appeal, 44 W. R. 340, [1896] 1 Q. B. 354, affirmed.—SUDELEY (LORD) *v.* ATTORNEY-GENERAL, *H.L.*, 305.

14. *Stamp duty—Agreement—Weekly payments—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *Schedule.*—An agreement entered into by the owner and manager of an hotel provided that the manager should have the entire control of the business of the hotel, and should make certain weekly payments to the owner. The agreement was not for a specified time, but contained provisions for its determination by either party. It was stipulated that the agreement should not operate as a demise of the hotel to the manager, and should not constitute a partnership between the parties.

Held, that the agreement was security for an indefinite period for a sum of money payable at stated periods—viz., weekly—within the schedule to the Stamp Act, 1891, and that the sum chargeable with duty was the amount of the weekly payment, and not the total sum received yearly under the agreement.—CLIFFORD *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 14.

15. *Stamp duty—Annuity secured by bond—"Conveyance on sale"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 60, 87 (2), *Schedule* 1—*Mersey Dock Acts Consolidation Act*, 1858.—A dock company had statutory powers to borrow money for certain purposes, and "all money so borrowed by the board of directors was to be secured either by bonds or by annuities." The company having by deed granted a large number of annuities, the question was raised by the Commissioners of Inland Revenue at what rate the instruments by which they were secured to the annuitants should be charged with stamp duty under section 87 (2) of the Stamp Act, 1891, the annuity deeds having been presented to the Commissioners stamped as securities on an *ad valorem* duty of 2s. 6d. per cent. under the head "Mortgage, Bond, Debenture, Covenant, &c."

Held, that, as the annuities were payable for an indefinite period, and could only be redeemed or extinguished by the board purchasing them at the then market price, the deed securing such an annuity was in the nature of a "conveyance on sale" and not a bond to secure the repayment of an advance or loan to the company, and was therefore chargeable at the rate of 10s. per cent. as a contract of sale and purchase.—MERSEY DOCKS CO. BOARD *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*, 448.

16. *Stamp duty—Bond—Company—Reconstruction—New bonds—Secured by mortgage—Bonds to be certified by trustee under mortgage—Certificate signed in England—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82 (1), (*b*) (*i.*, *ii.*, *iii.*).—The A. T. and S. F. Railroad Co. being in arrear with the interest on their bonds, committees were appointed in L., N. Y., and A. to reorganize the company, the bondholders depositing their securities with an executive committee. Certain firms who were termed depositaries were to receive these old bonds for the committee, and give the depositor a certificate of deposit, for which when the time arrived the holders of such were to receive new bonds in the A. T. and S. F. Railway Co. In April, 1896, the new bonds were issued. These new bonds were secured by a general mortgage over all the property of the railway company in favour of the U. T. Co. of N. Y. as trustee for the bondholders. These bonds when issued were delivered to the U. T. Co., and each bond contained this proviso: "This bond shall not be valid for any purpose unless authenticated by the certificate hereon indorsed of the trustee under the said mortgage or deed of trust," and a trustee's certificate was indorsed on the back of each. These certificates were unsigned when the new bonds were delivered by the railway company to the U. T. Co. A certain number of these bonds were forwarded to Messrs. B., who were the depositaries in London, to enable them to make the exchange against certificates of deposit issued. Owing to the expense of insuring these new bonds it was arranged that the U. T. Co. should sign the trustee's certificate in London. Among the bonds which Messrs. B. received was the one now in question, which they delivered to the appellant J. B. in exchange for the certificate of deposit. The respondents were of opinion that the bond was issued in England within the meaning of the Stamp Act, 1891, s. 82, and assessed the duty at £1 1s., the value of the bond being £204 3s. 4d. J. B. appealed.

Held, that the respondents were right, for, as the bond was made operative and valid in England, it was properly said to be issued there.—BARING *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

17. *Stamp duty—Conveyance—Agreement for sale of goodwill and trade-marks—Business carried on abroad and in England—Trade-mark registered in England—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59.—An agreement under seal was entered into for the sale of a business carried on in the United States, including the goodwill of the said business and the trade-marks and names used in connection therewith, to purchasers in the United Kingdom. The vendors were manufacturers of soap in America, a large proportion of which they sold wholesale to a syndicate in England. The vendors were also owners of a trade-mark registered in and extensively advertised throughout the United Kingdom, whereby a demand for the soap had been created therein.

Held, that the goodwill and trade-mark were "property" within the meaning of section 59 of the Stamp Act, 1891, and not "property locally situate out of the United Kingdom" within the exception contained in that section, and that therefore so much of the consideration as represented the price paid for the said goodwill and trade-mark was chargeable with conveyance duty under section 59 of the Stamp Act, 1891.—BROOKE *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

18. *Stamp duty—Conveyance on sale—Contract for sale—Share in Colonial patent—Licence to use patent—"Property"—"Property locally situate out of the United Kingdom"—Doctrine of* ejusdem generis—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.—An agreement made in England for the sale of a share in a patent granted in New South Wales and of a licence to use the patent in a particular district of New South Wales is an agreement for the sale of an interest in property within the meaning of section 59, sub-section 1, of the Stamp Act, 1891, and is not within the exception of "property locally situate out of the United King-

dom." It is therefore chargeable with *ad valorem* duty.

Judgment of the Queen's Bench Division (Pollock, B., and Bruce, J.), *ante*, p. 61, affirmed.—SMELTING CO. OF AUSTRALIA *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 203.

19. *Stamp duty—Conveyance on sale—Exchange of shares*—Ad valorem *stamp—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 55, 73.—By an instrument entered into in pursuance of an agreement, a shareholder in one company transferred his shares to another company in exchange for certain shares in the latter company.

Held, that the transaction was a conveyance on sale of the shares under sections 54 and 55 of the Stamp Act, 1891, and that the instrument was therefore chargeable with an *ad valorem* stamp.—COATS, J. & P., *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

20. *Stamp duty—Debenture—Principal sum repayable with premium—Stamp Act*, 1891, *s.* 86, *Schedule I.*—A company issued a series of debentures of £100 each containing an undertaking by the company to pay each registered holder on a specified date "£100, together with a premium thereon at £7 10s." The debentures were marketable securities not transferable by delivery within the meaning of Schedule I. of the Stamp Act, 1891.

Held, that each debenture was a security for the payment of £107 10s., and was liable to *ad valorem* stamp duty on that amount.—ROWELL *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*

21. *Stamp duty—Marketable security—Bond of foreign company—Security "issued," "offered for subscription," or "assigned or transferred" in the United Kingdom—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (*b*).—An arrangement for reconstructing an English company and transferring its business, property, and liabilities to a new company formed in America provided that the debenture-holders of the old company should receive in lieu of their debentures bonds issued by the new company. The holders in London of a debenture of the old company lodged it with the London agent of the new company, who sent it to the officials of the new company in Chicago, and such officials presented it there to a trustee for the debenture-holders and received in exchange from him a bond which they sent to their agent in London, by whom it was given in London to the owners in exchange for their debenture.

Held, that this bond did not come within section 82, sub-section 1 (*b*), of the Stamp Act, 1891, as having been either "issued," "offered for subscription," or "assigned or transferred" in the United Kingdom.

Judgment of the Queen's Bench Division (Pollock, B., and Bruce, J.), *ante*, p. 138, affirmed.—CHICAGO RAILWAY TERMINAL ELEVATOR CO. *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 242.

22. *Succession duty—Account duty—Insurance—Life policy—Assignment—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2 *and* 17—*Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.—Some years before his death a father made a voluntary assignment of a policy of insurance on his own life to his daughter, and she afterwards paid the premiums; previously to the assignment the premiums were paid by the father. In 1890, on death of the father, the daughter received the money due under the policy.

Held, that the assignee was neither liable to succession duty nor account duty.—LORD ADVOCATE *v.* ROBERTSON, *H.L.* (*Sc.*), 674.

23. *Succession duty—"New succession"—Annuity—"Valuable consideration in money or money's worth"—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 17, 18.—A testator, a peer, by his will bequeathed his residuary estate to his widow for life, with remainder to his nephew, if living, but, if not, to the person who should then be the testator's right heir at common law absolutely. The nephew died without issue in the lifetime of the testator's widow, and the testator's nieces, having survived the widow, were then the testator's co-heiresses and right heirs at common law. The defendant succeeded to the title, and a deed of settlement was then executed, by which the widow assigned her life interest in certain shares, and the nieces and the defendant assigned all their interest under the will, subject to the life interest of the widow, to trustees upon trust, by clause 1, to pay out of the income (*inter alia*) an annuity of £15,000 during the widow's life to the defendant for life; and, by clause 2, after the death of the widow, out of the income "to continue to pay the said annuity of £15,000" to the person for the time being holding the title, with trusts over. Upon the death of the testator's widow legacy duty was paid on his estate, and the Crown claimed succession duty in respect of the annuity which the defendant then became entitled to receive under clause 2 of the deed.

Held, that the annuity under clause 2 was not the same as the annuity under clause 1, as the former was payable out of the estate of the nieces and the latter out of the life estate of the widow, the annuities being also limited in favour of different persons, and that therefore there was a "succession" within section 2 of the Succession Duty Act, 1853, in respect of the annuity under clause 2 of the deed; that the deed did not create an "alienation not conferring a new succession" within the meaning of section 15; that the deed was not a "contract made for valuable consideration in money or money's worth" so as to come within the exemption in section 17; and that the payment of legacy duty upon the testator's estate on the death of his widow did not bring the case within the exemption in section 18, as the legacy duty was not paid "in respect of the same acquisition of the same property."

Held, therefore, that the defendant was liable to pay succession duty.—ATTORNEY-GENERAL *v.* WOLVERTON (BARON), *C.A.*, 236.

24. *Succession duty—Partnership deed—Contract for valuable consideration in money or money's worth—Succession Duty Act*, 1851 (16 & 17 *Vict. c.* 51), *s.* 2.—A father admitted his son into partnership for a term of five years. The assets of the business were then valued at about £62,000, of which two-thirds was to be deemed the father's share, and one-third the son's; and one condition of the partnership was that in the event of the father dying within five years the son was to take the whole of the business and pay to the father's executors or administrators £10,000. By a contemporaneous deed the son agreed to pay to the father and his executors a rent-charge of £139 per annum in respect of the freehold property of the partnership.

The son brought no capital into the business, and the father died before the term of the partnership had expired.

The Inland Revenue Commissioners claimed succession duty from the son in respect of the then estimated value of the business, less the £10,000 to

be paid to the father's representatives, and less the son's one-third share of the business, on the ground that although in form the partnership arrangement was a sale of part of the business to the son, it was substantially a settlement by the father under which at his death the son benefited, the property being admitted worth more than £10,000 at that date.

Held, that, taking all the circumstances in consideration, the £10,000 to be paid by the son was a fair commercial value to place upon the business for the purposes of the partnership. The transaction could not be regarded, therefore, as in substance a "settlement," and the son was not liable to pay succession duty on acquiring the whole of the business on the death of his father.—ATTORNEY-GENERAL *v.* BROWN, *Q.B.D.*, 446.

See also Company, 16; Crown.

INNKEEPER:—

Duty to provide accommodation—Traveller—Right to remain in inn.—A common innkeeper is under no legal obligation to receive into his inn a person who is not a traveller, or to permit to remain in his inn, after reasonable notice to quit, a person who, though he came to the inn as a traveller, has ceased to be a traveller.—LAMOND *v.* RICHARD, *C.A.*, 289.

INSURANCE:—

1. *Accident—Contract—Renewal—Continuation of old contract—New contract—Policy money—Insolvency—Creditors' deed.*—Accident policy renewable yearly so long as the assured pays the specified premium in advance and the insurance company consent to receive it, and requiring the assured at each renewal to give notice of any change in his state of health since the payment of the last premium, with power for the company in such case to determine the policy,

Upon the payment of the premium for each year, an entirely new contract arises for that year only, and the amount payable under it on the accidental death of the assured in the current year for which a premium has been paid is not affected by any assignment or other obligation made or entered into by the assured in any previous year and not extending to after-acquired property.—STOKELL *v.* HEYWOOD, *Ch.D. Kekewich, J.*

2. *Burglary—Policy signed and sealed—Payment of premium—Condition precedent—Recital that premium had been paid—Estoppel—Waiver.*—On the 14th of December, 1895, the plaintiff signed a proposal form addressed to the defendant company for an insurance against loss by burglary, the form stating that no insurance would be considered in force until the premium was paid. The first premium was stated to be 9s. 11d., to the 1st of January, 1897, and 9s. 9d. annually afterwards. On the 18th of December a protection note was given to the plaintiff, reciting the proposal and declaring the plaintiff to be provisionally protected, subject to the conditions contained in the form of policy used by the company, for seven days from that date. The seven days expired on the 25th of December, and on the night of the next day the plaintiff suffered a loss by burglary. On the 27th of December, at a meeting of the directors of the company, who were ignorant of the loss, a policy was duly signed and sealed insuring the plaintiff from the 14th of December, 1895, to the 1st of January, 1897, the policy reciting that the first premium, 9s. 11d., had been paid, and one of the provisoes therein stated that no assurance by way of renewal or otherwise should be held to be effected until the premium due thereon should have been paid. No premium was ever paid, and the policy never left the company's office.

Held, that the company must be taken to have waived the prepayment of the premium, and that they were therefore liable on the policy.—ROBERTS *v.* SECURITY CO., *C.A.*, 214.

3. *Fire—Contract of indemnity—Remedies of assured against third parties—Right of insurer to subrogation—Renunciation of remedies by assured—Right of insurer to recover value of remedies renounced.*—A policy of fire insurance being a contract of indemnity, the insurer is entitled to recover from the assured, not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him and to which, but for such renunciation, the insurer would have a right to be subrogated.—WEST OF ENGLAND FIRE INSURANCE CO. *v.* ISAACS, *C.A.*

4. *Marine—Barratry of master—Master part-owner of ship—Barratry as against mortgagee of master's interest.*—An act of a master and part-owner of a ship, which would be barratrous as against his co-owners, is barratrous as against the mortgagee of his interest in the ship—SMALL *v.* UNITED KINGDOM MARINE MUTUAL INSURANCE ASSOCIATION, *C.A.*

5. *Marine—Capture—Total loss—Notice of abandonment—Recovery after action brought.*—A ship insured under a policy covering war risks was, whilst carrying contraband of war destined for one belligerent government, captured by a cruiser of the other. The shipowners thereupon gave the underwriters notice of abandonment, which was refused, and the shipowners brought an action on the policy.

The war coming to an end, the prize court of the captors ordered the ship to be returned to her owners.

Held, that the return of the ship after action brought did not disentitle the owners to recover as for a total loss.—RUYS *v.* LONDON ASSURANCE CORPORATION, *Q.B.D.*

6. *Marine—Freight—Commencement of risk—Time of engagement of goods—Loading port.*—By a policy on freight "at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" the freight was to be covered "from the time of the engagement of the goods."

Goods were engaged for the vessel which was to earn the freight, and were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America.

Held, by the Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), affirming the decision of Gorell Barnes, J., [1896] p. 154, that the "engagement" clause must be construed with reference to the voyage described in the policy, and, therefore, as the vessel had not arrived at her first loading port on the west coast of South America, the risk had not attached.—THE "COPERNICUS," *C.A.*

7. *Marine—Policy on freight—Exception—Claim consequent on loss of time—Delay caused by peril of the sea—Frustration of adventure.*—A policy of marine insurance against total loss of freight contained the following exception: "Warranted free

from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise."

While the ship was proceeding on a voyage under a charter, her main shaft broke by perils of the sea, and in consequence thereof she was delayed for so long a time as to frustrate the objects of the adventure, and the owners thereby lost their chartered freight. In an action by the owners against the underwriters,

Held, that the claim was within the warranty, and that the defendants were not liable.—BENSAUDE *v.* THAMES AND MERSEY MARINE INSURANCE CO., *C.A.*, 114.

8. *Marine—Premium—Liability of assured—Custom whereby broker is liable—Company's policy—Promise by assured to pay premium.*—The general custom in the business of marine insurance, whereby the broker and not the assured is liable to the underwriter for the premium, is not limited to the case of a Lloyd's policy, but applies also to the case of a company's policy containing a promise on the part of the assured to pay the premium.—UNIVERSO INSURANCE CO. OF MILAN *v.* MERCHANTS' MARINE INSURANCE CO., *C.A.*, 625

9. *Marine—Reinsurance—Description of voyage in policy—"To any port or ports, place or places, in any order"—"For thirty days after arrival at final port"—Meaning of.*—The plaintiffs effected a policy of reinsurance on a vessel with the defendants. The risk clause was "at and from Newcastle, N.S.W., to any port or ports, place or places, in any order, on the west coast of South America, and for thirty days after arrival in final port, however employed." The vessel sailed with a cargo from Newcastle, N.S.W., to Valparaiso, and there discharged the whole of it. She remained at Valparaiso for thirty days, and while there loaded partly with ballast and partly with sugar, the latter being part of her cargo for the United Kingdom. She then sailed for a port on the west coast of South America in order to take on board the remainder of her cargo, but while proceeding there she was stranded and became a total loss.

Held, that the words "final port" in the risk clause were not confined to the port of discharge, but included the final port of loading for the homeward voyage, and that the plaintiffs were therefore entitled to recover.—CROCKER *v.* STURGE, *Q.B.D.*, 271.

10. *Marine—Salvage—Absence of sea peril—Towage services—Award—Conclusiveness of judgment of Admiralty Division as to supervening of sea peril.*—The plaintiffs' ship, while insured by a time policy, sailed from port with an insufficient supply of coal, and by reason thereof she sailed in an unseaworthy condition. The coal having run short, she was towed by a trawler and a tug to her port of destination. There was no rough weather, neither did any accident or casualty happen to the ship. The Admiralty Division awarded salvage to the trawler and the tug. The plaintiffs having brought an action to recover from the underwriters the amount which they had been adjudged to pay,

Held, that the judgment of the Admiralty Division was not conclusive to show that some peril of the sea must have supervened; and that the plaintiffs were not entitled to recover.—BALLANTYNE *v.* MACKINNON, *C.A.*, 70.

11. *Marine—Warranty—Amount insured.*—A warranty in a time policy that a vessel shall not be insured beyond a named amount means that it shall not be effectively insured to a larger amount; such a warranty is not broken by the owner taking out a new policy to cover the probable deficiency upon a policy effected with an underwriter who becomes insolvent, although the total nominal amount insured is thereby made to exceed the amount limited by the warranty.

A time policy upon hull and machinery of a steamship valued at £12,000 contained a proviso, "Warranted £2,400 uninsured." The owner effected time policies to the total amount of £9,600, one of the policies being effected with a syndicate to the amount of £5,000. During the currency of the policies the syndicate stopped payment, and eventually the large majority of its members became insolvent. The owner, estimating that the syndicate policy was not effective for more than £2,000, took out further policies upon the ship for £3,000. The ship was lost, and the total amount that the owner could in the most favourable event recover upon all the policies was less than £9,600.

Held, that there had been no breach of the warranty.—TRIESTE GENERAL INSURANCE CO. *v.* CORY, *Q.B.D.*

12. *Securities—Contract to insure payment of debenture at maturity—Postponement of date of maturity by special resolution of debenture-holders—Liability of insurer.*—The plaintiff, the holder of a debenture in a company which matured for payment on November 4, 1895, effected a policy of insurance with the defendants which, after reciting that the debenture matured on that day and that the plaintiff had paid a premium for insurance until that date, guaranteed to the plaintiff the due payment of the principal money secured by the debenture, if the debtors should make default for more than three calendar months in payment of any principal money due "under the debenture." Subsequently, by a special resolution of the debenture holders, which was neither assented to nor dissented from by the plaintiff, the date for payment of the debentures of the company was postponed. The plaintiff's debenture was not paid off on November 4, 1895, nor in three calendar months after that date.

Held, that, assuming the special resolution to be valid, the contract was nevertheless one of insurance against the default of the company to pay the amount of the debenture on the original date; that there had been a default by the company to pay money due under the debenture within the meaning of the policy; and that the plaintiff was therefore entitled to recover the amount of the policy from the defendants, who were entitled on payment to be subrogated to the plaintiff's rights as modified by the special resolution.—FINLAY *v.* MEXICAN INVESTMENT CORPORATION, *Q.B.D.*

See also Bankruptcy, 33; Inland Revenue, 22.

INTEREST.—See Bankruptcy, 27; Settlement, 2; Will, 13.

INTERPRETATION ACT, 1889.—See Local Government, 17.

INTESTATES' ESTATES ACT:—

Escheat—Equitable interest—Proceeds of the sale of real estate directed to be sold under will—Beneficial interest ineffectually disposed of—Intestates' Estates Act, 1884 (47 & 48 *Vict. c.* 71), *ss.* 4, 7.—Under sections 4 and 7 of the Intestates' Estates Act, 1884, the law of escheat applies to proceeds of the sale of real estate directed to be sold under the will.—WOOD, RE, ATTORNEY-GENERAL *v.* ANDERSON, *Ch.D. Romer, J.*

See also Administration, 7.

JOINT TENANCY:—

Freeholds—Leaseholds—Severance on marriage of female joint tenant—Leases by one joint tenant and husband of other joint tenant.—The marriage of one of two female joint tenants is not in itself a severance of the joint tenancy as regards either freeholds or leaseholds. *In re Butler's Trusts*, 36 W. R. 817, 38 Ch. D. 286, followed as regards the leaseholds.

The grant of a lease by one joint tenant and the husband of the other joint tenant is not such a disposition of the property by the husband as to sever the joint tenancy. The rule laid down in *Robinson* v. *Preston*, 4 K. & J. 505, 6 W. R. Ch. Dig. 87, as to the purchase of property by two or more persons, followed.—PALMER *v.* RICH, *Ch.D. Stirling, J.*, 205.

JUSTICES:—

1. *Bias—Hearing of an application for renewal of licence—Circular sent to magistrates to attend.*—The justices of the Tower Division of the county of London refused to renew a licence to a certain public-house. Against their decision K., an aggrieved party, appealed to the Quarter Sessions. Prior to the hearing of the appeal the chairman of the Tower Bench issued a circular to all the magistrates of the county of London requesting them to attend on the day fixed for the hearing of the appeal, and informing them that on that day six appeals ralating to one licensed house in the Tower Division would be heard. The appeal was heard and dismissed. K. then obtained a rule *nisi* directed to the justices of the county of London, to show cause why their decision dismissing the appeal should not be set aside on the ground of bias.

Held, that, as the circular did not ask those justices who attended to vote in any particular way, and as no interested justices took part in the proceedings except as mere spectators, the proceedings were not vitiated, and therefore a *mandamus* ought not to issue commanding the justices to hear and determine the application.—REG. *v.* LONDON JUSTICES, KERFOOT, EX PARTE, *Q.B.D.*, 58.

2. *Jurisdiction—Poor Law—Rating—Enforcement of, by distress-warrant—"Occupation" of rated property.*—On a summons before justices to enforce a poor rate of a parish, the justices have jurisdiction, before issuing a warrant of distress, to inquire whether the person affected by the rate is in reality the principal person in occupation of the rated property.—REG. *v.* BAGSHAWE (DERBY JUSTICES), *Q.B.D.*

3. *Jurisdiction—Public Health—Local Government—Insufficient water-closet accommodation—Non-compliance with sanitary notice—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 37 (3).—The respondent was summoned before a magistrate for non-compliance with a notice served upon him by a sanitary authority under the Public Health (London) Act, 1891, s. 37, sub-section 3, requiring the respondent to provide additional water-closet accommodation at premises of which he was the owner.

Held, that the magistrate was bound by the decision of the sanitary authority that there was not sufficient water-closet accommodation at the respondent's premises; and that, on proof of non-compliance by the respondent with the notice, it was the duty of the magistrate to convict the respondent.—ST. JOHN, HACKNEY, VESTRY *v.* HUTTON, *Q.B.D.*, 92.

4. *Jurisdiction—Search warrant—Information—Reasonable suspicion of felony—Sufficiency of information.*—The information on which a search warrant for goods is applied for need not allege the actual commission of a larceny. It is sufficient if the information alleges, either directly or by fair intendment, that the informant has reasonable grounds for suspecting that a larceny has been committed.

The judgment of Lord Russell of Killowen, C.J., (*ante*, p. 112, [1896] 2 Q. B. 418), affirmed.—JONES *v.* GERMAN, *C.A.*, 278.

5. *Licensing law—Refusal to renew—Appeal to quarter sessions—Costs—"Party"—Jurisdiction to order objector to pay costs—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49) *s.* 31, *sub-section* 5. —A person, who had duly served notice of his intention to object to the renewal of a licence at the general annual licensing meeting, appeared before the licensing justices and opposed the renewal, which was refused. The licence holder appealed to quarter sessions, having served notice of appeal on the objector, and the licence was renewed. The objector did not appear on the appeal.

Held, that the objector was a "party" within section 31, sub-section 5, of the Summary Jurisdiction Act, 1879, and the quarter sessions had jurisdiction to order him to pay the costs of the appeal.

Reg. v. *Justices of Gloucestershire*, 41 W. R. 379, approved.—REG. *v.* KENT JUSTICES, *C.A.*, 4.

6. *Married woman—Appeal—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5, 11.—The only mode of appeal from the decision of a court of summary jurisdiction on an application made for an order under the Summary Jurisdiction (Married Women) Act, 1895, is under section 11 of that Act, to the Probate, Divorce, and Admiralty Division. A court of summary jurisdiction has no power in such a case to state a case for the opinion of the Queen's Bench Divisional Court.—MANDERS *v.* MANDERS, *Q.B.D.*, 287.

7. *Married woman—Summary jurisdiction—Application by wife for separation—Costs—County court—Jurisdiction — Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5.—Section 5, sub-section (*d*), of the Summary Jurisdiction (Married Women) Act, 1895, gives the court of summary jurisdiction power to make provision for the payment of the costs of either party upon an application under the Act by a married woman against her husband.

Held, that this provision gives the court of summary jurisdiction exclusive jurisdiction over these costs, and that no action can be maintained in a county court by a wife or her solicitor to recover these costs from the husband.—CALE *v.* JAMES, *Q.B.D.*, 317.

8. *Married woman—Summary jurisdiction—Maintenance—Desertion—Cohabitation—Parties not living under same roof—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.—There may be cohabitation without the parties necessarily living under the same roof.

A husband from time to time visited his wife, who was in service, and she had a child by him. She left service, and he refused to receive her, and said if she sent her boxes to the house where he was living they would be returned.

Held, that there had been cohabitation giving justices jurisdiction to hear a summons by the wife

for desertion under the Summary Jurisdiction (Married Women) Act, 1895.

Fitzgerald v. *Fitzgerald*, 17 W. R. 264, L. R. 1 P. & D. 697, and *Reg.* v. *Leresche*, 40 W. R. 2, [1891] 2 Q. B. 418, considered and explained.—BRADSHAW *v.* BRADSHAW, *P.D. & Ad.D.*, 142.

9. *Married woman—Summary jurisdiction—Persistent cruelty causing wife to live apart—Continuing offence—Limit of time—Six months—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 30), *ss.* 4, 8—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.—The offence of persistent cruelty or wilful neglect, causing a wife to leave and live separately and apart from her husband within the meaning of section 4 of the Summary Jurisdiction (Married Women) Act, 1895, is not a continuing offence, but is complete when the wife leaves the husband, and complaint must be made or information laid within six calendar months from that time, as required by section 11 of the Summary Jurisdiction Act, 1848, which is incorporated by section 8 of the first-named Act.—ELLIS *v.* ELLIS, *P.D. & Ad.D.*, 144.

10. *Prohibition—Jurisdiction—Railway Clauses Act*, 1863, *s.* 6—*Interpretation.*—Where the jurisdiction of justices depended upon a particular interpretation of a statutory offence under the Railways Clauses Acts, and the justices adjourned the hearing of a summons for such an offence for the question as to their jurisdiction to be determined, an application for a writ of prohibition against the justices is a just and convenient mode of procedure.

The offence of failing to erect and maintain a lodge or watchman at a level crossing over a turnpike road or public carriage road mentioned in section 6 of the Railways Clauses Act, 1863, applies to any turnpike road or public carriage road, and is not limited to such similar roads as are specifically mentioned in the special Act authorizing the construction of the particular railway.—REG. *v.* LONGE, *Q.B.D.*

See also Adulteration, 4; Common; Factory, 1; Master and Servant, 3; Metropolis Management, 12; Poor Law, 8, 9; Vaccination, 1, 2; Water, 2.

LANDLORD and TENANT:—

1. *Lease—Assignment by tenant—Landlord's licence to assign—Landlord requiring consideration for licence—Deposit of money to secure performance of a contract between landlord and tenant—"Fine, or sum of money in the nature of a fine, payable for or in respect of such licence"—Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.—Where by a lease the lessee is forbidden to assign the premises without the licence of the lessor, the lessor is, notwithstanding section 3 of the Conveyancing Act, 1892, entitled to require, as a condition of granting such licence, that the lessee shall deposit in his hands a sum of money by way of security for the completion of improvements which the lessee has agreed to make upon the premises; such a deposit not being a "fine or sum of money in the nature of a fine payable for or in respect of such licence" within the meaning of that section.—COSH'S CONTRACT, RE, *C.A.*, 117.

2. *Lease—Breach of covenant—Sufficiency of notice—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14 (1).—The notice "specifying the particular breach complained of" required to be served on a lessee under section 14 (1) of the Conveyancing Act, 1881, as a condition precedent to the enforcement of a right of re-entry or forfeiture, must not specify the breach complained of by reference merely to the particular covenant which has been broken, but must give sufficient details to enable the lessee to understand with reasonable certainty what he is required to do to remedy the breach.—FLETCHER *v.* NOKES, *Ch.D. North, J.*, 471.

3. *Lease—Building agreement—Power of landlord to determine—Option to tenant to purchase—Interest of tenant after exercise of option.*—A. entered into an agreement with B., by which B. was to build upon A.'s land, and A. was, upon the works being carried out, to demise the land to B. for ninety-nine years, and the agreement contained an option to B. to purchase the freehold. It was thereby provided (*inter alia*) that B. should forthwith proceed with the works, and completely finish on or before a certain day, and if B. should not perform the several agreements on his part, A. might determine the agreement and re-enter. A., being dissatisfied with B.'s progress, gave notice to B. to determine the agreement, B. having shortly before given notice to A. of B.'s intention to purchase.

Held, (1) that B. had made default in performing his part of the agreement; (2) that the option of purchase was, notwithstanding, well exercised; (3) that the contract so made did not in itself before completion put an end to the leasing parts of the agreement, but created fresh rights and liabilities between the parties, and the new relation of vendor and purchaser between them; (4) that assuming that A.'s notice to determine had put an end to B.'s rights so far as they arose directly from the building agreement, A. had not thereby put an end to the contract for sale or to B.'s rights thereunder; but (5) that after the exercise of the option, and pending completion, A.'s power, if any, to determine B.'s occupation, and B.'s rights and liabilities under the building agreement, became, as between A. and B., superseded and not enforceable.—RAFFETY *v.* SCHOFIELD, *Ch.D. Romer, J.*, 460.

4. *Lease—Company—Mining lease—Distress for rent—Express power to seize chattels of lessee on adjoining mine—Bill of sale—Registration—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 6—*Voluntary winding up—Debenture-holders' action—Priority of landlord to debenture-holders.*—A power in a lease of a coal mine, which has no separate shaft and can be worked only through a neighbouring colliery, authorizing the lessor to distrain for rent in arrear on chattels of the lessee upon "adjoining or neighbouring collieries" is not a bill of sale within the Bills of Sale Act, 1878.

A distress under such a power made on chattels of the lessee, a limited company, before the commencement of its winding up, and before judgment has been given in a debenture-holders' action or a receiver effectually appointed, is good as against the debenture-holders.

Decision of Stirling, J., *ante*, p. 217, reversed on this point.—ROUNDWOOD COLLIERY CO., RE, *C.A.*, 324.

5. *Lease—Contract by lessee to purchase reversion—Power of distraint pending completion.*—A lease is not determined at law by a contract by the lessee to purchase the reversion; but, in equity, the landlord's right to distrain is suspended pending completion of the contract, so long as the contract is subsisting and enforceable by action for specific performance; if, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain.—ELLIS *v.* WRIGHT, *C.A.*

6. *Lease—Covenant by lessee to pay all taxes, rates,*

and duties imposed in respect of the premises—Cost of new drainage—Liability of lessee.—By indenture of lease a tenant covenanted that he would "pay the land tax, sewers rate, and all other taxes, rates, duties, assessments, and impositions, parliamentary, parochial, or otherwise, which now are or shall at any time during this demise be assessed or imposed on, or in respect of, the said demised premises, or of the rent hereby reserved." The vestry of the parish having, under the provisions of the Public Health (London) Act, 1891, required the landlord to lay down new drainage on the demised premises, the latter executed the necessary works.

Held, that the landlord was entitled under the covenant to recover from the tenant the expenses the landlord had incurred in complying with the order of the vestry.—BRETT *v.* ROGERS, *Q.B.D.*, 334.

7. *Lease—Covenant by lessor to pay water rate—Water supplied for domestic use—Water supplied for trade purposes—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 3—*The New River Company's Act*, 1852 (15 & 16 *Vict, c. clx.*), *ss.* 35, 38, 40.—A covenant by the lessor of premises intended to be used as a café that he will pay all water rate "now or hereafter to be imposed or assessed upon the said premises, or on the lessor or lessees in respect thereof."

Held, not to apply to a sum payable by the lessees, in virtue of a special contract under section 40 of the New River Company's Act, 1852, for the supply of water for trade purposes.—FLOYD *v.* LYONS & Co., *C.A.*, 435.

8. *Lease—Covenant not to sub-let—Forfeiture—Relief—Protection of under-lessee—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.—The court has jurisdiction under section 4 of the Conveyancing and Law of Property Act, 1892, to grant relief to an under-lessee on forfeiture of the superior lease by the lessee, even where the forfeiture has been incurred by reason of the breach of a covenant not to assign without licence, against which breach no relief could have been obtained under the Conveyancing and Law of Property Act, 1881. But such relief will only be granted where the under-lessee can prove that he is blameless and has exercised all precautions which a reasonable, cautious, and careful person would use.

L. became assignee of a sub-lease of a term of twenty-one years less twelve days; the original lease contained a covenant not to assign or sub-let without consent. The sub-lease was made without consent, but L. had no actual notice of the covenant, and his contract did not give him a right to call for the title of the original lessee. L. laid out a large sum of money on the property.

Held, that L. was guilty of negligence in precluding himself from investigating his lessor's title, and was not entitled to relief against forfeiture incurred by the lessee through breach of covenant.—IMRAY *v.* OAKSHETTE, *C.A.*, 681.

9. *Lease—Covenant running with land—Covenant by lessee to buy exciseable liquors only from lessor or his assigns—Assign of lessee not named—Assign whether bound—Proviso for abatement of rent on observance of covenant—Assign of lessee whether entitled to benefit of covenant after lessor has assigned his wine and spirit business.*—A covenant by the lessee of a hotel (the assign of the lessee not being named) to buy exciseable liquors only of the lessor or his assigns runs with the land, and is binding upon the assign of the lessee. Such assign, therefore, if in fact he has bought exciseable liquors only of the assigns of the lessor's wine and spirit business, is entitled to the benefit of a proviso for an abatement of rent on due observance of the covenant.—WHITE *v.* SOUTHEND HOTEL Co., *C.A.*, 434.

10. *Lease—Mining lease—Compensation clause—Subsidence of surface—Injury to buildings—Damages.*—Mines were granted by deed, with a proviso that the grantee and his assigns should make reasonable compensation for all damage occasioned to the surface or to buildings thereon by reason of the working of the mines.

Held, that damage by subsidence was not covered by the proviso, and consequently that the grantee and his assigns were liable in an action for damages for injury done to the surface by subsidence.

Davis v. *Treherne*, 6 App. Cas. 460, followed.

A lessee of mines is not liable in damages to the owner of buildings on the surface who has acquired a right to have the buildings uninjured by underground workings, for injury occasioned to the buildings during the currency of the lease, but which in fact arose, not from any act of the lessee, but from an excavation made by the lessee's predecessor in title before the date of the lease.—GREENWELL *v.* LOW BEECHBURN COAL Co., *Q.B.D.*

11. *Mortgage—Tenant's fixtures — Removability—Rights of mortgagee in possession against owner of the fixtures.*—A landlord demised certain premises to the plaintiff, who during his tenancy erected certain tenant's fixtures thereon. Prior to the determination of the tenancy the landlord agreed to give the tenant, on the expiration of his tenancy, permission to leave his fixtures on the premises, with a view to their being purchased by the incoming tenant, or, in the event of their not being purchased, to enter and remove them. Subsequent to the erection of the fixtures by the plaintiff, but prior to the said agreement, the landlord mortgaged the premises to the defendants, who, after the determination of the plaintiff's tenancy, became mortgagees in possession. The defendants, who were not parties to the said agreement, and had no knowledge of it, refused to permit the plaintiff, after he had quitted the premises at the termination of his tenancy, to remove the fixtures, claiming that they were entitled to them under the mortgage deed. In an action for the delivery up of the fixtures, and for damages for their wrongful detention,

Held, that as the defendants were mortgagees in possession under a deed subsequent to the erection of the fixtures, the agreement between the landlord and the defendant could not affect their rights as to the fixtures under their mortgage deed.—THOMAS *v.* JENNINGS, *Q.B.D.*, 93.

12. *Negligence—House let in dangerous condition—Defective staircase—Injury to tenant's workman—Liability.*—There is no implied obligation upon the landlord of an unfurnished house towards his tenant not to let the house in a defective or dangerous condition. Consequently, the landlord is not liable in an action for negligence brought against him by the tenant for injuries sustained by reason of such defective condition; *a fortiori* the landlord is not liable in such an action brought against him by a workman employed by the tenant.—LANE *v.* COX, *C.A.*, 261.

13. *Notice to quit—Agreement for three years—Tenant from year to year—Commencement of tenancy.*—The defendant went into possession of certain premises under an agreement for three years by

which he agreed to pay a yearly rent of £50, such rent to commence as from the 9th of May, 1891, and the first half-quarter was to become due and payable on the 24th of June, and after that on the usual quarter days. At the end of the three years he stayed on, and continued to pay the rent quarterly as before. On the 28th of September, 1896, notice to quit was served on him for the 25th of March, 1897.

Held, that the notice to quit was bad, as the tenancy did not commence on the 25th of March.—SIMMONS *v.* UNDERWOOD, *Q.B.D.*

14. *Notice to quit—Yearly tenancy—Six calendar months—Notice given on customary half-year—Notice insufficient.*—In a lease for a yearly tenancy, determinable on the 13th of May in any succeeding year, it was expressly provided that six calendar months' notice to quit should be given by either side. In that part of the country (county Durham) it was admittedly the custom for tenants of small holdings to pay rent on the 22nd of November and on the 13th of May in each year; and notice to quit given after the 13th but before the 22nd of November was commonly accepted as a full six months' notice expiring on the 13th of May following.

On the 21st of November, 1895, a notice to quit on the 13th of May, 1896, having been served on the tenant under the lease above mentioned,

Held, that, notwithstanding the custom, the notice was invalid, it not being a six calendar months' notice as required by the terms of the lease.—TRAVERS *v.* MASON, *Q.B.D.*, 77.

15. *Underlease—Covenants to repair—Measure of damages.*—Where an under-lessee is liable to his immediate lessor for breach of his covenant to keep the demised premises in repair, all the circumstances must be considered and the damages assessed at such a sum as reasonably represents the damage which the covenantee has sustained. Should the under-lessee have notice that the underlessor is liable over to his superior landlord, that is one of the circumstances to be considered.

The official referee, in such a case, estimated the amount at the cost of doing the repairs, less an abatement for the term of years still to run in the underlease. The immediate reversion, on the expiration of the underlease, consisted only of a few days.

Held, that he had properly assessed the damages, and the fact that the orginal lessee might not have to repair as required in the head lease was not a matter which could be gone into.

Decision of the Court of Appeal, 44 W. R. 56, [1895] 2 Ch. 377, affirmed.—CONQUEST *v.* EBBETTS (EBBETTS *v.* CONQUEST), *H.L.*, 50.

LANDS CLAUSES ACTS:—

1. *Taking lands — part of building — Material detriment to remainder—New access to building—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68 —*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92 —*Manchester, Sheffield, and Lincolnshire Railway Act*, 1892 (56 & 57 *Vict. c. lxxix.*), *s.* 42—*Costs of special case—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 7, 20.—A railway company's special Act provided that the owners of houses or other buildings, whereof parts only were required for the purposes of the Act, might, if such portions could be severed from the remainder of such properties without material detriment thereto, be required to sell to the company the portions only of the premises so required, without the company being obliged to purchase the whole.

The railway company gave notice to treat for a portion of a factory. The notice to treat comprised a portion of land over which lay the only access for vehicles from the public highway to the factory. The sole purpose for which the railway would use the land was to build a viaduct to carry the railway, and sufficient access to the remainder of the land could be provided through an archway of the viaduct. At the arbitration the company contended that the provision of such access was an accommodation work which they would be bound to make under section 68 of the Railways Clauses Act, 1845; and, whether so bound or not, they undertook to make and maintain the access in question and to grant a perpetual right of way through the archway.

Held, that, in considering whether the portion proposed to be taken could be severed from the remainder without material detriment thereto, the arbitrator was entitled to take into consideration the obligation imposed upon the company under 68 of the Railways Clauses Act, 1845, to make and maintain accommodation works for providing access to the remainder of the land.

Held, also, by Lord Esher, M.R., and A. L. Smith, L.J., that, apart from section 68, the company had power to grant a perpetual right of way through the archway; and that therefore the arbitrator was entitled to take that into consideration.

The costs of a special case stated by an arbitrator appointed under the Lands Clauses Act, 1845, are now, by section 20 of the Arbitration Act, 1889, in the discretion of the court.

Holliday v. *Mayor, &c., of Wakefield*, 20 Q. B. D. 699, 36 W. R. Dig. 8, upon this point held to be no longer applicable.—GONTY AND MANCHESTER RAILWAY CO. ARBITRATION, RE, *C.A.*, 83.

2. *Compensation—Costs—Land compulsorily taken —Costs of arbitration—Offer made by company—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.—A railway company seeking to acquire land under the provisions of the Lands Clauses Consolidation Act, 1845, an arbitration took place under that Act to determine the amount of compensation to be paid by them to the owner of the land. The company had previously made an offer of the sum of £11,000. Part of the landowner's claim was in respect of damage that would be caused to the residue of his land, which was building land, by cutting it off from the natural outfall for its drainage. When the parties came before the arbitrator, it was agreed between them that a right should be reserved to the landowner of making a sewer, for the purpose of draining his land, under the railway and land of the company; and consequently no claim in respect of such damage as before mentioned was ultimately submitted to the arbitrator. The arbitrator awarded the sum of £10,029 to the landowner.

Held, that, although the sum awarded was less than the amount of the company's offer, the company were liable under section 34 of the Lands Clauses Consolidation Act, 1845, to pay the costs of the arbitration to the landowner, on the ground that the award was not in respect of the same subject-matter as that in respect of which the offer was made.—MILES *v.* GREAT WESTERN RAILWAY CO., *C.A.*

LEASE.—See Landlord and Tenant, 1-10; Mortgage, 6; Solicitor, 18, 19; Trustee, 4; Will, 21-23.

LIBEL:—

1. *Consolidation of actions — Actions against*

different defendants for same libel—Time for making order—Law of Libel Amendment Act, 1888 (51 & 52 *Vict. c.* 64), *s.* 5.—An order may be made under section 5 of the Law of Libel Amendment Act, 1888, consolidating actions by the same plaintiff against different defendants in respect of the same libel before the defences in the actions have been delivered.—STONE *v.* PRESS ASSOCIATION, *C.A.*, 641.

2. *Counter-claim for damages against informer.*—No counter-claim can be maintained by the publishers of a libellous work against a person informing the individuals libelled of the publication and who bring actions against the publishers resulting in the recovery of damages.—SAUNDERS *v.* SEYD CREDIT INDEX CO., *C.A.*

3. *Privileged occasion—Excess of privilege—Defamation—Malice.*—The appellant acted for some time as agent to an insurance company at his own offices. After some correspondence as to a change of terms upon which the parties could not agree the company's secretary sent to persons who insured through the appellant a circular stating that the agency of the appellant at his offices had "been closed by the directors." The appellant having brought an action for libel against the company the judge ruled that the statement was capable of a defamatory meaning, but that the occasion was privileged. The jury found a verdict for the plaintiff, that the statement was a libel, that it was untrue, and that the defendants had exceeded the privilege, but did not find actual malice.

Held, that judgment must be for the company, on the grounds that the statement was not capable of a defamatory meaning, that it was true, that the occasion was privileged, that the finding of the jury as to excess of privilege was insufficient, and that there was no evidence of malice for the jury.

The decision of the Court of Appeal, [1895] 2 Q. B. 156, affirmed.—NEVILL *v.* FINE ART AND GENERAL INSURANCE CO., *H.L.*

See also Practice, 29, 51.

LICENSING LAW:—

1. *Closing hours—Person found drunk on licensed premises during closing hours—Penalty—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 12.—A person who is found drunk on licensed premises during closing hours when the premises are actually closed to the public, and who is neither a lodger nor inmate in the house, may be convicted under section 12 of the Licensing Act, 1872, of "being found drunk on licensed premises," as such premises do not cease to be licensed premises when they are actually closed to the public during closing hours.—REG. *v.* PELLY, *Q.B.D.*, 504.

2. *Constable demanding admission to licensed premises—Private room—Refusal by keeper of licensed premises—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 16.—Section 16 of the Licensing Act, 1874, does not give a police-constable power to demand admission to a private room upon licensed premises, unless some reason is shown for supposing that violations of the Act are being, or are about to be, committed.—DUNCAN *v.* DOWDING, *Q.B.D.*, 383.

3. *Conviction—Selling liquor without a licence—Protection order—Licensing Act*, 1872, *s.* 3.—The licence-holder of certain licensed premises remained on the premises and continued to sell liquor after a protection order had been granted in respect of the premises to another person.

Held, that the licence-holder was not liable to conviction for selling liquor without having a licence under section 3 of the Licensing Act, 1872.—ANDREWS *v.* DENTON, *Q.B.D.*, 500.

4. *Licence — Intoxicating liquors — Exemption—Children of soldiers who served in Peninsular War—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—56 *Geo.* 3, *c.* 67.—The benefit granted by 56 Geo. 3, c. 67, to the children of the officers and men who served his Majesty in the Peninsular War to set up and exercise a trade "in any city, town, or place within this country, without let, suit, or molestation, notwithstanding any statute, law, ordinance, custom, or provision to the contrary," does not exempt this class of persons from the provisions of the general public statutes, but has reference only to customs, charters, bye-laws, and the like, existing in particular localities.

Held, therefore, that K., the son of a soldier who had served in the Peninsular War, was properly convicted for having sold intoxicating liquors without obtaining a licence as required by section 3 of the Licensing Act, 1872.—KILLIN *v.* SWATTON, *Q.B.D.*, 235.

5. *Sale during prohibited hours*—Bonâ fide *traveller—Consumption off the premises—Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *ss.* 9, 10.—The provisions of section 10 of the Licensing Act, 1874, as to the sale of intoxicating liquor to a *bonâ fide* traveller during prohibited hours do not exempt a licensed victualler from being convicted under section 9 for selling intoxicating liquor during prohibited hours if the sale was for consumption off the premises; and it is no defence in such a case that the defendant truly believed that the person supplied with liquor was a *bonâ fide* traveller. — MOUNTIFIELD *v.* WARD, *Q.B.D.*, 288.

See also Vendor and Purchaser, 8.

LIGHT:—

Access — Photographic studio — Injunction—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—A photographer is entitled to the uninterrupted access of such a light as will enable him to enjoy his studio for photographic purposes, and his right will not be affected by the fact that he has not enjoyed the light required for that particular purpose for the period of twenty years.—LAZARUS *v.* ARTISTIC PHOTOGRAPHIC CO., *Ch.D. Kekewich, J.*, 614.

See also Limitations, Statute of, 2; Vendor and Purchaser, 1.

LIMITATIONS, STATUTE of:—

1. *Joint debt—When time begins to run—Rights of co-debtors* inter se.—As between co-debtors the Statute of Limitations begins to run, not from the accrual of the joint debt to the creditor, but from the time when one of the co debtors is damnified by being compelled to pay more than his just share of the common debt. Section 14 of the Mercantile Law Amendment Act, 1856, is intended only to give protection against the common creditor, and does not affect the rights and liabilities of the co-contractors *inter se.*

Wolmershausen v. *Gullick*, [1893] 2 Ch. 514, approved.—GARDNER *v.* BROOKE, *C.A.* (*Ir.*).

2. *Light — Obstruction — Administrator — Injury committed by deceased person—Continuing injury—* 3 & 4 *Will.* 4, *c.* 42, *s.* 2.—Where a person more than six months before his death erected a building which obstructed the plaintiff's ancient lights, and the plaintiff within six months of the grant of administration of the deceased person's estate, but more than six months after the death, brought an action against the defendants as administrators of the estate,

Held, following *Woodhouse* v. *Walker*, 28 W. R. 765, 5 Q. B. D. 404, that the action might be

maintained, and was not barred by section 2 of 3 & 4 Will. 4, c. 42.—JENKS v. CLIFDEN (VISCOUNT), *Ch.D. Kekewich, J.*, 424.

3. *Mortgage—Conveyance subject to mortgage—Person claiming under a mortgage—Real Property Limitation Act*, 1837 (7 *Will.* 4, *c.* 28)—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 2.—In 1886 the owner of an undivided moiety of land which for the previous eleven years had been in the possession of the owner of the other moiety, mortgaged his moiety, and in 1890 conveyed his moiety, subject to the mortgage, to the plaintiff, the land still continuing in the possession of the owner of the other moiety. The plaintiff subsequently paid off the mortgage, and in 1896 brought an action to recover possession of the moiety.

Held, that the plaintiff on paying off the mortgage did not become a "person claiming under a mortgage" within the meaning of 7 Will. 4, c. 28, and that that Act does not confer a new right of entry on the mortgagee where, at the date of the mortgage, the land is held adversely to the mortgagor by another person in whose favour the statute has, at the date of the mortgage, already begun to run against the mortgagor.—THORNTON v. FRANCE, *C.A.*

4. *Settlement—Power of appointment—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 1-3, 20—"*Person through whom another person is said to claim*"—"*Appointee*"—"*Other estate, interest, right, or possibility*"—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2, 9.—A tenant from year to year, under a verbal agreement, of settled land remained in possession for more than twelve years from 1876 without paying rent or giving any acknowledgment. Under the settlement the land was limited to A. for life, remainder to B. for life, remainder to such uses as A. should by deed or will appoint. This power of appointment was exercised by A.'s will. A. was barred shortly before his death. B., who succeeded A., died without having recovered the land in 1891. On an application to determine whether the estate of A.'s appointees, which thereupon came into possession, was barred,

Held, that the limitation to the appointees must be read into the settlement which created the power; and, applying the principle laid down by Tindal, C.J., in *James* v. *Salter*, 3 Bing. N. C. 544 (p. 553), that the case fell within the latter part of section 2 of the Real Property Limitation Act, 1874, and that B. being the person last entitled to a particular estate, and not being in possession or receipt of the profits of the land when his interest determined by his death in 1891, the appointees had a further period of six years from that time to bring their action; and therefore that their estate was not barred.

The words "other estate, interest, right, or possibility" in section 20 of the Real Property Limitation Act, 1833, and the word "appointee" in section 1 of the same Act, discussed and considered.—DEVON (EARL) SETTLED ESTATES RE, WHITE v. DEVON, *Ch.D. Chitty, J.*, 25.

See also Bankruptcy, 12; Company, 11; Estoppel; Executor, 1; Railway Company, 1; River, 1; Solicitor, 3; Trustee, 2, 9.

LOCAL GOVERNMENT:—

1. *Arbitration—Paving expenses—Apportionment—Award of arbitrator—Remedy of local authority—Proceedings to enforce award—Jurisdiction of High Court—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.—An award of an arbitrator under section 150 of the Public Health Act, 1875, fixing the proportion of paving expenses payable by an owner of premises to the local authority is not enforceable under section 12 of the Arbitration Act, 1889.—WILLESDEN LOCAL BOARD v. WRIGHT, *C.A.*

2. *Building plans—Refusal by district council to sanction—Action of* mandamus.—An action of *mandamus* will not lie against a district council to compel them to approve building plans which they have *bonâ fide* in the exercise of their discretion refused to approve.—SMITH v. CHORLEY DISTRICT COUNCIL, *C.A.*, 417.

3. *Bye-law — Old building — Reasonableness — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 157—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 23.—Under section 157 of the Public Health Act, 1875, as amended by section 23 of the Public Health Acts Amendment Act, 1890, rural sanitary authorities are empowered to make bye-laws with regard to (*inter alia*) cesspools in connection with buildings.

Held, that it was no defence to a summons for contravention of such a bye-law that the building in question had been erected before an order had been made by the Local Government Board under section 276 of the Public Health Act, 1875, extending the powers of section 157 to the rural sanitary authority.

The bye-law provided that a cesspool to be constructed in connection with a building should be at least 50 feet distant from a dwelling-house or building in which persons were employed.

Held, that the bye-law was reasonable.—SIMMONS v. MALLING DISTRICT COUNCIL, *Q.B.D.*, 603.

4. *County council—Bye-law—Validity—Prohibition of use of profane or obscene language—Bye-law made "for good rule and government," and "for prevention and suppression of nuisances"—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16.—The respondent was charged under a bye-law made by a county council under section 16 of the Local Government Act, 1888, which was as follows: "No person shall, in any house, building, garden, land, or other place, abutting on, or near to, a street or public place, make use of any violent, abusive, profane, indecent, or obscene language, gesture, or conduct, to the annoyance of any person in such street or public place."

The facts were sufficient to justify a conviction if the bye-law was valid, but the justices declined to convict.

On a case stated,

Held, that the bye-law was made for "good rule and government," and "for prevention and suppression of nuisances," within the meaning of section 23 of the Municipal Corporations Act, 1882, and therefore was valid under section 16 of the Local Government Act, 1888, and the respondent ought to be convicted.—MANTLE v. JORDAN, *Q.B.D.*

5. *Drainage—Single drain connecting different houses with public sewer—Liability to repair—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.—In an urban district in which Part III. of the Public Health Acts Amendment Act, 1890, had been adopted several houses belonging to different owners were connected with the public sewer by a single drain, constructed previously to the adoption of that Act.

Held, that the drain was a "single private

drain" within the meaning of section 19 of the Public Health Acts Amendment Act, 1890, and that the local sanitary authority were entitled to recover from the owner of one of the houses his proportion of the cost incurred by them in re-laying the drain.

Self v. *The Hove Commissioners*, 43 W. R. 300, [1895] 1 Q. B. 685, followed.

Hill v. *Hair*, 43 W. R. 651, [1895] 1 Q. B. 906, disapproved.—EASTBOURNE (MAYOR) *v.* BRADFORD, *Q.B.D.*, 31.

6. *Drainage—Surface water from road—Right to discharge into natural watercourse—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 16, 17, 308.—The plaintiffs were the owners of an estate in the neighbourhood of a certain town, part of which estate was laid out for building, and which included a portion of the course of a small stream. Three roads upon this estate, situated within the natural watershed of the stream, and originally laid out by the plaintiffs, had been taken over by the defendants, the urban district council, after they had constructed a system of drains and sewers for them under the powers of the Private Streets Works Act, 1892. In the scheme originally proposed by the defendants the surface water from these roads was allowed to flow into the sewers; but, the Local Government Board having refused to sanction any scheme which did not provide a separate system for carrying off the surface water, the defendants had provided such a system by drains which discharged the surface water into the stream. The defendants' drains were furnished with catch pits, the best known method of intercepting sand and silt. The plaintiffs nevertheless objected that the water so discharged carried with it a great quantity of sand, silt, and other solid matter washed off the roads, and was much more in quantity than would have naturally flowed into the stream, and that its discharge into the stream would injure the plaintiffs by causing floods and silting up the stream. They accordingly brought an action to restrain the defendants from permitting any water, sand, silt, or other solid matter to flow through their drains into the stream.

Held, that sections 15, 16, and 17 of the Public Health Act, 1875, authorized the defendants in doing what the plaintiffs complained of; and that the plaintiffs must be content with the remedy by way of compensation afforded by section 308.—DURRANT *v.* BRANKSOME DISTRICT COUNCIL, *C.A.*

7. *Member having personal interest in subject-matter of proceedings—Local Government Act*, 1894, *s.* 46.—The fact that one of the members of a public body has a personal interest in the subject-matter of the proceedings will not vitiate the acts of such body unless it be sitting in a judicial capacity.

A local board fulfilling the duties cast on them by the Local Government Act, 1894, s. 26 (1), is not sitting in a judicial capacity.—MURRAY *v.* EPSOM LOCAL BOARD, *Ch.D. Stirling, J.*, 185.

8. *Nuisance—Abatement—Action by local authority—Consent of Attorney-General—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 107.—Proceedings by a local authority under section 107 of the Public Health Act, 1875, to enforce the abatement of a nuisance from which the local authority suffers no damage, can only be taken with the consent of the Attorney-General.

Wallasey Local Board v. *Gracey*, 35 W. R. 694, 36 Ch. D. 593, approved.—TOTTENHAM URBAN DISTRICT COUNCIL *v.* WILLIAMSON, *C.A.*

9. *Nuisance—Railway company—Manure carried by—Unloading of at station—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *s.* 107.—The Great Northern Railway Co. carried for delivery to customers, and loaded and unloaded, manure at their station at Lurgan. The local authority obtained an order from the justices under section 107 of the Public Health (Ireland) Act, 1878, prohibiting the company loading or unloading the manure at any part of their station or line that was less than one hundred yards from any dwelling-house.

Held, that this did not constitute a nuisance within the Act, and that the order of the justices was wrong.—GREAT NORTHERN RAILWAY CO. *v.* LURGAN TOWN COMMISSIONERS, *Q.B.D.* (*Ir.*).

10. *Nuisance — Sewer — Diversion of.*—A local authority in exercise of their statutory powers diverted the sewage of one drain or sewer into another. The other sewer was already surcharged with sewage, and damage was thereby occasioned to an individual occupier.

Held, that the act of the local authority was not a mere omission to perform their statutory duties, but a committing of a legal wrong; and that the individual injured thereby had a good cause of action for damages.—DENT *v.* BOURNEMOUTH CORPORATION, *Q.B.D.*

11. *Paving expenses — National school — Charge upon the premises—Enforcement of charge by sale or mortgage—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.—The trustees of a National school, the site of which had been conveyed to them under section 6 of the School Sites Act, 1841, are liable as "owners" under section 4 of the Public Health Act, 1875, to be charged with the expenses of making up roads adjoining their land; and until payment such expenses are a charge upon the premises under section 257 of the same Act.

So held, affirming the decision of Kekewich, J., *ante*, p. 231.

But such charge cannot be enforced by sale or mortgage of the premises.

So held, reversing the decision of Kekewich, J., *ante*, p. 231.—HORNSEY DISTRICT COUNCIL *v.* SMITH, *C.A.*, 581.

12. *Public Health—Farmer keeping cows on his premises — "Cowkeeper" — Licence from County Council—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 20, 141.—A person who, being the occupier of a farm within the county of London, keeps upon his premises cows, the milk of which is used not for sale, but for fattening calves, is not a "cowkeeper" within section 141, and therefore not a "dairyman" within section 20, of the Public Health (London) Act, 1891, and, consequently, does not require a licence from the London County Council for the keeping of such cows.—UMFREVILLE *v.* LONDON COUNTY COUNCIL, *Q.B.D.*

13. *Public health—Drain or sewer—Single drain draining several houses—Liability of corporation to repair—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 41—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.—The owner of several houses, each draining into a common drain at the rear of the houses and thence at one end into the public sewer in the road, applied for a *mandamus* to the corporation to repair and maintain the said drain as being a sewer. No application had previously been made to them under section 41 of the Public Health Act, 1875, on complaint of the existence of a nuisance.

Held, that the corporation was liable to repair

and maintain the drain, and that their general liability under section 15 of the Public Health Act, 1875, to keep in repair all sewers belonging to them was not taken away by section 19 of the Amendment Act of 1890, which extends section 41 of the Act of 1875, and which was adopted by the corporation in their local Acts.

Held, further, that, as a general rule, in such cases as this, a *mandamus* was not the proper remedy, but that complaint should be made to the Local Government Board under section 299 of the Public Health Act, 1875.—REG. *v.* HASTINGS (MAYOR OF), *Q.B.D.*, 109.

14. *Public health—Paving charges—Duty imposed by Act of Parliament—Trespass—Memorial to Secretary of State—West Hartlepool Extension and Improvement Act*, 1870 (33 & 34 *Vict. c.* 113), *ss.* 80, 349—*Public Health Act*, 1875, *s.* 268.—Where the Legislature has imposed on any persons duties the discharge of which requires entry on lands, these duties are imposed irrespective of the ownership of the lands in question, and acts done in due discharge of such duties do not constitute a trespass.

The judge, being of opinion that under the circumstances of the case the defendant had a grievance on account of certain charges made against him for paving and sewering streets,

Held, following *Walthamstow Local Board* v. *Staines*, [1891] 2 Ch. 606, 40 W. R. Dig. 131 (which was decided on section 268 of the Public Health Act, 1875, with which section 349 of the local Act was practically identical), that the proper course for the defendant was by way of appeal to the Secretary of State by memorial for relief.—WEST HARTLEPOOL (MAYOR) *v.* ROBINSON, *Ch.D. Stirling, J.*, 312.

15. *Public health—Sewers—Duty of local authority to drain district—Remedy for default*—Mandamus—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 299.—The obligation imposed on a local authority by section 15 of the Public Health Act, 1875, to make such sewers as may be necessary for draining their district cannot be enforced by *mandamus*, the only remedy being that provided by section 299—viz., by complaint to the Local Government Board.

Robinson v. *Mayor, &c., of Workington, ante*, p. 453, followed.—PEEBLES *v.* OSWALDTWISTLE URBAN DISTRICT COUNCIL, *C.A.*, 454.

16. *Public Health—Sewers—Sewers not sufficient to drain district—Special damage—Action against local authority—Statutory remedy—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 299.—Where a local authority has neglected to make such sewers as are necessary for effectually draining their district, and special damage is thereby caused to an individual, no action will lie against them, the sole remedy being by complaint to the Local Government Board as provided by section 299 of the Public Health Act, 1875.—ROBINSON *v.* WORKINGTON (MAYOR OF), *C.A.*, 453.

17. *Public Health—Sewers—Street—Statute, Repeal of—Adoption of repealing Act—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 151, 257—*Notice under section* 150—*Effect of adoption of Private Streets Works Act*, 1892, *after a notice has been given under section* 150 *of the Public Health Act*, 1875.—Notices under section 150 of the Public Health Act, 1875, requiring the owner of a house to sewer and make up the street in which his premises are situated, are valid if duly given while that Act is in operation, and can be enforced notwithstanding that before the works required are actually done the local authority has adopted the Private Streets Works Act, 1892, section 25 of which excludes the operation of section 150 of the Public Health Act.

Decision of North, J., *ante*, p. 612, affirmed.—HESTON DISTRICT COUNCIL *v.* GROUT, *C.A.*, 697.

18. *Public health—Tenant for life—Remainderman—Expense of sanitary repairs—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 11, 117, 121.—The expenses of sanitary repairs ordered by the local authority under the Public Health (London) Act, 1891, are payable out of *corpus*, and are not borne by the tenant for life.—LEVER, RE, CORDWELL *v.* LEVER, *Ch.D. Stirling, J.*, 172.

19. *Public health—Service of notices by post—"Prepaid letter"—Evidence of service—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 257, 267.—In order to prove that notices have been duly served by post under section 267 of the Public Health Act, 1875, it is not sufficient for the evidence adduced to show that the letter containing the notice "was properly addressed and posted"; it must also show that the letter was prepaid.—WALTHAMSTOW DISTRICT COUNCIL *v.* HENWOOD, *Ch.D. Kekewich, J.*, 124.

20. *Sewer—Street sewers—New street—Main outfall sewer—Expense of constructing—Building plans—Refusal of local authority to approve—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 150, 157, 277.—An owner of land in a rural sanitary district, who proposed to lay it out as a building estate and to erect on it blocks of houses arranged in streets, deposited with the local authority plans of the proposed buildings, from which it appeared that each of the houses was to be drained with a separate drain ending in the middle of one of the proposed new streets. The local authority refused to approve the plans unless the owner would undertake to construct at his own expense the sewers with which the drains were intended to communicate, and also the necessary main outfall sewer,

Held, affirming the judgment of the Queen's Bench Division, 44 W. R. 646, [1896] 2 Q. B. 219, that the local authority were not entitled to attach such a condition to their approval.—REG. *v.* TYNEMOUTH RURAL DISTRICT COUNCIL, *C.A.*

21. "*Street*" — *Urban authority — Vesting of "street" in urban authority—Subsoil—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 39, 149.—The Public Health Act, 1875, which by section 149 vests certain streets in the urban authority, does not vest the subsoil.

Therefore, where a local Act authorized the urban authority to erect and maintain "in any street or public place, or on land belonging to them or under their control," lavatories for the use of the public,

Held, that the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them within the meaning of the Public Health Act, 1875.

The decision of the Court of Appeal, [1894] 2 Q. B. 867, affirmed.—TUNBRIDGE WELLS (MAYOR) *v.* BAIRD, *H.L.*

See also Criminal Law, 2; Justices, 3; Water, 3.

LONDON BUILDING ACT, 1894.—See Metropolis Management, 1-4, 6.

LUNACY:—

1. *Committee out of jurisdiction—Appointment—*

CORRECTION.—*Ante*, column 66, "INLAND REVENUE. 5. *Estate duty*"—for "NEW'S TRUSTEE *v.* HUNTING, *C.A.*, 577," read ATTORNEY-GENERAL *v.* FAIRLEY, *Q.B.D.*, 589.

Security.—A lunatic widow had real estate in Russia, where her son resided; her daughter resided in England. The court appointed the son and daughter joint committees of the lunatic's estate, on the security of their bond and that of the other children of the lunatic.—HOPPER, RE, *C.A.*

2. *Lunatic—Payment out—Foreign Subject—Lunatic ward of foreign court entitled to fund in court in this country—Jurisdiction.*—An application was made on behalf of a lady who had been found a lunatic by the Royal Bavarian Court and had been made a ward of that court by her next friend, who was a judge of that court, that a fund standing to her credit in the Chancery Division might be paid out to the Deposit Commission of the Bavarian court. The lunatic was the daughter of a German father and an English mother, and she herself and her nearest living relatives were domiciled German subjects.

Held, that there was jurisdiction to make an order for such payment out, and that the order ought to be made.

In re Barlow's Will, 35 W. R. 737, 36 Ch. D. 287, distinguished.—SPURRIER'S SETTLEMENT, RE, DE HAYN *v.* GARLAND, *Ch.D. Stirling, J.*, 342.

3. *Pauper lunatic—Maintenance—Adjudication of settlement—Subsequent maintenance order by justices—Action to enforce order—Jurisdiction of judge to go behind order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 287.—In the case of an action brought under section 314 of the Lunacy Act, 1890, for the recovery of money ordered to be paid under section 287 for the maintenance of a pauper lunatic, the court is bound to take judicial notice of a previous order of adjudication of settlement, and for future maintenance of the same lunatic, which was still in force at the time when the order upon which the action is brought was made.—SUFFOLK LUNATIC ASYLUM COMMITTEE *v.* STOW UNION, *Q.B.D.*, 620.

4. *Person detained as lunatic—Certificates that lunatic may safely be discharged—Discretion of Lunacy Commissioners to act on such certificates—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 49.—The Commissioners in Lunacy are not bound to act upon the certificates of two medical practitioners who have been authorized by them, under section 49 of the Lunacy Act, 1890, to make an examination of a person detained as a lunatic, and who after examination have duly certified that the person so detained may safely be discharged, but, notwithstanding such certificates, the commissioners have, under section 49, a discretion to grant or refuse an order for the discharge of the lunatic.—REG. *v.* LUNACY COMMISSIONERS, *Q.B.D.*, 505.

5. *Receiver in lunacy—Pauper lunatic—Poor Law—Guardians levying distress—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 299.—Where a receiver in Lunacy of funds of a lunatic in a pauper asylum had been appointed, an injunction was granted to restrain the guardians from levying a distress against trustees of the fund to enforce a magisterial order for payment of the fund to the guardians.

Sub-section 2 of section 299 of the Lunacy Act, 1890, operates only as a discharge to trustees of a lunatic's property; and *In re Newbegin's Estate*, 36 Ch. D. 477, is not an authority that a magistrate's order under sub-section 1 in respect of property in the hands of the trustees cannot be enforced.—WINKLE *v.* BAILEY, *Ch.D. North, J.*

MANDAMUS.—See Charity, 1; Local Government, 2, 15; Police; Practice, 38, 39.

MARRIED WOMAN:—

1. *Bankruptcy—Married woman carrying on a trade separately from her husband—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (5)—*Notice of intention to suspend payment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) h.—By section 1 (5) of the Married Women's Property Act, 1882, it is enacted: "Every woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

Held, that a woman does not cease from "carrying on a trade" until she has paid all debts incurred by her in respect of her trading.

By section 4 (1) *h* of the Bankruptcy Act, 1883, it is enacted that "If the debtor gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts," he commits an act of bankruptcy.

Held, that a circular issued by the debtor's solicitors to her creditors summoning them to a meeting and requesting them to send in their accounts is equivalent to a notice of intention to suspend payment.—DAGNALL, RE, SOANES, EX PARTE, *Bkcy.*, 79.

2. *Restraint on anticipation — Costs — Appeal—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 65), *s.* 2.—The court has no jurisdiction under section 2 of the Married Women's Property Act, 1893, to order the payment of costs of an appeal by a married woman, being the defendant in the action, out of separate property which she is restrained from anticipating.

Hood-Barrs v. *Cathcart* (No. 3), 42 W. R. 633, [1894] 3 Ch. 376, approved.—HOOD BARRS *v.* HERIOT (No. 3), *H.L.*, 507.

3. *Restraint on anticipation—Limitation not containing words "separate use"—Estate "without impeachment of waste"—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).—Income accrued due after judgment in respect of property subject to a restraint on anticipation cannot be taken in execution or by the appointment of a receiver.

Hood-Barrs v. *Heriot*, 44 W. R. 481, [1896] A. C. 174, distinguished.

Hood-Barrs v. *Cathcart*, 42 W. R. 628, [1894] 2 Q. B. 559, and *Whiteley* v. *Edwards*, 44 W. R. 530, [1896] 2 Q. B. 559, followed.

A restraint on anticipation may be validly annexed to the separate estate created by the Married Women's Property Act, 1882, though the words "for her separate use" do not occur in the limitation; and even to an estate expressed to be granted "without impeachment of waste."—LUMLEY, RE, HOOD-BARRS, EX PARTE, *C.A.*, 147.

4. *Separation deed—Covenant against molestation—American divorce proceedings — Molestation, what amounts to.*—A husband and wife were married in 1868. In 1880 they entered into a deed of separation, by which the husband covenanted not to molest the wife. In 1896 he served on her notice of his intention to commence divorce proceedings in El Paso, Texas, the ground alleged being the wife's desertion since 1880. In an action by the wife for an injunction to restrain him from taking any proceedings in the Texan action,

Held, that under the circumstances the proceedings were vexatious and unreasonable, and amounted to molestation, and that an injunction could be granted to prevent him taking any steps in the action in England.—HUNT *v.* HUNT, *Q.B.D.*

5. *Separate estate—Marriage settlement prior to Married Women's Property Act*, 1882—*Will of father made subsequent thereto—Contingent interest under will—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5 *and* 19.—By a marriage settlement made prior to the Married Women's Property Act a fund was settled upon a lady for life to her separate use without power of anticipation, and after her decease, in the event of her surviving her husband, for herself, her executors, administrators, and assigns, but in the event of the husband surviving her, as she should appoint, and in default of appointment to her next-of-kin. By his will made subsequently to the Act her father bequeathed a third of his residuary estate to the trustees of the settlement to be held upon the trusts therein expressed and declared.

On a summons taken out by the lady asking for a declaration that her contingent interest under the will was held by her to her separate use,

Held, that the incident of separate use was added by the statute, and that her contingent interest under the will was therefore disposable by her.—WILLIAMS, RE, WILLIAMS *v.* GRANT, *Ch.D. Stirling, J.*

6. *Separate estate—Restraint in anticipation—Proviso for cessor of married woman's interest—Erroneous admission made by her by deed that cessor had taken place—Invalidity of admission.*—A married woman had a life interest in property restrained from anticipation, but subject to a proviso for the cessor of her life interest and a gift over to her husband, in case she should succeed in her own right to certain property. The married woman, in order to enable her husband to make arrangement with a creditor, executed a deed-poll containing an admission that the cessor of her life interest had taken place. This was not the fact, but the married woman believed it to be the fact when she executed the deed. She afterwards claimed to be entitled to her life interest as no cessor had in fact occurred.

Held, that the married woman being restrained from anticipation, her interest was not bound by the admission contained in the deed-poll.—BATEMAN *v.* FABER, *Ch.D. Kekewich, J.*

7. *Separate estate—Restraint on anticipation—Removal of Restraint—Conveyancing Act*, 1881, *s.* 39.—Upon the application of a married woman the court made an order under section 39 of the Conveyancing and Law of Property Act, 1881, binding her life interest under her marriage settlement, notwithstanding restraint on anticipation, by approving a scheme for discharging her debts and liabilities, the court being of opinion that the scheme was for the benefit of the married woman, within the meaning of the section.—KEOWN-BOYD *v.* GILMOUR, *C.A.*

8. *Separate estate—Restraint on anticipation—Power of court to remove restraint, when exercised—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.—Though the words "where it appears to the court to be for her [the married woman's] benefit," in section 39 of the Conveyancing Act, 1881 (which enables the court to bind the interest of the married woman in any property, notwithstanding that she is restrained from anticipation), are not to be construed as applying only to pecuniary benefit, yet the court will not exercise its power under that section unless, when all the circumstances of the case are considered, a good case is made out for so doing.

Decision of Chitty, J., 44 W. R. 474, affirmed.—POLLARD'S SETTLEMENT, RE, *C.A.*, 18.

9. *Separate estate—"Sum of money not exceeding £200 under any will"—Several sums exceeding £200 in the aggregate—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 7.—A married woman, married after the passing of the Married Women's Property Act, 1870, became entitled under a will to a sum of £180, and also, under the same will, to a share of residue exceeding £20 in value.

Held, that section 7 of the Married Women's Property Act, 1870, was applicable to each sum separately, and consequently that each sum was, by virtue of that section, the separate property of the married woman.—DAVIES, RE, HARRISON *v.* DAVIES, *Ch.D. Kekewich, J.*

10. *Settlement—Petition—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 50—*Examination of married woman—Affidavit of no settlement—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 71), *ss.* 1, 5.—The separate examination under section 50 of the Settled Estates Act, 1877, is no longer necessary in the case of a married woman (party to a petition under that Act for confirming a contract of sale) who was married before 1883, but acquired her interest in the settled hereditaments after that date, and an affidavit of no settlement will not be required.

In re Standish, 25 W. R. 8, followed.—BATT'S SETTLED ESTATE, RE, *Ch.D. Kekewich, J.*, 614.

11. *Will—Legacy and share of residue "to be paid" to married woman with restraint upon anticipation—Absolute unfettered gift.*—A bequest of a fund in trust for a married woman "to be paid to her for her separate use without power of anticipation," there being no further indication that the income only is to be paid to her during coverture, will be construed as a direction that the *corpus* is to be forthwith paid to her, and the words "in restraint of anticipation" will be disregarded.

In re Bown, 33 W. R. 58, 27 Ch. D. 411, followed. FEARON, RE, HOTCHKIN *v.* MAYOR, *Ch.D. Kekewich, J.*, 232.

See also Justices, 6-9; Practice, 37; Settlement, 3; Trustee, 3.

MASTER and SERVANT:—

1. *Dismissal—Public elementary school established under trust deed—Appointment and dismissal of schoolmistress by committee of management—Validity.*—Where the plaintiff, a schoolmistress of a public elementary school established under a deed of trust, had been dismissed from her employment by an irregularly constituted committee of management by whom she was appointed, instead of by the trustees of the school, she was held to have no right to an injunction to restrain the committee from so dismissing her, notwithstanding the terms of the deed.—POTTLE *v.* SHARPE, *C.A.*

2. *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* 1—*Defect in condition of machinery—Absence of safeguard.*—The temporary absence of a movable guard or shutter which had been provided to afford protection from a circular saw held to be a defect in the condition of machinery within the meaning of section 1, sub-section 1, of the Employers' Liability Act, 1880.—TATE *v.* LATHAM, *C.A.*, 400.

3. *Justices — Summary jurisdiction — Dispute —*

Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 4.—Section 4 of the Employers and Workmen Act, 1875, gives jurisdiction to courts of summary jurisdiction to hear and determine disputes under the Act provided that the amount claimed does not exceed £10.

On the 16th of November, 1896, a workman wrongfully left the employment of his employers, intimating that he did not intend to return. On the 16th of December the employers brought an action in a court of summary jurisdiction to recover £10 damages in respect of the absence of the workman from his work from the 16th of November to the 28th of November. They recovered the amount claimed. Subsequently the employers brought a second action against the workman to recover £10 damages in respect of his absence from work between the 30th of November and the 12th of December.

Held, that the court of summary jurisdiction had no jurisdiction to hear and determine the second action.—JAMES *v.* EVANS, *Q.B.D.*, 654.

4. *Negligence of servant—Effective cause of injury—Intervention of wrongful act by third party.*—The defendant, who was a grocer, kept a van, which he sent out with a man to drive and a boy to deliver goods at the customers' houses. The boy was expressly forbidden to drive. The driver negligently left the van for a short time in charge of the boy, who drove the van for a few yards in order to turn it round, and while so doing injured the plaintiff's trap.

Held, that the driver's negligence in leaving the van in charge of the boy was an effective cause of the injury, and that the defendant was liable for that negligence.—ENGELHART *v.* FARRANT, *C.A.*, 179.

See also Arbitration, 1; Contract, 4; County Court, 5.

MAYOR'S COURT.—See Practice, 40.

MERGER.—See Settlement, 8.

METROPOLIS MANAGEMENT:—

1. *Building—New building—Wall within twenty feet of centre of highway—Application for consent of county council after erection—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 13 (1) (4).—By the London Building Act, 1894, s. 13, sub-section (1), "No new building or structure, or any part thereof, shall be erected at any less distance than the prescribed distance from the centre of the highway without the consent in writing of the London County Council"; and by sub-section (4) the council may, in any case where they think it expedient, consent to the erection of such building at a distance less than the prescribed distance.

Held, that such consent must be given in the same way as the consent to the building itself—namely, before the erection takes place—and that it does not apply to a building already executed.

The court has power to compel the council to hear and entertain an application for their consent to the retention of an illegal structure already erected. — REG. *v.* LONDON COUNTY COUNCIL, WEBSTER, EX PARTE, *Q.B.D.*, 605.

2. *Building—Party wall—Wall extending above adjoining building—Wall dividing a building of the warehouse class extending to more than* 250,000 *cubic feet—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 59 (1), 75.—By the London Building Act, 1894, s. 75, it is enacted that buildings of the warehouse class above a certain size shall be divided by party walls.

Held, that it was not intended that a wall which was a party wall for the purposes of the section up to a certain height should necessarily continue to be a party wall above that height, so as to be subject, as to the upper portion, to the provisions of the Act with regard to party walls.—DRURY *v.* ARMY AND NAVY CO-OPERATIVE SOCIETY, *Q.B.D.*

3. *Building—Party structure notice—Adjoining owner—Possession of premises under building agreement—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 90, *s.* 5, *sub-sections* 29, 32.—The defendant, who was owner of premises in London, desiring to do certain work upon a wall dividing his premises from the adjoining premises, duly served C. O. with the notice required by section 90 of the London Building Act, 1894, to be served by a "building owner" upon the "adjoining owner," but omitted to give any such notice to the plaintiff, who at the time the notice was served on C. O. was in possession of the adjoining premises under a building agreement with C. O. for a lease to the plaintiff for a long term of years. By such agreement the grant of the lease was made conditional upon the production of a surveyor's certificate, and it was stipulated that nothing in the agreement should be construed into a demise at law of the premises. At the time the defendant commenced work the plaintiff had erected the buildings, and was in possession thereof under a lease granted pursuant to the agreement. On motion to continue, until trial of the action, an injunction obtained by the plaintiff *ex parte* to restrain the defendant from proceeding with the work to the wall,

Held, that, inasmuch as the plaintiff was in possession of the adjoining premises under the agreement "otherwise than as a tenant from year to year or for any less term, or as a tenant at will," and was therefore owner within the meaning of sub-section 29 of section 5 of the Act, the defendant was not entitled to exercise any rights under the Act, assuming him to have any, in respect of the wall in question without having served on the plaintiff a notice under section 90 of the Act; that the plaintiff's rights in this respect had not become merged in the lease on the granting of the lease pursuant to the agreement; and, consequently, that the injunction must be continued.—LIST *v.* THARP, *Ch.D. Chitty, J.*, 243.

4. "*Building structure or work*"—*Notice to district surveyor—Temporary seating—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 78, 145, 200 (11*b*).—A large public building was used for the purpose of holding exhibitions and shows therein. At some of the exhibitions and shows it was necessary to provide seating accommodation for the spectators, but at others no such accommodation was required. The owners of the hall had caused to be constructed certain wooden seating which could be temporarily fixed up in the hall when it was required. When not in use it was taken down and stored away.

Held, that the wooden seating was not a "building structure or work" within section 145 of the London Building Act, 1894, and that it was not necessary to give notice under that section to the district surveyor before it was placed in position in the hall.—VENNER *v.* MCDONELL, *Q.B.D.*, 267.

5. *Bye-law—Slaughter-houses—Validity of bye-law—Improper slaughtering of cattle by servant contrary to instructions—Liability of occupier.*—Bye-laws made under the repealed Slaughter-houses (Metropolis) Act, 1874, but kept in force by section 142, sub-section 2 (*b*), of the Public Health (London) Act,

1891, make it an offence for the licensed occupier of a slaughter-house to slaughter sheep in the pound of the slaughter-house or in view of other sheep. During the absence of the respondent, the licensed occupier of a slaughter-house, his foreman, in direct disobedience of his orders and in order to save himself trouble, slaughtered a sheep in the pound in view of other sheep:

Held, that the bye-law was good and that the respondent was guilty of an offence under it, for he was liable for the act of his servant, that act having been committed within the general scope of his employment, although contrary to the orders of his master.—COLLMAN *v.* MILLS, *Q.B.D.*

6. *County council—Dangerous structure—Notice to remove or repair—Recovery of expenses—Ministerial duty of county council—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 103, 106.—The powers and duties conferred upon the London County Council by sections 103 and 106 of the London Building Act, 1894, are ministerial, and may be delegated to, and are exercisable by, the duly authorized servants and representatives of the council.—LONDON COUNTY COUNCIL *v.* HOBBIS, *Q.B.D.*, 270.

7. *Drain—Liability to repair—Sewer made without approval of Metropolitan Board of Works or of vestry—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 47, 48, 61.—The fact that the requisite sanction for the making of a sewer in the metropolis was not obtained from the vestry or Metropolitan Board of Works does not prevent it, when made, from being a sewer within the meaning of the Metropolis Management Acts, and as such vested in the vestry and repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe for the purpose of carrying off the drainage from them, which he connected with a sewer belonging to the vestry in a neighbouring street. No order for this work was given by the vestry, nor was the same sanctioned or approved of by the vestry or the Metropolitan Board of Works.

Held (affirming the judgment of a Divisional Court), that the pipe so laid was a sewer within the meaning of section 250 of the Metropolis Management Act, 1855, and was consequently vested in the vestry and repairable by them.—REG. *v.* VESTRY OF ST. MATTHEW, BETHNAL GREEN, *C.A.*

8. *Drain—Sewer—Combined system of drainage—Rain-water pipe.*—A drain for the drainage of four houses by combined operation was constructed under the order of a vestry. A pipe which carried off rain-water from the roof of a fifth house was, without the sanction of the vestry, turned into and connected with this drain.

Held, that the rain-water pipe was a drain within section 250 of the Metropolis Management Act, 1855, and that its unauthorized connection with the drain belonging to the four houses converted the latter from the point of junction and onwards into a sewer.—HOLLAND *v.* LAZARUS, *Q.B.D.*

9. *Hackney carriage—Railway station—"Place"—Whether railway station is a "place"—London Hackney Carriage Act*, 1853 (16 & 17 *Vict. c.* 33), *s.* 17, *sub-section* 2.—Section 17 of the London Hackney Carriage Act, 1853, imposes a penalty upon the driver of any hackney carriage who refuses to drive to any "place within the limits of the Act" to which he shall be required to drive any person hiring or intending to hire such carriage.

Held, that a railway station is a "place" within the meaning of this section, and that the driver of a hackney carriage who refuses to drive the person hiring such carriage into a railway station, within the limits of the Act, is liable to the penalty.—KIPPINS, EX PARTE, *Q.B.D.*, 188.

10. *London—Grain duty—"Grain brought into the port of London for sale"—Manufacture of grain into other articles—Metage on Grain (Port of London) Act*, 1872 (*c. c.*), *s.* 4.—The Metage on Grain (Port of London) Act, 1872 (c. c.), s. 4, which entitles the corporation of London to a duty "in respect of all grain brought into the port of London for sale," applies only to grain brought in for sale as grain, and not to grain brought in to be ground into meal, or manufactured into other articles of commerce, and then sold.

The decision of the Court of Appeal, 44 W. R. 55, [1895] 2 Q. B. 652, affirmed.—COTTON *v.* VOGAN, *H.L.*

11. *Nuisance order—Recovery of costs and expenses—Limitation of time—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 11, 117.—An action brought in the county court under section 11 of the Public Health (London) Act, 1891, to recover costs and expenses incurred in respect of a nuisance order is subject to the limitation of time imposed by section 11 of the Summary Jurisdiction Act, 1848, in respect of making complaints and laying informations, and must therefore be commenced within six months from the time when the costs and expenses were incurred.

Tottenham Local Board v. *Rowell*, 25 W. R. 135, 1 Ex. D. 514, followed.—HAMMERSMITH VESTRY *v.* LOWENFELD, *Q.B.D.*, 60.

12. *Nuisance—Sewer—Jurisdiction of justices—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 2, *sub-section* 1 (b).—By the Public Health (London) Act, 1891, s. 2, sub-section 1 (*b*), "Any pool, ditch, gutter, watercourse, cistern, water-closet, earth-closet, privy, urinal, cesspool, drain, dung-pit, or ash-pit so foul or in such a state as to be a nuisance or injurious or dangerous to health . . . shall be nuisances liable to be dealt with summarily under this Act."

The appellants, as the sanitary authority, summoned the respondents to abate a nuisance from "foul smells" arising from a surface sewer ventilator constructed by them in a roadway within the appellants' district.

Held, that the provisions of section 2, sub-section 1 (*b*), of the Public Health (London) Act, 1891, did not apply to public sewers, and that the justices were right in refusing to make the order on the ground that they had no jurisdiction to deal with the complaint.—FULHAM VESTRY *v.* LONDON COUNTY COUNCIL, *Q.B.D.*, 620.

13. *Nuisance—Vacant land—Deposit of filth—Removal—Duty of landowner—Injunction—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 13, 35, 138.—The defendant was the owner of a piece of vacant land in the metropolis. Costermongers and others used the land for the deposit of offal and other kinds of filth, so that it became a nuisance to the neighbourhood. The Attorney-General, at the relation of the vestry of the parish, brought an action to restrain the nuisance.

Held, that there is a common law liability on the owner or occupier of land to abate a nuisance upon his land, and that the Attorney-General was entitled to an injunction to enforce the performance of such duty by the owner or occupier.—ATTORNEY-GENERAL *v.* TOD-HEATLEY, *C.A.*, 394.

14. *Public Health—Unsound meat—Sale or exposure for sale—Seizure subsequent to sale—Purchase by a customer—Liability of seller to penalty—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-sections* 2, 3.—The respondent, a meat salesman, to whom meat had been consigned to sell on commission, sold a portion of it to H. While the meat was on H.'s premises it was seized and condemned by a magistrate under the Public Health (London) Act, 1891, s. 47, as being diseased and unfit for the food of man.

The respondent was summoned under sub-section 2 of section 47 of the Act, and it was proved that the meat was unsound at the time of the sale to H. The alderman before whom the summons was heard dismissed it.

Held, that the summons was rightly dismissed, and that the summons ought to have been drawn under sub-section 3.—BILLING *v.* PREBBLE, *Q.B.D.*, 187.

15. *Sewer—Drain—Combined drain laid with sanction of Metropolitan Commissioners of Sewers—Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.—The "Metropolitan Commissioners of Sewers" mentioned in section 112 of the Metropolis Management Act, 1862, are the commissioners who were created under that title in 1848 by the statute 11 & 12 Vict. c. 112, and do not include any previously existing commissioners. Therefore no drain laid before 1848 can come within the definition of "drain" given in that section.

Judgment of Hawkins, J., *ante*, p. 173, affirmed. —APPLEYARD *v.* LAMBETH VESTRY, *C.A.*, 370.

16. *Sewer—Drain—New sewer—House insufficiently drained—Liability of owner to make new drain—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 69, 73.—Where a vestry, acting under section 69 of the Metropolis Management Act, 1855, provide a new sewer in substitution for an old sewer, they are not entitled under section 73 to charge the owner of a house which was drained into the old sewer with the expenses of connecting his house with the new sewer, on the ground that the drain connecting the house with the old sewer is an insufficient drain.

Vestry of St. Marylebone v. *Viret*, 13 W. R. 1064, followed.—ST. MARTIN-IN-THE-FIELDS VESTRY *v.* WARD, *C.A.*, 81.

17. *Street music—Refusal to go away from neighbourhood—Metropolis Street Music Act*, 1864 (27 & 28 *Vict. c.* 55), *s.* 1.—It is not an offence under section 1 of 27 & 28 Vict. c. 55, for a street musician to refuse to move away from a neighbourhood when requested to do so by a householder, unless the complainant has at the same time given the man a reason why he requires him to cease playing near his house.

Semble, it makes no difference that in fact the householder had a reasonable and sufficient cause of complaint.—SHIELDS *v.* HOWARD, *Q.B.D.*, 138.

18. *Street—New street—Adjoining owner—Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.—A private roadway existed before 1855. No new buildings were erected which had access to it after that date.

Held, that the roadway was not a new street within the meaning of section 112 of the Metropolis Management Act, 1862, and the adjoining owners were not liable to be charged with the expense of paving it under section 105 of the Metropolis Management Act, 1855.—ARTER *v.* HAMMERSMITH VESTRY, *Q.B.D.*, 398.

19. *Street—"New street"—Paving expenses—Apportionment—Road partially built along—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105 —*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.—The respondents were the owners of two plots of land in and abutting that part of a road lying within the district of the appellant vestry, the road having been formed or laid out after 1862. So much of the road as was within the district of the appellant vestry was 200 yards long, and the present proceedings related to such portion only; on one side of such portion of the road was only one house, and on the other, one house, a church, and a hall. The rest of such portion of the road was unbuilt upon. The vestry, having paved such portion of the road, summoned the respondents before the magistrate for the payment of the sums apportioned by order of the vestry in respect of the land of which the respondents were owners towards the paving expenses. The magistrate dismissed the summons on the ground that such portion of the road was not a new street within the meaning of section 77 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102).

Held, that such portion of the road was not a "new street." The Legislature appeared to contemplate that in order that a road should be a street within the Metropolis Management Acts of 1855 and 1862 it must be composed wholly or partially of houses.—ST. MARY, BATTERSEA, VESTRY *v.* PALMER, *Q.B.D.*, 110.

20. *Vestry—Committee—Approval of acts of committee—Ratification—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 58.—A committee appointed by a vestry under section 58 of the Metropolis Local Management Act, 1855, resolved that a notice be served under section 85 of the Act upon the owner of premises requiring him to abate a nuisance thereon arising from defective drainage. The notice not having been complied with, the committee resolved that proceedings should be taken for the recovery of penalties, and a summons was issued against the owner. Section 58 provides that the acts of the committee shall be submitted to the vestry for their approval.

Held, that the fact that the vestry had not approved of the service of the notice until after the issue of the summons did not render the service of the notice invalid.—FIRTH *v.* STAINES, *Q.B.D.*, 575.

See also Poor Law, 7; Practice, 38.

MILK.—See Adulteration, 3, 4.

MINE:—

Abandoned mine—Obligation to fence—"Owner and every other person interested in the minerals"—Metalliferous Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 77), *ss.* 13, 13 (2), 41—*Derbyshire Mining Customs and Mineral Courts Act*, 1852 (15 & 16 *Vict. c. clxiii.*).—By section 13 of the Act of 1872 the owner and person interested in the minerals of a mine shall fence an abandoned mine, but by sub-section 2 of the same section, where the abandonment has occurred before the passing of the Act, it need only be done under certain conditions or on notice from an inspector on the ground that it is specially dangerous.

The appellant was the lord of the manor of H. and freeholder of the soil of a mine, which had not been worked for over thirty years, and the workers of which or their representatives could not be traced. Notice was served on him to fence on the ground that the entrance was specially dangerous. By the Derbyshire Mining Act, 1852, the appellant was entitled to dues of lot and cope and a third

meer, and this Act further only gave the worker the right to mine, and conferred no title on the soil. The appellant, having failed to comply with the terms of the notice, was summoned and convicted.

Held, that the appellant was a person interested in the minerals, and that on abandonment the mine reverted to him as owner; and that, therefore, being liable to fence, he was rightly convicted.—DEVONSHIRE (DUKE) *v.* STOKES, *Q.B.D.*

See also Canal; Landlord and Tenant, 4, 10.

MISREPRESENTATION.—See Company, 19, 23; Guarantee, 2.

MORTGAGE:—

1. *Costs — Practice — Foreclosure action — Mortgagees' costs—Administration proceedings combined with foreclosure action—Executor's costs—Costs relating to the security.*—So far as administration proceedings are necessary to enable mortgagees to realize their security, mortgagees will be entitled to add to their security their administration costs in the action so far as they relate to their security, and be paid the same in priority to the administration costs of the mortgagor's executor.—BANKS, RE, DAWS *v.* BANKS, *Ch.D. Romer, J.*, 206.

2. *Equitable mortgage by deposit—Declaration of trust — New Trustee — Vesting declaration — Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *ss.* 12, *sub-sections* (1) (3); 50.—Real estate was conveyed in 1883 to A. in fee, who sold it again, and afterwards repurchased it on the 26th of August, 1887. In 1890 A. made an equitable mortgage of the property to B. by deposit of the deed of conveyance of the 26th of August, 1887. On the 20th of February, 1894, A. made a second equitable mortgage by depositing with a bank the deed of conveyance of 1883, and this deposit was accompanied by a memorandum in which A. declared that during the continuance of the loan then advanced by the bank he held the property on trust for the bank, and thereby further gave the bank power to appoint a new trustee in his place and to make a declaration vesting the property in such new trustee. The bank had then no notice of B.'s prior equitable mortgage. On the 22nd of February, 1896, A. executed a legal mortgage of the same property to C., who, however, took with notice of the bank's equitable mortgage. On the 23rd of March, 1896, the bank (having then become aware of B.'s equitable mortgage) executed a deed appointing the manager of the bank a new trustee in the place of A., and containing a declaration vesting the property in such new trustee.

Held, (1) that, by reason of the power of appointing a new trustee and the above-mentioned vesting declaration, the bank could, by virtue of section 12, sub-section (1), of the Trustee Act, 1893, vest the legal estate in the new trustee, and that neither section 12, sub-section (3), nor section 50 of the same Act prevented this;

(2) That C., the legal mortgagee, having taken with notice of the bank's equitable mortgage, only took the legal estate subject to the power of the bank to divest it; and

(3) That the bank had got in the legal estate, not by means of a conveyance from a bare trustee, but by means of the declaration of trust which the bank stipulated for when it advanced the money, and, consequently, that the bank was entitled to priority over B.'s prior equitable mortgage.—LONDON AND COUNTY BANKING CO. *v.* GODDARD, *Ch.D. North, J.*, 310.

3. *Foreclosure — Receiver — Form of order.*—The form of order in a foreclosure action where a receiver has been appointed should charge the mortgagees with all the rents and profits in the hands of the receiver at the date of the chief clerk's certificate, and also "with such a sum, if any, as they submit to be charged with," in respect of rents and profits coming to the receiver's hands between the dates of the certificate and foreclosure absolute.—SIMMONS *v.* BLANDY, *Ch.D. North, J.*, 296.

4. *Power of sale—Mortgage by tenants in common — Purchase by one co-tenant — Private tender — Validity of sale.*—No fiduciary relationship exists between tenants in common and real estate; and should one collect the rents of the whole, he does so as owner.

Where a mortgagee sells under a power of sale, in compliance with the terms of the power and in good faith, the sale cannot be impeached.

Decision of the Court of Appeal, 44 W. R. 454, [1896] 1 Ch. 762, affirmed.—KENNEDY *v.* DE TRAFFORD, *H.L.*, 671.

5. *Power of sale—Surplus proceeds—Money in hands of first mortgagee—Interest—Discretion of court.*—Where upon the realization of mortgaged property the first mortgagee receives and retains more money than is sufficient to satisfy his claim under his mortgage, the court will order him to pay to the second mortgagee simple interest upon the surplus moneys so retained by him, unless there are circumstances in the particular case before the court which render such an order unjust.

The fact that the second mortgagee has wilfully abstained for four years from taking proceedings to enforce his claim to the surplus moneys retained by the first mortgagee is not a circumstance upon which the court will deprive him of interest.—ELEY *v.* READ, *C.A.*

6. *Receiver—Manager—Contract—Sale of lease and business—Mortgage for unpaid purchase-money.*—A., who was the owner of leasehold premises (on which the business of a private hotel was carried on) and furniture, entered into a contract for the sale of such lease, furniture, and the goodwill of the business to B. A portion of the purchase-money remained unpaid, and a draft assignment of the lease and mortgage to secure the unpaid purchase-money were prepared, but never executed. In an action for specific performance of the contract, a motion was made for a receiver and manager of the premises, furniture, and business.

Held, that such a receiver and manager might be appointed with power to take possession and carry on the business, but not to include any chattels other than those which would pass by an assignment of the lease.—POOLE *v.* DOWNES, *Ch. D. Stirling, J.*

7. *Right to redeem—Remainderman.*—A widow to whom a testator devised the equity of redemption in certain hereditaments *durante minore ætate* of her two sons, mortgaged her interest under the will to the person to whom the testator had previously mortgaged the hereditaments.

Held, that, after the death of the widow, the sons were not entitled to redeem the mortgage effected by the testator until they both attained the age of twenty-one, unless they obtained the mortgagee's consent as owner of the widow's limited interest.—PROUT *v.* COCK, *Ch.D. North, J.*, 157.

8. *Tender — Cheque — Authority of mortgagee's*

solicitor—Payment under protest.—A mortgagee's solicitor is not authorized to accept a cheque in payment of the debt due in respect of the mortgage unless he is expressly empowered to do so. The tender, therefore, of a cheque to a mortgagee's solicitor not having such express authority is not a good tender even though he consent to accept the cheque.—BLUMBERG *v.* LIFE INTERESTS SECURITIES CORPORATION, *Ch.D. Kekewich, J.*, 246.

See also Company, 39; Fixture, 1; Limitations, Statute of, 3; Practice, 41; Settlement, 7.

MORTMAIN:—

Charity—Metropolitan Consolidated Stock—Charge on lands, rents, and property—Pure or impure personalty.—Metropolitan Consolidated 3½ per Cent. Stock issued under the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), is impure personalty, as it confers on the holders an interest in land within the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 10 (3).—CROSSLEY, RE, BIRRELL *v.* GREENHOUGH, *Ch.D. Kekewich, J.*, 615.

NATAL, LAW of:—

Water—Watercourse—Right to construct—Right to divert streams—Grant of land—Construction of reservation.—Where in a grant of land a right is reserved to make watercourses over it for the public use and benefit by order of Government,

Held, that such reservation may include, and in the circumstances of this case will include, a right to divert water from streams in the land and to use the water so diverted.—REMFRY *v.* SURVEYOR-GENERAL OF NATAL, *P.C.*

NEGLIGENCE.—See Landlord and Tenant, 12; Master and Servant, 4; Poor Law, 5; Railway Company, 7; Solicitor, 22.

NEW SOUTH WALES, LAW of:—

11 *Vict. No.* 4, *s.* 7—*Malicious prosecution*—Mens rea.—By section 7 of 11 Vict. No. 4, a sale of wool under a lien, "with a view to defraud," without the written consent of the holder of the lien, is made an offence; a like sale of stock is also made an offence, independently of a like intent.

In an action for malicious prosecution thereunder, it appeared that the plaintiff had sold stock on which the defendant bank had a lien, without intent to defraud and with the bank's oral assent.

Held, on the construction of the above section, that an intent to defraud was not an element of the statutory offence charged, that this was matter for decision by the judge, and that a verdict must be entered for the defendant.

An intention to offend against the penal provisions of an Act constitutes *mens rea;* and was proved by the plaintiff's knowledge that there was no written consent.—BANK OF NEW SOUTH WALES *v.* PIPER, *P.C.*

NUISANCE:—

1. *Highway—Breach of statutory duty—Special damage—Right of action—Gasworks Clauses Act,* 1847 (10 & 11 *Vict.* c. 15), *ss.* 11, 29.—A gas company, in laying down a main along the side of a public road, filled up the trench so carelessly and defectively that the wheel of the vehicle in which the plaintiff was driving sank into the trench, whereby the vehicle was upset and the plaintiff injured. A jury having found not only that the company were guilty of negligence in the filling up of the road, but also that they left the road in such a state as to constitute a nuisance and a danger to those using the road,

Held, that, as the company had left the road in a condition which amounted to a public nuisance, they were liable to the plaintiff, notwithstanding the provisions of section 11 of the Gasworks Clauses Act, 1847. — GOODSON *v.* SUNBURY GAS CO., *Q.B.D.*

2. *Obstruction of street—Tramways—Snow and salt.*—A tramway company after a heavy fall of snow cleared their track by means of a snow-plough and heaped up the snow upon the sides of the streets; they then scattered salt upon the rails and in the vicinity; the town council did not take any immediate steps to remove the briny slush so produced, and it was left upon the streets,

Held, that a legal nuisance had been committed which was not sanctioned by either the special or the general Tramways Acts, and that the default, if any, of the town council did not affect the primary liability of the tramway company.—OGSTON *v.* ABERDEEN DISTRICT TRAMWAYS CO., *H.L.* (*Sc.*).

See also Local Government, 8-10; Metropolis Management, 11-13; Practice, 43.

OPTION.—See Landlord and Tenant, 3; Patent, 8.

PARTITION:—

Practice—Infant plaintiffs—Sale in lieu of partition—Sale depending upon result of inquiries—Form of judgment.—Form of judgment in an action for sale in lieu of partition where the plaintiffs are infants entitled to one undivided one-third share, and where the execution of the sale depends upon the result of the inquiries directed by the order, the infants, in the event of a sale, being declared trustees of their shares for the purchaser and their next friend being appointed to convey the infants' shares.—DAVIS *v.* INGRAM, *Ch.D. Kekewich, J.*, 459.

PARTNERSHIP:—

1. *Administration—Spanish firm—Separate estate of deceased partner*—Lex fori.—A rule of Spanish law that the separate estate of a deceased partner cannot be proceeded against by a creditor of the partnership until the joint assets are first judicially proved insufficient, is a rule of procedure, and does not prevent the creditor of a Spanish firm obtaining administration in this country of the separate assets in this country of a deceased partner. The rule as to administration is a matter of the *lex fori.*—DOETSCH, RE, MATHESON *v.* LUDWIG, *Ch.D. Romer, J.*, 57.

2. *Articles—Death of one partner—Purchase of business by surviving partner—Valuation—Goodwill—Profits.*—Two persons agreed to carry on the business of a brewery for twenty-one years under partnership articles, which provided that, on the death of a partner without nominating a son to succeed him (which event happened), "the property, stock, goods, and effects of the said partnership" were to be valued, and the surviving partner was to have the option to purchase at such valuation.

The articles further provided that immediately on the determination of the partnership by any of the contingencies mentioned in the articles the partners should join in making up a final account of all the property, joint-stock, money, goods, and effects belonging to the partnership, and that after such account should have been so made up "the property, stock, goods, and effects then employed or used in carrying on the said business" should be valued as therein mentioned.

The partnership was continued upon the same

articles by a deed of covenant for a further period of seven years and afterwards without any written or verbal agreement. One partner died, and the surviving partner exercised his option to purchase the business at the valuation.

Held, that, although the articles said nothing about goodwill in terms, yet the words "then employed or used in carrying on the said business" could not be construed in so narrow a way as to exclude the goodwill in valuing the business; and that therefore the goodwill must be valued separately.

Hall v. *Barrows*, 4 De G. J. & S. 150, applied.

Held also, that the executors of the deceased partner were entitled to a share of profits down to the date of the valuation.

Decision of Stirling, J., 74 L. T. N. S. 343, affirmed.—PAGE *v.* RATCLIFFE, *C.A.*

3. *Receiver—Salary—Security—Premiums paid to guarantee society—Liability.*—Where in an action for dissolution of partnership one of the partners is appointed receiver, or receiver and manager, without a salary, and has to find security for his fidelity, he is properly allowed out of the assets the amount paid by him as premiums to a guarantee society for furnishing such security.

It is otherwise, however, where he is appointed with a salary, as in that case he is bound to pay out of his own pocket whatever expenses are reasonably incurred by him in finding security, whether by bond or sureties or through a guarantee society. —HARRIS *v.* SLEEP, *Ch.D. Kekewich, J.*, 536.

4. *Receiver and manager—Salary—Allowances—Services rendered for benefit of estate outside the duty of a receiver.*—On a dissolution of partnership one of the partners was appointed by the court receiver and manager without salary. He carried on the business successfully, and ultimately purchased it under an order of the court. He, during the continuance of the business, being a skilled mechanic, did work as an ordinary workman and included in his accounts an item of £2 per week for services rendered by himself as a workman.

Held (reversing Kekewich, J.), that though the receiver and manager had committed a technical irregularity in not asking for wages at the time of his appointment, yet he was entitled to be paid for work done by him for the benefit of the estate, to do which was no part of his duty. The allowance of £2 per week was therefore allowed.—HARRIS *v.* SLEEP (No. 2), *C.A.*, 680.

See also Bankruptcy, 6, 9, 19, 26, 29; Contract, 6; Inland Revenue, 24; Solicitor, 22; Trade-mark, 4; Trustee, 9; Vendor and Purchaser, 7.

PATENT:—

1. *Action for infringement—Discontinuance—Costs of particulars of objections — Certificate — Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-section* 6.—The plaintiff in a patent action by written notice discontinued the action before the pleadings were closed. By reason of the provisions of sub-section 6 of section 29 of the Patents, Designs, and Trade-Marks Act, 1883, the taxing-master refused to allow the costs of the defendant's particulars of objections, because no certificate had been granted as required by that sub-section. The defendant took out a summons asking for a certificate.

Held, that in the absence of information which would enable the court to certify that the particulars were reasonable and proper, the court would not enter upon any kind of trial of the action to obtain such information. That the case came within the provisions of sub-section 6 of section 29, and that there being no certificate no costs of the particulars of objection could be allowed.—WILCOX *v.* JANES, *Ch.D. Romer, J.*, 474.

2. *Anticipation—Variation between provisional and complete specifications — Disconformity— Objects of invention as stated in provisional specification—Abandonment of parts of invention claimed in provisional specification—Application of invention to subsequent discoveries by other persons.*—In a provisional specification the nature of the invention need not be described otherwise than roughly, though it must be described fairly, and the manner in which the invention is to be carried into effect need not be described. A patentee is not bound in his provisional specification to detail the advantages of his invention, and in stating in such specification his chief objects, he should not be taken to imply, where the invention consists of several parts, that he obtains all these objects in every part of his invention, or that some parts of it may not have other advantages not expressly mentioned.

Although a patented invention may, in consequence of subsequent discoveries made by other inventors, prove more valuable and have a wider field of usefulness than was contemplated by the patentee at the date of his invention, yet the patentee is entitled to the full benefit of the use of his invention if taken and applied for the purposes of these subsequent discoveries; and if the subsequent discoveries take place after the date of the provisional and before the date of the complete specification, there is nothing improper in the patentee referring to them in the complete specification, and thus showing the manner in which his invention could be best applied to them.

The antecedent existence of an invention, not shown to have been brought to any successful result, and which was so far similar that, if subsequent in date to the patent, it would have been held a colourable and clumsy imitation for the purpose of effecting the same result, does not invalidate the patent by anticipation.—PNEUMATIC TYRE CO. *v.* EAST LONDON RUBBER CO., *Ch.D. Romer, J.*

3. *Assignment — Application for extension of period of protection by assignee—Patents Act*, 1883, *s.* 25.—Although the effect of section 25 of the Patents Act of 1883 (46 & 47 Vict. c. 57), is to confirm an assignee's right to petition for prolongation of his patent, he cannot succeed without showing that the original inventor has been inadequately remunerated.—IN RE HOPKINSON'S PATENT, *P.C.*

4. *Disclaimer—Amendment of specification—Practice—Petition for revocation pending—Application for leave to amend—Discretion of court—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.—The granting or refusing leave to apply to amend a specification by way of disclaimer, under section 19 of the Patents Act, 1883, is still a matter for the judicial discretion of the court, and this discretion has been in a way interfered with by *Moser* v. *Marsden*, 12 Rep. Pat. Cas. 24, and *Deeley* v. *Perkes*, [1896] A. C. 496.—DELLWICK'S PATENT, RE, *Ch.D. Chitty, J.*

5. *Disclaimer—Revocation—Patent Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 19, 26.—Where, on a petition for revocation of a patent the judge holds that all the claims are bad and orders the patent to be revoked and this order is entered on the Register of Patents, the Court of Appeal, it it is of opinion that one claim is valid, may reverse the order below

and order that the patent be revoked, unless within three months, or such further time as the court may allow, the patentee obtain leave to amend his specification by disclaiming all the claims except the valid one.—DEELEY *v.* PERKES, *H.L.*

6. *Infringement — Patent applicable to United Kingdom only—Foreigner resident abroad sending infringing goods by post to England—Order from an English purchaser—Goods the property of the purchaser from the time of dispatch—Agency of post-office — Jurisdiction.*— A person who manufactures abroad goods according to a patent applicable only to the United Kingdom, and who, in compliance with an order received from an English customer, sends such goods by post to such customer, does not infringe the English patent.

Decision of North, J., reversed (Rigby, L.J., dissenting.)

Coombes's case, 1 Lea Cr. C. 388, discussed.—BADISCHE ANILIN UND SODA FABRIK *v.* JOHNSON, *C.A.*, 481.

7. *Infringement,— Subsequent threats—Claim for injunction to restrain such threats—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.—The plaintiffs brought an action against the defendants for the infringement of their patent.

The plaintiffs then published a circular to the effect that their patent was being infringed, and that they were bringing a large number of actions against specified alleged infringers, including the action against the defendants.

The defendants delivered a defence and counter-claim. The defence was, that the goods complained of as infringements of the patent were manufactured and sold under a licence granted by the plaintiffs to predecessors of the defendants. By their counter-claim they claimed an injunction to restrain the plaintiffs from publishing, or representing by circulars, &c., that the defendants were not authorized to make and sell such goods.

The plaintiffs contended that, though they had given a licence to certain persons to use their patent, there were no rights under the circumstances to assign to the defendants without the plaintiffs' consent, a consent that had never been granted.

Upon motion for an interlocutory injunction,

Held, that the case was not within section 32 of the Patents, &c., Act, 1883, because of the proviso at the end of that section, in this case an action having been *bonâ fide* brought even before the circular was issued; that there was no analogy between this case and that where a tenant sued his landlord, for in this case the question between the parties was whether the defendants were licensees at all; and that, although the publication of the circular complained of might greatly damage the defendants, they had no equity to restrain the plaintiffs from stating that they were taking proceedings.—DUNLOP PNEUMATIC TYRE CO. *v.* SEDDON PNEUMATIC TYRE CO., *C.A.*

8. *Licence to use implied—Exclusive licensee with option of purchase—Slander of title—Allegation of infringement — Advertisement — Threatening legal proceedings—Present interest of exclusive licensee—Damages for infringement — Injunction — Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.—A clause in the agreement between the owners of a patent and a company, whereby it was agreed (*inter alia*) that the latter should have an option to purchase the patent, provided that if the option was not exercised within a certain time a royalty should be paid as from a certain date on all articles manufactured by the company having such option,

Held, that a licence to use the patent as from the date mentioned was implied upon the terms that if the option to purchase was exercised nothing was to be paid for so doing, but if the option was not exercised a royalty was to be paid.

The exclusive licensees of a patent with an option of purchase have sufficient interest in the patent to rebut the presumption that an advertisement issued or statement made by them containing a threat that persons using a certain process in manufacturing certain articles alleged to be so used in infringement of the patent may be liable to proceedings at law, is not issued or made in good faith; it is not necessary that such an interest should be a present vested interest, and the fact that such exclusive licensees may never be entitled to recover damages in respect of alleged present infringements of the patent is immaterial.

When the owner of a patent has brought an action against an alleged infringer of the patent, the exclusive licensees of the patent with an option of purchase, who have threatened alleged infringers of the patent with legal proceedings or liability, can claim the protection afforded to a person making such threats, under the proviso in section 32 of the Patents Act, 1883, and an injunction cannot be obtained against them under the section.

An injunction will not be granted restraining a defendant from making a statement alleged to be for the purpose of injuring the plaintiff in his trade when such statement, though not literally true, is true in substance and in fact; it is always necessary for the plaintiff to prove express malice on the part of the defendant when such statement is made in defence of the defendant's property.—INCANDESCENT GAS LIGHT CO. *v.* NEW INCANDESCENT GAS LIGHTING CO., *Ch.D. Stirling, J.*

9. *Threats—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 32.—A letter containing a threat of legal proceedings, written with the intention o being understood to refer to patent claims of the defendants, and the natural effect of which, under the circumstances, was to be so understood, but which contained no express reference to any such patent rights,

Held, to be a threat under section 32 of the Patents, &c., Act, 1883.—DOUGLASS *v.* PINTSCH'S PATENT LIGHTING CO., *Ch.D. Romer, J.*, 108.

PENALTY.—See Contract, 2.

PENSION.—See Bankruptcy, 20; Police.

POLICE:—

Pension—Cancellation — Constable—Incapacity by infirmity—Police authority—Attendance for medical examination—Collateral purpose—Illegal stoppage of pension—Mandamus—*Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 1 (a), (b); *s.* 5, *sub-sections* 1, 3, 4, 7; *s.* 12.—The power conferred upon a police authority by the Police Act, 1890, *s.* 5, of requiring a pensioner to attend to be examined by a medical practitioner selected by them at a particular time and place, for the purpose of satisfying them that his incapacity to serve continues, cannot be exercised by the police authority for any collateral purpose.

A police authority has no power under section 5, sub-section 4, of the Act to cancel a pension without requiring the pensioner to serve again.

A police authority has power to fix the time and place for the examination of the pensioner

by the medical practitioner whom they may select under the provisions of section 5 of the Police Act, 1890.

A police authority, on the 12th of July, 1894, resolved that their former chief constable, to whom they had granted a pension on the ground of incapacity by infirmity, should attend at Warwick on a specified day and hour for the purpose of being examined by two doctors as to his state of health, and that if he failed to do so his pension should be cancelled.

The pensioner had been declared bankrupt in 1891, and in 1892 a warrant had been issued for his arrest, on the ground that he being out of England had not attended his adjourned examination in bankruptcy. He had been residing in Portugal since April, 1892; but in March, 1893, he had come to England for a day or two, and had been examined by a doctor, selected by the police authority, who had certified his continuing incapacity. He did not attend in compliance with the resolution of the 12th of July, 1894, and the police authority cancelled his pension.

Held, upon the evidence, that the police authority had used their statutory power of requiring the pensioner's attendance at Warwick, not for the purpose of satisfying themselves as to his continued incapacity, but for the purpose of assisting the Bankruptcy Court; and, consequently, that they had exceeded their jurisdiction, and the pensioner was entitled to a *mandamus* calling upon the police authority to show cause why they should not pay him the arrears of his pension.—REG. *v.* LORD LEIGH, KINCHANT, RE, *C.A.*

POOR LAW:—

1. *Costs—Limitation of time—Judgment ordering guardians to pay costs—Taxation—Debt, claim, or demand incurred or become due—Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict.* c. 49), *s.* 1.—Where guardians of the poor are ordered by a judgment of the court to pay costs, the time within which, under section 1 of 22 & 23 Vict. c. 49, it is lawful for them to pay such costs is to be reckoned, not from the date when the judgment was delivered, but from the date when the costs were taxed.

The decision of the House of Lords in *Guardians of West Ham* v. *Churchwardens, &c., of St. Matthew, Bethnal Green*, [1896] A. C. 477, held to apply to the case of an order for the payment of costs made by the Supreme Court.—MANCHESTER, &c., RAILWAY CO. *v.* DONCASTER UNION, *C.A.*, 82.

2. *Husband and wife—Maintenance—Non-liability of husband to maintain adulterous wife—Poor Law Amendment Act*, 1868 (31 & 32 *Vict.* c. 122), *s.* 33.—In 1862 the appellant married F. H. M. They lived together a few months and then the husband joined the Marines. Nothing more was heard of him, and in 1889 F. H. M. married R. G., and lived with him as his wife. On hearing the appellant was alive the wife still continued to live with R. G.

F. H. M. became chargeable to the T. Union in 1886, and the guardians applied for an order against the husband, the appellant, which the magistrates made.

Held (quashing the order of the magistrates), that the wife was guilty of adultery, and that the appellant could not be compelled to support F. H. M. his wife.—MITCHELL *v.* TORRINGTON UNION, *Q.B.D.*

3. *Limitation of time for payment of debt of guardians—Jurisdiction of House of Lords over costs—Costs of appeal in House of Lords—Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict.* c. 49), *ss.* 1, 4.—An order of this House for payment of the costs of an appeal without specifying the amount does not constitute a "debt, claim, or demand lawfully incurred or become due" within the meaning of the Poor Law (Payment of Debts) Act, 1859, ss. 1, 4, until the amount has been certified by the Clerk of the Parliaments under the Standing Orders, and the time for payment limited by that Act runs from the date of the certificate and not from the date of the order.

This House has an inherent jurisdiction, independent of statute, over costs in proceedings before itself.

The decision of the Court of Appeal, [1895] 1 Q. B. 662, reversed.—WEST HAM UNION (GUARDIANS OF) *v.* ST. MATTHEW, BETHNAL GREEN (CHURCHWARDENS, &c., OF), *H.L.*

4. *Loan to guardians—Contract—Loan for fixed period payable by instalments—Act of Parliament—Construction—Effect of proviso—Implied alteration of contract—Poor Law Loans Act*, 1871 (34 & 35 *Vict.* c. 11), *s.* 2.—The plaintiffs in 1875 borrowed from the defendants money which it was agreed should be repaid with interest at 4¼ per cent. by sixty equal specified half-yearly instalments in respect of principal and interest. In 1895 the plaintiffs applied for and obtained from the Local Government Board an order enabling them to redeem the balance of the said loan and to borrow at 3 per cent. interest so much money as might be necessary for that purpose. The defendants were not served with any notice of the plaintiffs' intention to apply for such order, and did not appear to oppose it.

Held, that the plaintiffs were not entitled, under section 2 of the Poor Law Loans Act, 1871, to compel the defendants to receive repayment of the balance of the said loan at any time prior to the expiration of the period fixed by the contract for the loan.

Decision of North, J., *ante*, p. 90, reversed.—WEST DERBY UNION *v.* METROPOLITAN LIFE ASSURANCE CO., SAME *v.* PRIESTMAN, *C.A.*, 388.

5. *Negligence of poor law official—Non-liability of guardians—Lord Campbell's Act.*—Guardians of the poor are not answerable in damages in their corporate capacity for injuries caused by the negligence of their officials in the treatment of poor patients received into the workhouse hospital.—DUNBAR *v.* ARDEE GUARDIANS, *Q.B.D.* (*Ir.*).

6. *Rating—Appeal—Consent of guardians—Assessment committee as respondents—Costs—Union Assessment Committee Amendment Act*, 1864 (*c.* 39), *s.* 2.—Where the assessment committee of a union receive notice of a poor-rate appeal under section 1 of the Union Assessment Committee Amendment Act, 1864, they have no authority to appear as respondents to the appeal unless they obtain the consent of the guardians after sending notice to every guardian, as required by section 2. If they do appear without such consent and the appeal is dismissed "with costs to the respondents" they are not entitled to costs, although throughout the proceedings they receive notices to attend from the appellants and are treated by them as respondents.

The decision of the Court of Appeal ([1895] 1 Q. B. 38) affirmed.—WEST HAM UNION *v.* ESSEX (JUSTICES OF) AND LONDON COUNTY COUNCIL, *H.L.*

7. *Rating—Arrears—Right of distress—Change of occupation—Receivers and managers appointed by the*

court—No order for delivery of possession of premises —Poor Law Act (43 *Eliz.* c. 2), *s.* 2—*Metropolis Management Act*, 1855 (18 & 19 *Vict.* c. 120), *s.* 161 —*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict.* c. 41), *s.* 16.—The appointment of receivers and managers of the business of a company by an order which does not direct the company to deliver up to them the possession of its premises does not produce a change of occupation within the meaning of section 16 of the Poor Rate Assessment and Collection Act, 1869; nor does the existence of an equitable charge protect the goods subject thereto from a distress for rates. Leave will, therefore, in such a case, be given to the overseers to distrain for rates in arrear upon goods on the premises.

Richards v. *Overseers of Kidderminster*, 44 W. R. 505, [1896] 2 Ch. 212, discussed.—MARRIAGE, NEAVE, & CO., RE, *C.A.*, 42.

8. *Rating — Exemption — County council — Joint occupation by county council and justices.*—Premises which are jointly occupied by a county council for administrative purposes and by justices for judicial purposes are rateable in respect of the occupation by the county council.

The principle laid down in *Greig* v. *University of Edinburgh*, L. R. H. L. (Sc.) 348, as to exemption from rateability, followed. — WORCESTERSHIRE COUNTY COUNCIL *v.* WORCESTER ASSESSMENT COMMITTEE, *C.A.*, 309.

9. *Rating—Exemptions—County council offices—User for administrative purposes—Joint occupation with quarter sessions.*—Premises were occupied as to one part by a county council exclusively for the purpose of the administrative business of the county; another part of the premises was occupied by the county council jointly with the quarter sessions.

Held, that occupation for the administrative business of the county was not occupation for a "Crown" purpose so as to exempt the county council from being rated for the relief of the poor; that as to the part of the premises occupied jointly with the quarter sessions the county council must be rated in proportion to the extent of their occupation.

Decision of the Divisional Court (Cave and Wills, JJ.), 44 W. R. 666, affirmed.—MIDDLESEX COUNTY COUNCIL *v.* ST. GEORGE'S UNION COMMITTEE, *C.A.*, 215.

10. *Rating—Exemption—Society instituted for the purposes of science, literature, or the fine arts—Supported by voluntary contributions—Art Union*—6 & 7 *Vict.* c. 36, *s.* 1.—The Art Union of London is a society instituted for the purposes of the fine arts exclusively, but it is not a society supported by voluntary contributions within section 1 of the 6 & 7 Vict. c. 36, as the subscribers get an equivalent for their subscriptions, and consequently the society is not exempt from liability to be rated to the poor and other local rates in respect of the premises occupied by it.

Decision of the Court of Appeal (42 W. R. 690, [1894] 2 Q. B. 609) reversed.—SAVOY OVERSEERS *v.* ART UNION OF LONDON, *H.L.*, 31.

11. *Rating—Lighthouse—Dues.*—In assessing the rateable value of the lighthouse, the dues received in respect of it cannot be taken into consideration.—LANCASTER (COMMISSIONERS OF PORT OF) *v.* OVERSEERS OF BARROW-IN-FURNESS, *Q.B.D.*

12. *Rating—Property other than land — Land—Brickfield*—43 *Eliz.* c. 2, *s.* 1—*Lighting and Watching Act*, 1833 (3 & 4 *Will.* 4, c. 90), *s.* 33.—By section 33 of 3 & 4 Will. 4, c. 90, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at and pay a rate in the £ three times greater than that which the owners and occupiers of land shall be rated at and pay for the purposes of the Act.

Held, that "property other than land" meant things *ejusdem generis* with "houses and buildings," and did not include a brickfield; and that a foreman's cottage, together with all the sheds and machinery for brick-making erected on the property (at any rate, so long as that property was assessed as a whole), must be considered as merely ancillary to the brickfield, and therefore the owners of the brickfield were not liable to be rated at the higher rate.—RUTTER *v.* CRAYFORD OVERSEERS, *Q.B.D.*, 542.

13. *Rating—Public park—Beneficial occupation.*—The respondents, a county council, were empowered by statute to acquire, and did acquire, certain hereditaments to be held and maintained by them in perpetuity as a park for the use and recreation of the public. There was no duty imposed on the respondents to provide a park for the use of the public.

The necessary expenses of maintaining the park exceeded any revenue which could be derived from it.

The respondents were rated to the relief of the poor in respect of the park.

Held, that there was no beneficial occupation in respect of which the rate could be supported.

Hare v. *Overseers of Putney*, 7 Q. B. D. 223, approved and followed.

London County Council v. *Erith*, 13 App. Cas. 562, distinguished.—LAMBETH (CHURCHWARDENS) *v.* LONDON COUNTY COUNCIL, *H.L.*

14. *Rating—River—Occupation of land—Value of land enhanced—Floating pontoons—Liability to be rated.*—The T. P. company are occupiers and owners of about nine acres of land on the Tyne, which is here a tidal river. A creek was excavated on the land, and in it were placed two pontoons, into which ships could be received for repairing purposes. They were attached to piles and "dolphins" by means of shackles which could be easily detached, and joined to the land by a moveable gangway. They could be towed out; but, as a matter of fact, had not been moved except for repairing purposes for ten and four years respectively. They were rated as being in occupation of land over which they floated, and to which they were attached, and also that the occupation of the land was enhanced by reason of their being attached and used in connection therewith.

Held, that they were rightly rated on the latter ground, and were within the principle of *Reg.* v. *Morrison*, 1 Ell. & Bl. 150.—TYNE PONTOON CO. *v.* TYNEMOUTH UNION, *Q.B.D.*

15. *Rating — Tithe rent-charge — Assessment — Deductions—Liability to repair chancel—Tenant's profits.*—In assessing the rateable value of tithe rent-charge issuing from a rectory the tithe-owner is not entitled to a deduction for money expended in repairs to the chancel of the parish church.

On an appeal against an assessment of tithe rent-charge a court of quarter sessions is not justified in allowing a deduction in respect of tenant's profits unless it finds as a fact that the allowance made for expenses of collection is insufficient to cover tenant's profits.

Judgment of the Queen's Bench Division (Wills

and Wright, JJ.), *ante*, p. 223, affirmed.—ST. ASAPH (DEAN AND CHAPTER) *v.* LLANRHAIADR-YN-MOCHNANT OVERSEERS, *C.A.*, 375.

16. *Rating—Valuation list—Notice of objection—Assessment committee—Appeal—Union Assessment Committees Act*, 1862 (25 & 26 *Vict. c.* 103), *ss.* 18, 19—*Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 11, 32.—The Union Assessment Committees Act, 1862, s. 18, provides that any person who may feel himself aggrieved by the valuation list of any parish may give to the assessment committee a notice in writing of his objection, and by section 19 the assessment committee shall not hear any objection unless notice of the objection has been given aforesaid. The Valuation (Metropolis) Act, 1859, s. 32, gives a right of appeal to quarter sessions from any decision of the assessment committee on an objection made before them.

Held, that the assessment committee had no power to entertain any objection unless notice thereof in writing was given; and that an appeal to quarter sessions only lay from a decision of the assessment committee on an objection, notice of which had been given in the prescribed manner to the committee.—REG. *v.* LONDON JUSTICES, *Q.B.D.*, 247.

17. *Settlement—Computation of time—Period of residence in a hospital—Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.—The Divided Parishes Act, 1876, s. 34, enacts that "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years" as would have created a *status* of irremovability, he shall be deemed to be settled therein.

Held, that the expression "term of three years" meant three consecutive years.

Dorchester Union v. *Weymouth Union*, 16 Q. B. D. 31, approved.

The Poor Removal Act, 1846, s. 1, provides that, in computing the period of residence which shall render a person irremovable from a parish, the time during which such person "shall reside as an inpensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum . . . or as a patient in a hospital . . . shall for all purposes be excluded."

Held, that the proviso included the temporary residence of a patient in a hospital, and was not limited to cases of compulsory confinement.

Decision of the Divisional Court (*ante*, p. 302) affirmed.—ST. OLAVE'S UNION *v.* CANTERBURY UNION, *C.A.*, 530.

See also Justices, 2; Lunacy, 5.

POST OFFICE:—

Die for making fictitious stamp—Possession—Without lawful excuse—Post Office (*Protection*) *Act*, 1884 (47 & 48 *Vict. c.* 76), *s.* 7 (c).—The respondent had in his possession a die for a fictitious stamp which he used for the purpose of making a representation of a postage stamp in a newspaper published in the interest of stamp collectors. The die was made abroad to the respondent's order.

Held, that the respondent had committed an offence within section 7 (*c*) of the Post Office (Protection) Act, 1884, which provides that a person shall not, unless he shows a lawful excuse, have in his possession a die for making a fictitious stamp.—DICKINS *v.* GILL, *Q.B.D.*

POWER:—

1. *Appointment—Appointment for all purposes—Lapse.*—The question whether a general power of appointment has been so exercised by the donee as to take the fund subject to the power away from the persons entitled in default of appointment for all purposes, is one of intention to be gathered from the dispositions of the fund made by the donee.

J. K., a donee of a general power of appointment, by will of a sum of £5,000 (as to which, in default of appointment, there was a gift over to other persons by the donor of the power), exercised the power by appointing the fund directly in equal shares between eight nephews and neices, to whom she also gave legacies out of her own estate which, both in her will and codicil, she distinguished from the £5,000. She appointed an executor; but her own estate was more than sufficient to pay all her debts and legacies. A nephew and a niece died in her lifetime.

Held, following *In re Davies' Trusts*, 20 W. R. 165, L. R. 13 Eq. 163, that J. K. had not indicated an intention to make the £5,000 her own for all purposes; and that the persons entitled in default of appointment under the limitation in the instrument creating the power took the shares appointed to the nephew and niece who had died in the donee's lifetime.—BOYD, RE, KELLY *v.* BOYD, *Ch.D. Romer, J.*, 648.

2. *Appointment—Fraud on power—Severance of good from bad appointment—Appointment bad* pro tanto.—By a settlement made on the marriage of J. V. with his first wife, the funds were settled after the husband's and wife's life interests (in default of joint appointment, which happened) as the survivor should appoint among the children of the marriage, of whom there were three. The wife died and J.V. married again.

By an agreement the children (none of whom were emancipated) agreed to assign on the death of J. V. a portion of the fund for the benefit of the wife and children of the second marriage.

By his will and codicil J. V. gave the funds to one child only, subject to annuities to the others, and to a request to settle £100 a year on the wife and children of the second marriage.

Held, (1) that the above-mentioned agreement was not enforceable; (2) that the exclusion of the two children from sharing in the *corpus* was not, but the request to settle £100 a year was, a fraud on the power, and that the appointment was bad to that extent.—VIANT *v.* COOPER, *Ch.D. Stirling, J.*

3. *Appointment—Life interest—Forfeiture clause—Fraud on power—Lapse—Remoteness.*—Property was vested in trustees of a marriage settlement "to pay the income thereof to the wife for her life, and after her death in trust for all and every or such one or more exclusively of the other or others of the child or children of the marriage at such ages, days, or times, for such estates or interest, and if more than one in such shares and proportions, and with, under, and subject to such powers, provisions, conditions, and limitations as the said wife should by deed or will appoint." There was issue of the marriage three daughters, and the wife by deed-poll appointed two-thirds in trust for two daughters absolutely; "And as to the remaining one equal third part thereof upon trust to pay the said income thereof to the" remaining daughter H. E. S., "if not at my death a member of the Roman Catholic Church or of any sisterhood, during her life, or until she shall become a member of the Roman Catholic Church or of any sisterhood, without power of anticipation during any coverture;

and subject as aforesaid, as to the capital and income thereof, for the" other two sisters in equal shares.

After the death of her mother H. E. S. became a member of an Anglican sisterhood.

Held, (1) that the appointment was not a fraud on the power; (2) that the appointment was not void for remoteness, and that the gift over took effect.—WAINWRIGHT *v.* MILLER, *Ch.D. Byrne, J.*, 652.

See also Deed; Limitations, Statute of, 4; Settled Land, 9; Settlement, 1; Will, 19.

PRACTICE:—

1. *Administration action—Costs—Defendant trustees—Severance of defence—Apportionment of costs—Discretion of court—Appeal—R. S. C.*, 1883, *ord.* 65, *r.* 1.—In an action to administer the estate of a deceased testator, in which the two trustees and executors S. and I. were defendants, the defendants were represented by one firm of solicitors until a certain date, when they severed, and the defendant I. appeared in person. Some time afterwards I. instructed another solicitor to act for him. The action coming on for hearing on further consideration, Kekewich, J., gave the trustees one set of costs only out of the estate, and directed that it should be paid to S. exclusively.

Held, on appeal, that, there being no evidence that I. had acted unreasonably in severing, the costs were not in the discretion of the judge, and therefore the appeal was competent.

Further, that the proper order to be made was that one set of costs should be given, to be apportioned by the taxing-master, but so as to give to I. only costs for work actually done by him.—ISAAC, RE, CRONBACH *v.* ISAAC, *C.A.*, 262.

2. *Appeal—Chambers—"Matters of practice and procedure"—Judgment under Order XIV.—Appeal to Court of Appeal—Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.—An appeal against an order of a judge at chambers giving leave to the plaintiffs to enter final judgment under Order XIV., r. 1, is an appeal in a "matter of practice and procedure" within the meaning of section 1, sub-section 4, of the Judicature Act, 1894, which must be brought to the Court of Appeal.—CANNON BREWERY CO. *v.* GILBY, *C.A.*

3. *Appeal—Court of Appeal—Criminal cause or matter—Poor rate—Distress warrant—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.—Where justices ordered a distress warrant to be issued to enforce payment of a poor rate, under a local Act which gave them power to order imprisonment in default of distress, but stated a case for the opinion of the court,

Held, that the judgment of the Queen's Bench Division on the case was in a criminal cause or matter, and that no appeal lay to the Court of Appeal.—SEAMAN *v.* BURLEY, *C.A.*, 1.

4. *Appeal — Court of Appeal — Jurisdiction — "Criminal cause or matter" — Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.—By a local Act it was provided that, "if it shall at any time be proved to the satisfaction of any two justices, after hearing the parties, that the illuminating power of the gas supplied by the corporation in the said township did not, when so tested as aforesaid, equal the illuminating power by this Act prescribed," the corporation shall forfeit the sum not exceeding £20 as such justices shall determine, to be paid to the local board.

Upon an information and complaint by the local board under the above provisions, the justices convicted the corporation and imposed a penalty of £10, and stated a case for the opinion of the High Court.

Held, that the judgment of the High Court upon the case was a judgment in a "criminal cause or matter," within the meaning of section 47 of the Judicature Act, 1873, from which no appeal would lie to the Court of Appeal.—SOUTHPORT (MAYOR) *v.* BIRKDALE DISTRICT COUNCIL, *C.A.*

5. *Appeal — Trial — Judgment and finding of official referee—Notice of motion—Ord.* 39, *rr.* 3 *and* 4—*Ord.* 40, *r.* 6.—Upon an appeal from the judgment and finding of an official referee, by way of asking for a new trial, the respondent took the preliminary objection that the application was out of time.

Held, that the case came within ord. 39, rr. 3 and 4, and that the objection was good.—FORREST *v.* TODD, *Q.B.D.*

6. *Assignment of debt—Absolute assignment in writing — Assignment to agent to collect—Right of assignee to sue—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—A foreigner resident abroad assigned to the plaintiff a debt, due to him from the defendant, by a deed which purported, in consideration of £50 paid by the plaintiff, to absolutely assign the debt. If fact, the assignment was made to the plaintiff in order to enable him to sue in England in his own name to recover the debt for the benefit of the assignor, and the plaintiff had not paid any sum by way of consideration to the assignor.

Held (reversing the judgment of Bruce, J.), that there was an absolute assignment in writing within section 25, sub-section 6, of the Judicature Act, 1873, which entitled the plaintiff to sue in his own name.—WIESENER *v.* RACKOW, *C.A.*

7. *Consolidation of actions—Application by plaintiff—Ord.* 49, *r.* 8.—The court has power to make an order for the consolidation of actions at the instance of a plaintiff as well as at the instance of a defendant.—MARTIN *v.* MARTIN, *C.A.*, 260.

8. *Contempt—Breach of injunction—Attachment—Service of copies of affidavits with notice of motion—Proof of service of order—Consent order—Ord.* 52, *r.* 4.—Upon a motion to commit for breach of an injunction the fact that the injunction was granted upon a consent order agreed to by the defendant's counsel will not relieve the plaintiff from the necessity of proving either that such order has either been served upon or has been otherwise brought to the knowledge of the defendant.—HALL *v.* TRIGG, *Ch.D. Kekewich, J.*, 703.

9. *Costs—Appeal—House of Lords—Stay of execution.*—The plaintiff, a foreigner residing abroad, on instituting his action, deposited £350 by way of security. On judgment being given for the defendants, £308 13s. 10d. of this sum was paid over to the defendants by way of costs, and the balance returned to the plaintiff, who, being successful on his appeal, claimed the return of the costs.

Held by the Court of Appeal, that, in the circumstances, a stay would be granted, unless the plaintiff's solicitors gave an undertaking to refund any costs in the event of the defendants' appeal to the House of Lords being successful.—THE RATATA, *C.A.*

10. *Costs—Consultations with counsel—Shorthand notes of evidence—Expenses of witnesses.*—Where a taxing-master had directed (1) that fees for con-

sultations should be ascertained by the number of consultations allowed; (2) that costs of witnesses should be ascertained at a uniform rate of fourteen days' subsistence when the witness was examined twice, and seven days when examined only once,

Held, that the first direction was right, and that the master need not inquire into the length of the consultations and the importance of the occasions on which they were held, but that the second direction was erroneous, for that the case of each witness properly called should be considered, and a reasonable allowance made having regard to the character of his evidence and the probability of his having to be recalled.—COMMISSIONER FOR RAILWAYS *v.* O'ROURKE, *P.C.*

11. *Costs—Order as to costs made by judge at chambers—Power of judge at trial to interfere—Ord.* 14, *r.* 9.—Where on an application under order 14 the judge at chambers has made an order as to costs, the judge at the trial has no jurisdiction to interfere with those costs.—KOOSEN *v.* ROSE, *C.A.*, 337.

12. *Costs—Parties—Husband and wife—Separate actions by—Ord.* 16, *r.* 1—*Ord.* 18.—Where the defendants contemplated erecting premises which would if completed, it was alleged, interfere with the ancient lights of two messuages, one of which belonged to a husband and the other to his wife, separate actions were brought by husband and wife claiming (*inter alia*) an injunction and damages. The title of the wife did not appear. On a motion for an injunction the defendants admitted the right of the plaintiffs, and had previously offered to amend their plans accordingly. They objected, however, to paying two sets of costs.

Held, that, if it should turn out that the wife was not entitled to her separate use, the taxing-master should disallow any extra costs occasioned by bringing two actions instead of one.—HEIMBS *v.* NEWCASTLE CO-OPERATIVE SOCIETY, *Ch.D. Stirling, J.*

13. *Costs—Security for costs of appeal—Appeal against order for attachment—Ord.* 58, *r.* 15.—Where an appeal is brought against an order for a writ of attachment, the court will not, in its discretion, as a general rule, order security for the costs of the appeal to be given.—HOOD BARRS *v.* HERIOT (No. 2), *C.A.*, 17.

14. *Costs—Sequestration—Discretion—Ord.* 43, *r.* 7.—When an application is made for leave to issue a sequestration for non-payment of costs the court or judge should be satisfied that the application is reasonable, but it is not necessary to point to any particular property which may be made available for the payment of the costs by sequestration.

When the court or judge to whom the application is made has exercised a discretion and made an order, that order ought not to be interfered with by a superior court unless it is shown that there has been an improper exercise of the discretion or some miscarriage of justice.—HULBERT *v.* CATHCART, *H.L.*

15. *Costs—Solicitor—Plaintiff made party without authority—Motion to strike out name—Action discontinued—Judicature Act*, 1875 (36 & 37 *Vict. c.* 77), *s.* 21—*R. S. C., ord.* 26, *r.* 1; *ord.* 78, *r.* 2.—When a plaintiff is made a party to an action without his authority there is jurisdiction to order the solicitors so using the plaintiff's name to pay the plaintiff's costs, although before a motion for that purpose and to strike out the plaintiff's name from the writ can be made, the action has been discontinued.—GOLD REEFS OF WESTERN AUSTRALIA *v.* DAWSON, *Ch.D. North, J.*, 285.

16. *Costs—Taxation—Costs of Appeal—Meaning of.*—The expression "costs of the appeal" means extra expenses first incurred in the litigation started by the notice of appeal.

Held, accordingly, that the costs of briefs of the pleadings and evidence used in the court of first instance, although such briefs were utilized and necessary for the appeal, were not "costs of the appeal."—KEVANS *v.* JOYCE, *C.A.* (*Ir.*).

17. *Costs—Taxation—Taxation in district registry—Jurisdiction of judge—Order for retaxation before taxing-master in London—Grounds for making such an order—Question of principle.*—Where costs have been taxed in a district registry, a judge in chambers, if satisfied that the registrar, whether or not he has gone wrong on any question of principle, has taken an exaggerated or erroneous view of the case, has jurisdiction to order that the bill, or part of it, be referred for retaxation to some other person of greater skill and experience (*e.g.*, to one of the taxing-masters in London).—STEVENS *v.* GRIFFIN, *C.A.*, 658.

18. *Default of pleading—Motion for final judgment against one defendant in absence of other defendants—Cause of action severable—Company—Rectification of register—Ord.* 27, *r.* 12.—Upon motion for final judgment against one of several defendants upon admission of the plaintiff's claim by such defendant, it is not necessary to serve the other defendants with notice of the motion, the cause of action being severable.—MACMILLAN *v.* AUSTRALASIAN TERRITORIES, *Ch.D. Stirling, J.*

19. *Discovery of documents—Action for fraudulent conspiracy—Ord.* 31, *r.* 12.—An order for discovery of documents may be made against a defendant in an action for fraudulent conspiracy. The objection that the production of any document would tend to criminate the defendant can be made by him in his affidavit in answer.

Redfern v. *Redfern*, 39 W. R. 212, [1891] P. 139, distinguished.

Allhusen v. *Labouchere*, 27 W. R. 12, 3 Q. B. D. 654, approved.—SPOKES *v.* GROSVENOR RAILWAY HOTEL CO. (No. 1), *C.A.*, 545.

20. *Discovery of documents—Action by shareholder to recover damages for company—Company joined as defendant—Right of plaintiff to discovery from company—"Other party"—Ord.* 31, *r.* 12.—Where a shareholder in a company brings an action on behalf of himself and the other shareholders to recover damages for the company, and the company is joined as a defendant to the action, an order may be made against the company at the instance of the plaintiff for discovery of documents, though no relief is sought against the company.—SPOKES *v.* GROSVENOR RAILWAY HOTEL CO. (No. 2), *C.A.*, 546.

21. *Discovery—Documents—Affidavit of documents—Objection to produce—Conclusiveness of affidavit.*—In an action against directors for an alleged fraudulent misrepresentation in the prospectus of a company to the effect that more than 12,000 cyclists in London alone had enrolled themselves as annual subscribers to the company, the defendants made an affidavit of documents in which they said that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the company, but they objected to produce these documents on the ground that they formed no part of the evidence supporting

the defendants' case, and did not support or tend to support the plaintiff's case, and contained nothing impeaching the defendants' case.

Held, that, there being nothing to show that the affidavit erroneously represented or misconceived the nature of the documents, they were protected from production.—FRANKENSTEIN *v.* GAVIN, *C.A.*, 547.

22. *Discovery — Production of books — Common order—Liberty to seal up irrelevant entries—Form of order giving liberty to cover up without sealing.*—A party to an action, who has obtained against his opponent the common order for production and inspection of books and documents, giving liberty to the opponent to seal up such parts of the books as do not relate to the matters in question, is not entitled to insist upon the actual sealing up of such parts of the books where so doing would interfere with the conduct of the opponent's business or be oppressive; and the covering up upon oath of the irrelevant parts of such books is a sufficient compliance with the order. — GRAHAM *v.* SUTTON, CARDEN; & Co., *C.A.*

23. *Discovery—Production of documents—Crown —Crown Suits Act*, 1865, *ss.* 13, 16.—The Crown is not bound to give discovery to a subject, although it has the same right of discovery against a subject as another subject has.—ATTORNEY-GENERAL *v.* NEWCASTLE-UPON-TYNE CORPORATION, *C.A.*

24. *Discovery—Production of documents—Sealing up—Inspection by judge — Jurisdiction—R. S. C.*, 1883, *ord.* 31, *r.* 19a, *sub-rule* 2.—The word "privilege" in ord. 31, r. 19*a*, sub-rule 2, is not to be construed in a narrow sense so as to exclude the case of an objection to discovery based on the ground of irrelevancy. It includes any ground on which inspection is sought to be resisted.—EHRMANN *v.* EHRMANN (No. 2), *Ch.D. Stirling, J.*

25. *Discovery of documents — Interrogatories — Action for forfeiture of land.*—The defendant in an action to recover possession of land on a forfeiture for breach of a covenant contained in a lease, cannot be ordered to make an affidavit of discovery of documents or to answer interrogatories.

Seaward v. *Dennington*, 44 W. R. 696, disapproved. —MEXBOROUGH (EARL) *v.* WHITWOOD DISTRICT COUNCIL, *C.A.*, 564.

26. *Discovery—Inspection of documents—Documents referred to in affidavits—R. S. C.*, 1883, *ord.* 31, *rr.* 15-18.—In the course of proceedings to set aside an award on the ground of misconduct of an arbitrator an affidavit was sworn by the arbitrator for the purpose of being used by the party in whose favour the award had been made. The affidavit was not filed, but a copy of it was handed to the other party. It contained a reference to certain letters. On an application for inspection of the letters,

Held, that the case was within ord. 31, r. 15, and that there was power to make an order for inspection under rule 18.—FENNER AND LORD'S ARBITRATION, RE, *C.A.*, 486.

27. *Discovery—Interrogatories—Criminal or penal proceedings — Right to discovery — Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10. —Section 3 of the Rivers Pollution Prevention Act, 1876, makes it an offence to cause or knowingly to permit any sewage matter to flow into any stream; and by section 10 the county court of the district has power, by summary order, to require any person to abstain from the commission of such offence, and any person making default in complying with any such requirement shall pay such sum not exceeding £50 for every day during which he is in default, as the court may order, and such penalty shall be enforced in the same manner as any debt adjudged to be due by the court.

Held, that proceedings instituted in the county court for an order requiring a person to abstain from causing or permitting sewage to flow into a river were not proceedings of a criminal or penal nature, and that an order for discovery might be made against such person.—DERBYSHIRE COUNTY COUNCIL *v.* DERBY (MAYOR), *C.A.*, 3.

28. *Discovery — Production of documents—Documents in possession of former solicitor—Solicitor's lien—Dispute as to bill of costs—R. S. C.*, 1883, *ord.* 31, *r.* 14.—The principle that it is not a good defence on a summons for production of documents to say that the documents are in the possession of a former solicitor of the person called on to produce, who has a lien on them for his bill of costs, applies also to a case where it is alleged, in addition, that the bill of costs is disputed and that there is a good defence to it. An order for production will be made in such a case, with liberty to apply, in order to prevent any hardship.

Rodick v. *Gandell*, 10 Beav. 270, and *Vale* v. *Oppert*, 23 W. R. 780, L. R. 10 Ch. App. 340, applied.—LEWIS *v.* POWELL, *Ch.D. Stirling, J.*, 438.

29. *Discovery—Production of documents—Libel in newspaper—Original manuscript—Ord.* 31, *r.* 18.—In an action for libel in a newspaper the defendants in their defence admitted the publication, and pleaded an apology, and paid a sum of money into court. In their affidavit of documents the defendants stated that they had in their possession certain documents relating to the matters in question in the suit, among them being a manuscript which they objected to produce on the ground that it was the original contribution to them, and was that which was published by them.

Held, that the plaintiff was not entitled to production of the manuscript.

Hennessy v. *Wright*, 36 W. R. 879, 24 Q. B. D. 445, followed.—HOPE *v.* BRASH, *C.A.*, 659.

30 *Evidence—Letters of request to take evidence before foreign tribunal—Discretionary power of court.* —In order to justify the court, in the exercise of its discretion, ordering the issue of letters of request to a foreign tribunal to take evidence, there must be clear proof that the evidence abroad which is sought to be obtained is material to the case in issue, and is not merely such as incidentally might be useful on a collateral matter.—EHRMANN *v.* EHRMANN, *C.A.*, 149.

31. *Evidence—Order to examine person making statements deposed to in affidavit filed on motion*—Ex parte *application — R. S. C., Ord.* 37, *r.* 5. — Where, in an affidavit filed on behalf of the plaintiffs on a motion, which by consent stood over, statements were deposed to as having been made by a person to the deponent, and which were material for the purposes of the plaintiffs' case, leave was, on an *ex parte* application, given to the plaintiffs to examine such person before an examiner, the deposition to be given in evidence as if it were an affidavit.—TURNER PNEUMATIC TYRE CO. *v.* DUNLOP PNEUMATIC TYRE CO., *Ch.D. Stirling, J.*

32. *Garnishee order—Prior charge on interest of judgment debtor—Tenants' rents.*—A garnishee order only binds the attached debt to the extent to which the judgment debtor himself can deal with it.—O'CONNOR *v.* IRELAND, *Q B.D.* (*Ir.*).

33. Habeas Corpus—*Prisoner—Witness—Order on*

governor of prison.—Where a plaintiff moved *ex parte* for an order on the governor of a prison to produce a prisoner in court at the trial, but the time of hearing was uncertain, the court made the order in the form given in Seton, 5th ed., p. 89, but directed that the same should not be drawn up until the case was in the paper for trial.—JENKS *v.* DITTON, *Ch.D. Stirling, J.*

33A. *Interpleader—Seizure of goods in execution—Claim by holder of bill of sale—Order for sale—Application of proceeds—Jurisdiction of judge—Ord.* 57, *r.* 12.—Goods were in June, 1897, seized by the sheriff under a *fi. fa.* for £60; they were claimed by the holder of a bill of sale, given on 2nd of May, 1897, to secure a loan of £130, repayable by seventeen monthly instalments, with interest at 60 per cent. On an interpleader summons by the sheriff, the judge ordered a sale of the goods, and payment out of the proceeds to the bill of sale holder of the amount of his debt, with interest only up to the date of payment, and of the surplus (if any) to the execution creditor.

Held (Rigby, L.J., dissenting), that the judge had jurisdiction under ord. 57, r. 12, to make the order for repayment at once of the principal due to the bill of sale holder together with interest at the agreed rate, up to the date of payment only; and that such order was "just," within the meaning of that expression in ord. 57, r. 12.—FORSTER *v.* CLOWSER, *C.A.*

34. *Judgment — Administration — Priorities — Judgment creditor—Liberty to sign judgment under R. S. C., ord.* 14, *not acted upon—R. S. C., ord.* 41, *rr.* 3, 4.—Where a creditor has obtained an order under R. S. C., ord. 14, in the usual form, giving him liberty to sign final judgment against the debtor's administratrix, but had never acted upon the order by actually signing judgment,

Held, that he was not a judgment creditor entitled to priority over ordinary creditors in administration of the debtor's estate.—GURNEY, RE, CLIFFORD *v.* GURNEY, *Ch.D. Kekewich, J.*, 92.

35. *Judgment—Consent judgment—Setting aside—Common mistake—Mistake of one party induced by the other—Approbating and reprobating.*—Where a consent order does not correctly express the agreement come to between the parties it may be set aside on the same grounds and in the same circumstances as a contract in similar terms between the parties.

The party complaining of mistake is not disentitled to succeed because he has previously taken proceedings (unsuccessfully) to enforce the order in the sense in which he understood it.

A consent order set aside on the ground of mistake common to both the parties, or induced by one of them.

Decision of Byrne, J. (*ante*, p. 462), affirmed.—WILDING *v.* SANDERSON, *C.A.* 675.

36. *Judgment—Motion for — Dismissal—Renewal of application—Ord.* 14, *r.* 1.—Where, on an application to enter final judgment under ord. 14, r. 1, unconditional leave to defend has been given in consequence of a technical defect in the writ, the plaintiff may, after the defect has been cured, make a second application for final judgment.—DOMBEY & SON *v.* PLAYFAIR, *C.A.*

37. *Judgment debtor—Married woman—Inquiry as to separate estate—Examination of third person—Ord.* 42, *r.* 32.—Judgment having been recovered against a married woman and not having been satisfied, the master ordered that an inquiry be held as to her separate estate and that the judgment debtor do attend to be examined.

Held, that the order was made under ord. 42, r. 32, and that therefore, following *Irwell* v. *Eden*, 35 W. R. 511, 18 Q. B. D. 588, there was no power to compel the attendance and examination of any person other than the judgment debtor.—HOOD BARRS *v.* HERIOT (No. 1), *C.A.*, 1.

38. Mandamus—*Metropolis management—Sewer—Drain — Liability to repair — Vestry—Alternative remedy—Action for declaration of right—Ord.* 25, *r.* 5.—The owner of premises in the metropolis alleged that a defective drainage pipe on his premises was a sewer within the Metropolis Management Act, 1855, and therefore repairable by the vestry. The vestry denied that the pipe was a sewer.

Held, that a prerogative writ of *mandamus* ought not to be issued to the vestry directing them to repair the pipe. The proper proceeding was for the owner of the premises to bring an action against the vestry for a declaration of right and for a *mandamus.*—REG. *v.* CAMBERWELL VESTRY, *Q.B.D.*, 335.

39. Mandamus — *Vaccination Acts — Refusal of guardians to enforce—Application by urban sanitary authority—No legal right to performance of the duty sought to be enforced.*—The District Board of Works for L. as the urban sanitary authority applied for a *mandamus* to compel the guardians of the poor of that district to put in force the provisions of the Vaccination Acts.

Held, that, as the urban sanitary authority had no specific legal right to the enforcement of any statutory duty by the guardians, the remedy sought was inapplicable and must be refused, because it had always been held that a clear legal or equitable right to the performance of the duty which it was desired should be enforced was necessary to support an application for a *mandamus.*—REG. *v.* LEWISHAM GUARDIANS, *Q.B.D.*, 346.

40. *Mayor's Court—Jurisdiction—Part of cause of action arising outside the City—Prohibition.*—The defendants contracted with the plaintiffs that on the incorporation of a company which it was proposed to form they would transfer to him shares in the company of the value of £6,000. The proposed company was formed and incorporated. The plaintiff brought an action in the Mayor's Court for specific performance of the contract.

Held, that the Mayor's Court had no jurisdiction, on the ground that the incorporation of the company, which was a part of the cause of action, took place outside the City—viz., at Somerset House.—BOWLER *v.* BARBERTON DEVELOPMENT SYNDICATE, *C.A.*, 162.

41. *Originating summons—Mortgage—No offer to redeem—R. S. C.*, 1883, *ord.* 54 (*a*), *r.* 1.—Under ord. 54 (*a*), r. 1, a mortgagor may apply by originating summons for the determination of a question of construction arising under the mortgage deed without offering to redeem.

Where the mortgagor of a reversionary interest applied under ord. 54, r. 1, for the determination of the question whether, according to the true construction of the mortgage deed she was entitled to redeem during the period fixed by the deed for the continuance of the loan,

Held, that the court was bound to decide the question, and ought not to put the mortgagor on the terms of offering to redeem.—NOBBS *v.* LAW REVERSIONARY INTEREST SOCIETY, *Ch.D. Kekewich, J.*

42. *Parties—Adding defendants—Alternative relief—R. S. C.*, 1883, *ord.* 16, *rr.* 7, 11.—The plaintiffs, who were shipowners, instructed the defendants, who were shipbrokers, to procure a charter. The defendants effected a charter in the name of B., P., & Co., as charterers. Default was made in loading the chartered cargo. B., P., & Co. having asserted that the defendants had acted without their authority, the plaintiffs commenced an action against the defendants for breach of warranty of authority. It subsequently appeared that the defendants probably had authority to make the charter on behalf of B., P., & Co.

Held, that the plaintiffs were entitled to an order adding B., P., & Co., as defendants to the action. —BENNETTS *v.* MACILWRAITH, *C.A.*, 17.

43. *Parties—Joinder of defendants—Nuisance—Injunction—Ord.* 16, *r.* 4.—A plaintiff cannot join independent tortfeasors as co-defendants in an action for damages.

Decision of the Court of Appeal (44 W. R. 50) affirmed.—SADLER *v.* GREAT WESTERN RAILWAY CO., *H.L.*, 51.

44. *Parties—Joinder of plaintiff—Consent of person to be joined—"His own consent in writing"—R. S. C.*, 1883, *ord.* 16, *r.* 11—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 34.—The provision of ord. 16, r. 11, that "no person shall be added as a plaintiff . . . without his own consent in writing thereto," makes it necessary that the consent should be actually written and signed by the person to be joined; and a consent written and signed by his solicitor in his presence and with his approval is not sufficient.—FRICKER *v.* VAN GRUTTEN, *C.A.*, 53.

45. *Parties—Pauper—Leave to sue in* formâ pauperis—*Affidavit—Case and opinion of counsel made an exhibit—Right of defendant to inspect exhibit—Ord.* 16, *rr.* 23, 24.—Where a plaintiff has been admitted to sue in *formâ pauperis*, the defendant is not entitled to inspect the case laid before counsel and his opinion thereon, which have been produced to the judge upon the application for leave to sue in *formâ pauperis*, even though they have been made an exhibit to the affidavit filed upon that application.

In re Hinchcliffe, 43 W. R. 82, [1895] 1 Ch. 117, distinguished.—SLOANE *v.* BRITAIN STEAMSHIP CO., *C.A.*, 203.

46. *Parties—Representation order under ord.* 16, *r.* 32—*Will—Construction*—Res judicata—*Acquiescence.*—An order appointing a person to represent a class for the purpose of obtaining the judgment of the court does not affect a member of the class who has a distinct and independent right in the subject-matter of the litigation, and does not make the judgment binding on him.

Where the court has construed a will for the purpose of determining the title to a fund passing under the will, and the same question of construction is raised afterwards in regard to another fund passing under the same will, the court is bound by the precedent created by its former decision.—LART, RE, WILKINSON *v.* BLADES, *Ch.D. Chitty, J.*, 27.

47. *Parties—Third party procedure—R. S. C.*, 1883, *ord.* 16, *r.* 48—*Breach of trust—Claim to follow trust money—Indemnity.*—In an action to make the defendant liable for breach of trust by him and his deceased co-trustee, T. G. T., who was a solicitor, the defendant alleged that the trust money sought to be recovered was paid to the deceased as a member of the firm of solicitors acting for the trustees, and obtained an order for leave to serve a third party notice under ord. 16, r. 48, on the surviving members of the firm.

The notice claimed indemnity from them against the plaintiff's claim on the ground that the firm became liable for the misapplication of the money by T. G. T. On an application to discharge the order,

Held, that the defendant's right (if any) to recover from the applicants a sum equal to the lost trust fund was not a right depending on his liability in the action, but an independent right, and therefore that the notice was not a claim for indemnity within ord. 16, r. 48, and must be discharged.—WYNNE *v.* TEMPEST, *Ch.D. Chitty, J.*, 183.

48. *Payment into court before defence—Defence denying liability—Joinder of issue—R. S. C.*, 1883, *ord.* 22, *rr.* 1, 4, 6, *and* 7.—In an action by the holder of a bill of lading for short delivery the defendants paid money into court, and served on the plaintiff a notice stating that the money paid in was enough to satisfy the plaintiff's claim. A month later they delivered a defence denying liability, on which the plaintiff joined issue.

Held, that the defence and the joinder of issue ought to be struck out, and that the only question for the court was as to the amount of damages.—DUMBLETON *v.* WILLIAMS, *C.A.*

49. *Payment into court—Issue—Method of leaving issue to jury—Ord.* 22, *r.* 22—*Judicature Act*, 1875, *s.* 22.—Ord. 22, r. 22, is not *ultra vires* as a contravention of section 22 of the Judicature Act, 1875.—WILLIAMS *v.* GOOSE, *C.A.*, 308.

50. *Pleading—Statute of Frauds—Ord.* 19, *rr.* 15, 20.—The plaintiffs brought an action upon a written guarantee signed by the defendant. The defendant did not plead the Statute of Frauds. At the trial the plaintiffs gave evidence of a verbal contract, and in answer to the case so set up the defendant sought to rely upon the Statute of Frauds.

Held, that, if the evidence was admissible at all, the defendant was not debarred from relying on the statute by the fact that he had not pleaded it in the first instance, and that the judge should have directed the necessary amendments to be made in the pleadings.

But *semble*, that the evidence was not admissible. *Morrell* v. *Cowan*, 7 Ch. D. 151, approved.—BRUNNING *v.* ODHAMS, *H.L.*

51. *Pleading—Striking out allegation—Libel—Publication abroad—No civil remedy in foreign country, but only criminal remedy at instance of the State—Plea of the foreign law.*—Where an act has been committed abroad which if done here would by English law give rise to a right of action, an action may be brought in this country unless by the law of the place where it was done the act complained of is either justified or excused. It is therefore no defence to show that the law of the place where a libel was published provides for no civil action, but only for criminal proceedings at the instance of the State, in respect of such publication.—MACHADO *v.* FONTES, *C.A.*, 565.

52. *Pleadings—Striking out pleading—Frivolous and vexatious—Abuse of process of court—Affidavit evidence.*—Though the court will not in general, on an application to strike out a pleading, inquire into the truth or falsehood of the allegations pleaded, yet an affidavit will be admitted to show that the allegations which a party denies by his pleading have been previously so admitted by him

as to make his pleading a mere abuse of the process of the court; and in that case the pleading may be struck out.

Hildige v. *O'Farrell*, 8 L. R. (Ir.) 158, 30 W. R. Dig. 169, distinguished.—REMMINGTON *v.* SCOLES, *C.A.*, 580.

53. *Receiver—Ejectment action—Disputed title—Defendant in possession—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.—In a pending action to recover possession of land the court has jurisdiction, under section 25, sub-section 8, of the Judicature Act, 1873, to appoint a receiver, although the title is legal and the tenant is in possession.

But a case must be made to justify such appointment; and the Court of Appeal discharged an order for a receiver made by Kekewich, J., as made on insufficient grounds.—FOXWELL *v.* VAN GRUTTEN, *C.A.*

54. *Stay of proceedings—Vendor and purchaser—Ord.* 25, *r.* 4.—A summons under the Vendor and Purchaser Act asking for relief, to which it is plain from the contract that the tenant cannot be entitled, will be stayed as frivolous and vexatious.—BARTLETT AND BERRY'S CONTRACT, RE, *Ch.D. North, J.*

55. *Writ—Service—Foreign corporation—Agent—Clerk—Admiralty—R. S. C.*, 1883, *ord.* 9, *r.* 8.—The defendants, a foreign corporation, had their name on the door of an office of their agents in London, and issued business cards and advertisements directing the public to apply to them there respecting the carriage of goods by their steamers running between Tilbury and Ostend. The rent of the office was paid by the agents of the defendants, and the clerks, including the manager, employed in the office were the servants of the agents.

The plaintiffs, owners of cargo in a foreign ship, commenced an action for damages by collision against the defendants, and served the writ of summons on the managing clerk at the office in London.

On motion by the defendants to set aside the service,

Held, that the service of the writ was not on "the . . . clerk . . . of such corporation" within the meaning of ord. 9, r. 8, of the Rules of the Supreme Court, 1883, and must therefore be set aside, but without costs, as the defendants had held themselves out as having an office in London.—"PRINCESS CLEMENTINE," THE, *P.D. & Ad.D.*

56. *Writ—Specially-indorsed writ—Recovery of land and mesne profits—Ord.* 3, *r.* 6—*Ord.* 14, *r.* 1—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 214.—The plaintiffs issued a specially-indorsed writ under ord. 3, r. 6, claiming possession of certain lands held over by the defendant, who had been tenant to the plaintiffs, after the termination of his tenancy, and £80 for mesne profits. On an application under ord. 14, r. 1, for leave to sign final judgment for £80 and for possession, the accompanying affidavit stated that the £80 was claimed as double value for six months in consequence of the defendant having refused to deliver up possession.

Kennedy, J., gave the requisite leave and directed mesne profits "to be calculated up to the date of the plaintiffs obtaining possession."

Held (affirming Kennedy, J.), that, notwithstanding the terms of the affidavit, the writ was specially-indorsed so as to bring it within order 14, and that the learned judge has jurisdiction to make the order giving mesne profits up to the time of possession being obtained.—SOUTHPORT TRAMWAYS CO. *v.* GANDY, *C.A.*, 684.

See also Administration, 4-6; Admiralty, 3; Arbitration, 2; Bankruptcy, 22; County Court, 6; Partition; Probate, 8-11; Railway Company, 4; Trustee, 3.

PRINCIPAL and AGENT:—

Liability of agent—Warranty of authority—Contract by public servant on behalf of Crown.—A public servant of the Crown who makes a contract on behalf of the Crown is not personally liable upon an implied warranty of authority to make such a contract.—DUNN *v.* MACDONALD, *C.A.*, 355.

See also Company, 7; Contract, 7; Corporation, 1.

PRINCIPAL and SURETY:—

Bill of Exchange—Securities for—Double insolvency Doctrine of Ex parte Waring.—In order that the doctrine in *Ex parte Waring*, 19 Ves. 345, should apply, both estates must be insolvent and both must be under judicial administration or liquidation.—BELFAST WAREHOUSE CO., RE, CARMICHAEL, EX PARTE, *C.A.* (*Ir.*).

See also Bankruptcy, 23, 27.

PROBATE:—

1. *Administration — Persons entitled abroad — Urgency—Limited grant to stranger—Court of Probate Act*, 1875 (20 & 21 *Vict. c.* 77), *s.* 73.—Where the next-of-kin of an intestate resided in the interior of Bolivia where a communication would take two months by letter and six weeks by telegram to reach them, and there were heavy transactions (shipments and bills) of the deceased's firm requiring to be immediately dealt with, the court, under section 73 of the Court of Probate Act, 1857, made a limited grant to a member of the firm of chartered accountants in whose hands the books of the firm had been placed.—IN THE GOODS OF SUAREZ, *P.D. & Ad.D.*, 704.

2. *Administration — Revocation of grant — Subsequent order upon administrator to file account.*—A grant of administration which had been made as upon intestacy was subsequently revoked, and probate granted to an executor of a will which had recently been discovered.

Upon application by the executor for an account showing how the administrator had dealt with the estate, objection was taken that the court had no jurisdiction, in view of the fact that the grant had been revoked, and the registrar so held and dismissed the application. But, upon appeal, Barnes, J., upon the authority of *Taylor* v. *Newton*, 1 Lee 15, reversed the registrar's decision with costs, and ordered the defendant to furnish to the plaintiff within fourteen days after probate should be exhibited to him an account showing how he had disposed of the estate.—JENKINS, IN THE GOODS OF, *P.D. & Ad.D.*

3. *Administration with will annexed — French domicil of testatrix — English domicil of origin — Will made in English form in execution of a power.*—The testatrix, whose domicil of origin was English, but who married a Frenchman, and though living apart from him for many years, died domiciled in France, made a will in exercise of a power of appointment. The will, which was in English form and described the testatrix as of English domicil, was invalid according to the law of France.

The court made a grant of administration with the will annexed to her daughter the residuary legatee for life, the executors of the will having renounced probate thereof.

In the Goods of Hallyburton, L. R. 1 P. & D. 90, followed.—HUBER, IN THE GOODS OF, *P.D. & Ad.D.*

4. *Administration with will annexed—Minors—Guardians—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Limited grant—Form of order.*—In making a limited grant, under section 73, of administration with the will annexed, in favour of the guardian appointed on behalf of minors, who, if of age, would be entitled to administer the estate of the deceased.

Held, that the best form of limitation would be "until one of the minors comes of age and applies."

A limited grant, under section 73, made without notice to the person primarily entitled.—LILLEY, IN THE GOODS OF, *P.D. & Ad.D.*

5. *Company executors—Administration with the will annexed to nominee—Company sole surety.*—A testator appointed a limited company trustees and executors of his will. The court on motion, upon evidence of the sufficiency of the company and its power to act, granted letters of administration with the will annexed to a nominee of the company with the company as sole surety.—HUNT, IN THE GOODS OF, *P.D. & Ad.D.*, 236.

6. *Practice—Appointment of receiver* pendente lite—*Jurisdiction—Pending suit*—Caveat—*Warning—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.—Notwithstanding sub-section 8 of section 25 of Judicature Act, 1873, the court has no jurisdiction to appoint a receiver unless the application is made in a pending proceeding already duly commenced by writ or otherwise.

In re Parker, Dearing v. *Brooks*, 54 L. J. Ch. 694, 35 W. R. Dig. 162, explained.

The entry of a *caveat* in the goods of a deceased person, together with a warning to the *caveat* and an appearance by the *caveator* to the warning, does not constitute a *lis pendens* or enable the court to appoint a receiver *pendente lite.*—SALTER *v.* SALTER, *C.A.*, 7.

7. *Practice—Costs—Probate suit.*—As a general rule, parties unsuccessfully resisting probate of a will on the ground of undue influence, will be ordered to pay the costs of the suit; but under the particular circumstances of the suit in question the court allowed the defendant's costs out of the estate.—BROWNING *v.* MOSTYN, *P.D. & Ad.D.*

8. *Practice—Non-contentious proceedings—German executor—Declaration instead of oath—R. S. C.*, 1883, *ord.* 38, *rr.* 6, 14.—Upon application by three German executors, all resident in Germany, for probate of a will, one of the executors declined to take the usual oath, on the ground that he was not allowed to do so by the laws of his place of residence, and the registrar of the Principal Probate Registry declined to accept his declaration in lieu of his usual oath; but the court accepted the declaration, and ordered that probate should issue in favour of all three executors.

The Rules of the Supreme Court do not apply to non-contentious probate business.—CASPARI, IN THE GOODS OF, *P.D. & Ad.D.*

9. *Practice—Pleading—Parties—Joinder.*—The plaintiff, who had full knowledge of the testamentary documents of the deceased testator, issued a writ making one person defendant only. After that defendant had put in his defence settnig up a later will, the plaintiff applied for leave to amend the pleadings by adding as a defendant the surviving witness of the will propounded by the plaintiff. This person was in fact the solicitor who had prepared the will propounded in the defence, and was executor thereunder.

The registrar refused the application, holding that it was misconceived, and dismissed the summons, with costs.

Upon appeal to the judge (in chambers) the proposed amendment was allowed, but the plaintiff was ordered to pay the costs of the defendant which had been thrown away by reason of the non-joinder of the second defendant in the first instance. The plaintiff was also ordered to pay the defendant's costs on the appeal.—COKE *v.* FRENCH, *P.D. & Ad.D.*

10. *Practice—Presumption of death—Affidavit.*—On an application for leave to depose as to the death of a person who had disappeared, the affidavit of the applicant referred to letters from that person which were not produced or accounted for, and did not explain the delay which had occurred in making the application, and there was no corroborative statement or belief of the death.

Held, that the hearing must be adjourned for a further and better statement.—CLARKE, IN THE GOODS OF, *P.D. & Ad.D.*

11. *Practice—Suit for revocation of probate—Judgment given in absence of plaintiff—Application to restore—Ord.* 36, *r.* 33—*Application granted—Terms.*—Where, for a reason explained to the court, the plaintiff was not represented at the hearing of a probate suit, and applied within six days from the date of the judgment for leave to restore the cause, the court, in granting the application, made it a condition that the plaintiff should, before a certain day, pay the costs of the defendant as between solicitor and client, and directed that, if he failed to do so, the judgment against him should stand.—CUDWORTH *v.* HAYWARD, *P.D. & Ad.D.*

12. *Will—Codicils written by inadvertence upon a former and revoked will—Motion—Mistake rectified.*—The testator executed a will in 1883. His wife died in August, 1884, and in November, 1884, he executed a fresh will. In October, 1890, the testator handed to his solicitor a document, which the solicitor understood to be the last will, and the testator requested that a codicil should be prepared. This was accordingly done, and appended to the document in question and duly executed. In 1895 a second codicil was duly executed on the same document.

After the testator's death it was discovered that the codicils had been appended to and made to refer to the document which was, in fact, the revoked will of 1883.

The court, upon motion, allowed the words of mis-description in the codicils to be omitted from the probate, and, with such omissions, granted probate of the two codicils, and of the will of 1884, as together constituting the true testamentary intentions and dispositions of the deceased.—SNOWDEN, IN THE GOODS OF, *P.D. & Ad.D.*

13. *Will—Condition.*—A soldier, whilst on active military service in New Zealand in 1864, made a will in the form of a holograph letter addressed from the camp to his sister, in the following terms: "This is the most important part of my letter. If we remain here taking Pahs for some time, the chances are in favour of more of us being killed, and, as I may not have another opportunity of saying what I wish to be done with any little

money I may possess in case of an accident, I wish to make everything I possess over to you. In the first place, there is money at Cox's, over £100 in New South Wales Bank, New Zealand. Keep this till I ask you for it.—Your affectionate brother, J. S."

The testator died in 1896.

The court held the will not conditional, and admitted it to probate.

Where there is an ambiguity as to whether a will is contingent or not, the whole language and the surrounding circumstances must be considered. There are two criteria specially useful for determining the problem—first, whether the nature of the disposition made appears to have relation to the time or circumstances of the contingency; and, secondly, whether the period of danger which is apprehended is or is not coincident with the period of contingency.—SPRATT, IN THE GOODS OF, *P.D. & Ad.D.*, 159.

14. *Will—Lost will—Proof—Motion—Consent of next-of-kin—Next-of-kin minors.*—The court will not allow the contents of a lost will to be proved on motion, without the consent of the next-of-kin, unless the estate be small.

Where the next-of-kin were minors and therefore could not consent, the court refused to allow proof of a lost will on motion, and ordered the will to be propounded.—PEARSON, IN THE GOODS OF, *P.D. & Ad.D.*, 143.

15. *Will — Misdescription of legatees — Wrong Christian names—Refusal to strike out.*—The will of the testator contained a bequest in favour of "Florence Lilian Savory and Thomas Savory, the two children of my nephew, J. F. Savory"; another bequest, to "my nephew Allen Edward Savory" for his life, and thereafter in trust for "his two children, Gordon Savory and Ronald Savory, in equal shares"; and a further bequest, to "Florence Savory, the wife of Allen Edward Savory, during her life," and, subject thereto, "in trust for her two children, Gordon Savory and Ronald Savory, in equal shares."

These were, in fact, the names of the children of J. D. Savory, while the children of Allen Edward and Florence Savory were named Florence Lilian and Thomas.

Upon motion to omit from the probate the Christian names so transposed in the will,

Held, that this could not be done, as it was not shown that the testator did not mean those names to be inserted in the will, though he might not have meant so to benefit the persons to whom those names actually belonged.—DURLACHER, IN THE GOODS OF, *P.D. & Ad.D.*

16. *Will — Revocation — Evidence — Admissibility —Statements of testatrix after date of will.*—Under the Wills Act the same formalties are necessary to prove the revocation of a will as to prove the execution of a will.

If a will has been executed in duplicate conformably with the statute, and the possession of the duplicate has been traced to the testator, and after his death it is proved that one of them has been destroyed by the testator or is missing, the destruction of the one part will operate as the destruction of the will itself; but the statement of a testator, made after the execution of his will, that he had executed it in duplicate and has destroyed one of the duplicates is not admissible evidence.

Decision of Barnes, J., affirmed.

Sugden v. *Lord St. Leonards*, 24 W. R. 860, 1 P. D. 154; *Doe d. Shallcross* v. *Palmer*, 16 Q. B. 747; and *In the Goods of Ripley*, 6 W. R. 460, 1 Sw. & Tr. 68, applied and followed.—ATKINSON *v.* MORRIS, *C.A.*, 293.

17. *Will—Revocation—Revival—Wills Act* (1 *Vict. c.* 26), *s.* 22.—Testatrix made a will in 1889, and in 1892 instructed her solicitor to prepare a codicil, which she took away with her but never executed. Afterwards, in 1892, she executed a new will prepared by another solicitor revoking the former will. In 1893 she executed a codicil prepared by the first solicitor, who was not aware of the second will. This codicil purported to be a second codicil to the will of 1889, and confirmed "my said will and the first codicil thereto."

Held, that the codicil by its language revived the earlier will, and that both wills together with the codicil must be admitted to probate.—CHILCOTT, IN THE GOODS OF, *P.D. & Ad.D.*

18. *Will—Revocation—Will executed in duplicate —Part retained by testator not forthcoming—Holograph copy of first codicil and original second codicil—Second codicil alone admitted to probate.*—The testator in 1891 executed a will in duplicate and retained both parts in his possession at the time, but in the following year he sent one part to the defendant, who, some time in 1893, tore it up by accident along with some other papers, but, finding he had done so, caused the pieces to be pasted together.

No testamentary papers were found in the testator's repositories, but soon after his death, which occurred in July, 1895, a friend of the testator produced to his solicitors holograph copies of the will and of a document which purported to have been executed as a codicil to the will, and to bear date 1892, and also an original holograph document duly executed and bearing date the 22nd of August, 1892, and described as "a second codicil to my will." The last document gave a legacy of £800 among the children of the friend to whom the testator had sent it, and in whose custody it had remained.

Held, that the will and first codicil had been revoked, and that the second codicil alone was entitled to probate.—PAIGE *v.* BROOKS, *P.D. & Ad.D.*

19. *Will—Testamentary document—Scotland, law of—Conditional will.*—The testator, a Scotsman, by his will gave the residue of his estate to his wife for life during widowhood, and in case of her remarriage gave her one-third for life, the remainder to various legatees. There was no disposition of the residue after the wife's death in the event of her remaining a widow.

The testator being about to sail with his wife from Calcutta to England, wrote a letter to his brother in England, which was in form a good testamentary document at Scots law, and contained the following: "If anything happens to us on the way, my will has been accidentally packed away in a tin box to which I cannot now get access, as I forget which box it has been put into. However, if we both come to grief, I appoint you my executor; if I only, then in conjunction with Nan." The letter then proceeded to deal with the disposition of his estate after his wife's death in the event of her surviving him. Neither the testator nor his wife died during the voyage.

Held, that the letter was not conditional, but was a valid testamentary document, and must be admitted to probate.—HALFORD *v.* HALFORD, *P.D. & Ad.D.*

See also Executor, 8.

PROHIBITION.—See Company, 2; Justices, 10; Practice, 40.

PUBLIC HEALTH.—See Justices, 3; Local Government, 1, 3-6, 8, 9, 11-21; Metropolis Management, 11-14; Water, 3.

RAILWAY:

1. *Abandonment—Superfluous lands—Limitations, Statute of.*—In 1863 lands were compulsorily taken by a railway company for constructing a line through certain private quays in Dundalk. The railway, which was to be complete in 1869, was not finished until 1875, when, on trial it was found to be defective, and was never opened for public traffic. The rails were allowed to be torn up to some extent and the company never made any use of the line. There was evidence that the public passed over the line as they wished and that it was also used by a tenant of the owner of the lands taken for carting materials in which he dealt.

Held, that the lands had not become superfluous lands within section 45 of the Lands Clauses Act, 1845; and that no title under the Statute of Limitations had been acquired by the original owner of them.—DUFFY'S ESTATE, RE, *C.A.* (*Ir.*).

2. *Cloak-room—Article deposited—Ticket—Condition on ticket—"Not responsible for"—Meaning of.*—The plaintiff deposited a gun of over £10 in value in the cloak-room of the defendants, and received a ticket which contained the condition that "the company will not be responsible for articles left at the station unless the same be duly registered and a ticket given in exchange; the company will not be responsible for any package exceeding the value of £10." When the gun was given back to the plaintiff it was found to be damaged through the careless handling of the company's servants.

Held, that the words in the condition, "not responsible for any package exceeding the value of £10," meant not responsible for either the loss of such article or any damage to it, and protected the company against not only the loss of such article, but also any damage to it, and that the plaintiff therefore had no right of action against the company.—PRATT *v.* SOUTH-EASTERN RAILWAY CO., *Q.B.D.*, 503.

3. *Compensation—Land let at low rent for public park—Proviso for re-entry if land compulsorily taken—Land taken by company—Principle of compensation.*—The claimants, who were lessees of a piece of land, demised the land for the remainder of their term less one day, to a corporation at a low rent upon condition that the land should be laid out and kept as a public park. The lease contained a proviso that if the land were taken compulsorily under the powers of an Act of Parliament it should be lawful for the lessor to re-enter and re-possess the land as of his former estate. Part of the land was taken by a railway company under statutory powers, but the lessor did not re-enter upon the land taken.

Held, that the claimants were entitled to receive as compensation the full commercial value of their interest in the land considered as freed from the lease, and not merely the capitalized value of the nominal rent paid to them by the corporation under the lease.—MORGAN AND LONDON AND NORTH-WESTERN RAILWAY CO.'S ARBITRATION, RE, *Q.B.D.*, 176.

4. *Compensation — Lands taken or injuriously affected—Order for trial of question in High Court—Jurisdiction of master—Ord.* 54, *r.* 12—*Regulation of Railways Act,* 1868 (31 & 32 *Vict. c.* 119), *s.* 41.—A master has jurisdiction to entertain an application for an order under section 41 of the Regulation of Railways Act, 1868, for the trial in the High Court of a question of compensation for lands taken or injuriously affected.

Where the master refuses to make an order under section 41, and between the date of the master's order and an appeal to the judge the railway company issues a warrant to the sheriff to summon a jury to assess the compensation, the judge has still jurisdiction to make the order notwithstanding the issue of the warrant, as his order must be taken as relating back to the time when the application was before the master.—DONISTHORPE *v.* MANCHESTER, SHEFFIELD, &c., RAILWAY CO., *C.A.*, 386.

5. *Contractors—Money to be paid to bankers for the purposes of railway company—Guarantee—Right of contractors to sue guarantor in their own name—Interest.*—By an agreement between the plaintiff company and the defendants, the contractors for the company, the price to be paid for the construction of the works was fixed at the whole capital of the company. The money as received was to be paid to the bankers, and made applicable for payment to the contractors. A sale of shares and debentures was subsequently arranged, and the bankers guaranteed the interest on the debentures and preference shares up to the time fixed for completion of the works. By agreement of the 31st of December, 1889, the contractors entered into an undertaking with the plaintiff company for the payment of such interest. During the progress of the works the business of the bankers was transferred to a limited company, and such banking company were allowed to continue as bankers on the guarantee of the Trustees Corporation. The banking company went into liquidation. The works were not completed for more than a year after the time fixed for completion. Interest on the debentures and preference shares in the meantime became due which was not paid by the contractors, and was paid by the plaintiff company only so far as concerned the debentures.

The plaintiff company brought this action against the contractors to recover from them a sum of money in their hands, and a further sum for non-completion of the line within the stipulated time. The defendants counter-claimed to recover similar sums from the Trustees Corporation on the guarantee.

The contractors had admitted that at the time of action brought there was due from them £35,000, which might have been recovered by the bankers from the Trustees Corporation or the company.

Held (1), on the evidence, that the contractors had not completed within the time fixed, and there was no agreement to relieve them from payment of interest, but that the arbitrator (to whom the matters in dispute had been referred) having found that the company were liable for not taking over the line when it was completed, the contractors were entitled to have the amount for which the company was so liable applied in reduction of the interest;

(2) That the contractors were entitled to sue the Trustees Corporation in their own name;

(3) That, inasmuch as the debt of the bankers was not due at law to the contractors, this sum could in ordinary circumstances not be set off against them, yet as the contractors were entitled to sue in their own name, set-off was available by the Trustees Corporation against them.—ALCOY RAILWAY *v.* GREENHILL, *Ch.D. Stirling, J*

SETTLEMENT:—

1. *Appointment of stock sufficient to raise net sum—Deductions—Liability for.*—Under a power in a settlement an appointment was made of sufficient stock to raise a net sum of £2,000.

Held, that the appointee was not entitled to receive the said sum free from deductions in respect of duty, but that he must pay duty.

Banks v. *Braithwaite*, 32 L. J. Ch. 35, followed.—SAUNDERS, RE, SAUNDERS *v.* GORE, *Ch.D. Stirling, J.*, 456.

2. *Costs — Successive appointments — Assignments and incumbrances of appointed shares—Interest.*—By a marriage settlement certain funds were settled upon trust to invest and pay the annual produce, during the joint lives of the husband and wife as therein mentioned, and after the death of one of them, to the survivor for life, and after the death of the survivor to distribute among the children of the marriage as the husband and wife should jointly appoint, and in default thereof as the survivor should by deed or will appoint. The husband died without exercising the joint power of appointment, and the wife made several successive appointments in favour of certain of her children and appointed the residue in favour of another child. The wife having died, and an action having been brought for the administration of the trusts of the settlement, and it appearing that the appointees had assigned (in some cases to two or three persons) and incumbered their shares,

Held, (1) that interest was payable in respect of the several appointments at the rate of £4 per cent. per annum as from the death of the tenant for life; (2) that the costs must be borne rateably by the appointed shares, one set of costs to be allowed to each child in respect of the several appointments to him, the several assignees of such appointments to stand on the same footing, and to divide the costs allowed in respect of such child's share rateably between them.—HILL'S SETTLEMENT, RE, *Ch.D. Stirling, J.*

3. *Covenant to settle after-acquired property—Investments of income and of accumulations of income of such investments.*—By a covenant in a marriage settlement it was agreed and declared that if during the coverture the intended wife or the intended husband in her right should become entitled to property above a certain value, then and in every such case the intended husband and wife should assure the property to or otherwise cause the same to be vested in trustees upon the trusts of the settlement. The trustees claimed certain investments of more than the specified value admittedly purchased by the wife out of income derived by her under the settlement.

Held, on the construction of the above covenant, that it was not intended to bind the married woman's income arising from the settled property, and that the investments ought to be regarded as accumulated income, and therefore were not bound by the covenant.

Lewis v. *Madocks*, 8 Ves. 150, 17 Ves. 48, distinguished.

In re Bendy, Wallis v. *Bendy*, 43 W. R. 345, [1895] 1 Ch. 109, not followed.—FINLAY *v.* DARLING, *Ch.D. Romer, J.*, 445.

4. *Deed—Construction—Referential trusts—Hotchpot—"Such and the same or the like trusts."*—Express trusts were declared by a marriage settlement of a fund settled on behalf of the intended wife comprising powers of appointment of the *corpus* and a usual hotchpot clause as regards the unappointed part; and trusts by reference to the before-mentioned trusts were by the same settlement declared of a sum payable under a life policy which had been settled by the intended husband, in default of appointment of the sum under an express power in this behalf in the settlement. The first-named fund was appointed in unequal shares, but no appointment was made of the policy moneys.

Held, that the two funds must be treated as distinct for the purpose of hotchpot, and not as one aggregate fund.

The principle of construction adopted in *Hindle* v. *Taylor*, 4 W. R. 62, 5 De G. M. & G. 577, and approved and explained in *Trew* v. *Perpetual Trustee Co.*, 43 W. R. 636, [1895] A. C. 264, held not to be applicable in such a case.

In re Perkins, 41 W. R. 170, distinguished.—BRISTOL (MARQUIS), RE, GREY (EARL) *v.* GREY, *Ch.D. Romer, J.*, 552.

5. *Determinable interest—"Become payable to or vested in other person"—Forfeiture.*—B., by a marriage settlement, assigned property to trustees upon trust to pay the income to B. until he should die or . . . should assign, charge, or incumber the said income, or do or suffer anything whereby the same or some part thereof would, . . . if belonging absolutely to him, become payable to or vested in other persons. The surviving trustee in and subsequently to 1887 made advances out of the *corpus* to B., which were expended by B. for the maintenance of his family and other purposes.

Held, that the dissipation of the *corpus* by B. did not, on the construction of the above clause, work a forfeiture of B.'s life interest, for, so long as the money was in B.'s hands and capable of being followed, the right to the income did not pass from B.; and after B. had spent the money, the persons to whom he paid it being purchasers for value without notice, the money in their hands ceased to have any existence as a trust fund.

Semble, the result would have been different if the words "or cease to be payable to himself" had been in the settlement.—BREWER, RE, MORTON *v.* BLACKMORE, *Ch.D. Chitty, J.*, 8.

6. *Limitation to A. and his heirs—Limitation over in default of issue of A.*—Freehold property was conveyed, by way of settlement, to trustees; upon trust for A. for life and after A.'s death, in the event of B. and C. (daughters of A.) surviving A., upon trust for B. and C. as tenants in common, and after the deaths of B. and C. upon trust for their issue as they should appoint, and in default of appointment upon trust for their children equally; and in case of the death of either B. or C. in the lifetime of A. without leaving issue, then on trust for the survivor in fee; and in default of issue of either of them, in trust for D. and E. (sons of A.) in fee as tenants in common.

B. died unmarried in A.'s lifetime. C. survived A., and upon A.'s death entered into possession of their property. C. died unmarried, having by will devised the property to her niece F.

Held, that on the death of C. without issue the property passed under the limitation in the settlement to D. and E. in fee as tenants in common.

Morgan v. *Morgan*, L. R. 10 Eq. 99, followed.—ARTHUR *v.* WALKER, *M.R.* (*Ir.*).

7. *Mortgage—Purchaser for value without notice—Estoppel—Estate clause.*—An estate was limited to A. for life, with remainder to B. for life, with remainder to A. in fee. A. mortgaged the estate to B. for 500 years to secure £2,000. Subsequently, in 1876, on the marriage of C., A. and B., "according to their respective estates and interests," con-

veyed the property in fee to trustees to the use of A., B., and C. successively for life, with remainder, to secure a jointure for C.'s wife. This conveyance contained the usual "estate clause" on the part of the grantors, but contained no reference to the mortgage of £2,000 belonging to B. B. afterwards transferred this mortgage to C., who charged it in favour of the plaintiffs, who had no notice of the settlement of 1876. C. had previously also charged his life estate under the settlement in favour of the defendants, who had no notice of the £2,000 mortgage.

Held, that the £2,000 mortgage was not conveyed by virtue of the estate clause in the settlement of 1876, and was still a subsisting mortgage; that, though B. could not have set up the mortgage against the settlement of 1876, the plaintiffs, as purchasers for value without notice, were entitled to do so, and had priority over the settlement.—WILLIAMS *v.* PINCKNEY, *Ch.D. Kekewich, J.*

8. *Tenant for life—Merger—Intention—Sale by—Judicature Act*, 1873, *s.* 25 (4).—A tenant for life of a settled estate agreed to sell and convey a piece of land, part thereof, to a company, and then, before the conveyance was completed, by deed—in consideration of the release by his son (who was the succeeding tenant for life of the settled estate) of a rent-charge charged thereon payable to him, and of a covenant by the son to pay and keep down certain charges thereon in exoneration of the father and of such part of the settled estate as was retained by the father—conveyed part of the settled estate, including the land agreed to be conveyed to the company, to a trustee for a term of ninety-nine years upon trusts for further securing the payment of the charges covenanted to be paid by the son, and subject to such term and to the trusts thereof to the use of the son, his heirs and assigns.

Held, that, having regard to the provisions of section 25, sub-section (4), of the Judicature Act, 1873, and to the fact that it was for the benefit of the son that the father's life estate should be kept alive, the father's life estate was not merged and extinguished, and that he had the power (with the consent of the son) to execute a valid conveyance to the company of the land agreed to be conveyed to them.—BARRY RAILWAY CO.'S CONTRACT, RE, *Ch.D. North, J.*

9. *Trust for accumulation—Policies of assurance on the lives of the settlor and others—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98), *s.* 1.—Where an indenture of settlement contains a direction for the accumulation of the moneys payable in respect of five policies of assurance, one on the life of the settlor and four on the respective lives of other persons, until the last of such four policies shall have fallen in, the first period for accumulation allowed by the Thellusson Act (39 & 40 Geo. 3, c. 98), s. 1—viz., the settlor's life—is the only period which, upon the proper construction of such a settlement, is applicable to the accumulation of the proceeds of the four policies.—ERRINGTON *v.* ERRINGTON, *Ch.D. Kekewich, J.*, 573.

10. *Trust for payment of debts—Deed of family arrangement—No notice to creditors—Death of settlor—Binding trust—Liability of estate.*—Where a father and son by deed appoint property to trustees upon trust (subject to the father's life interest therein) to sell the same or any part thereof with the consent of the father and son during their joint lives and of the survivor of them during his life, and after the survivor's death at the discretion of the trustees, and out of the proceeds of sale and out of the rents and profits until sale to pay the father's debts owing during his life or at his decease, and to pay the surplus proceeds and convey the unsold property to the trustees of a settlement of even date under which the father was tenant for life and the son tenant in tail in remainder, a binding trust in favour of the father's creditors will arise upon his death although the purport of the deed has not been communicated to them, and the unsold part of the property comprised in the deed will remain charged with the unsatisfied debts of the father notwithstanding the fact that it has been conveyed to the settlement trustees.

Synnot v. *Simpson*, 5 H. L. Cas. 121, and *Garrard* v. *Lord Lauderdale*, 2 Russ. & M. 451, discussed.—PRIESTLEY *v.* ELLIS, *Ch.D. Kekewich, J.*, 442.

See also Fixture, 2; Inland Revenue, 2-6; Limitations, Statute of, 4; Married Woman, 5, 10.

SHERIFF:—

Fees—Levy—Interpleader issue—Liability of unsuccessful execution creditor.—The execution creditor who is unsuccessful in an interpleader issue is liable to repay to the claimant the charges of the sheriff which he has deducted from the amount of the levy.—BLAKER *v.* SEAGER, *Q.B.D.*

See also Solicitor, 16.

SHIP:—

1. *Arrest—Action* in rem—*Guarantee*—Lis alibi pendens—*Staying proceedings—Bail.*—A British and a German ship came into collision near Rotterdam. The agents at Rotterdam of the owners of the two vessels exchanged written agreements on behalf of the respective captains to give bail to the extent of 50,000 guilders to answer the damages, interest, and expenses to which the captains might be condemned in virtue of the sentence of a competent court, and for the purpose of serving the writ the domicil of the captains was stated to be at the offices of the respective agents. The agents also procured from Lloyd's surveyor at Rotterdam an estimate of the amount of damages sustained by each vessel, but owing, it was alleged, to the owners of the German ship insisting on this estimate being conclusive, further negotiations between the parties fell through; and on the arrival of the German ship in this country she was arrested in an action *in rem* at the suit of the owners of the British ship.

The owners of the German ship moved the court for an order for her release and a stay of all proceedings,

Held, that the guarantee was no bar to the action in this country, the vessel not having been arrested in Holland, and there being no legal proceedings pending there.

The Christiansborg, [1885] 10 P. D. 141, distinguished.—"MANNHEIM," THE, *P.D. & Ad.D.*

2. *Average bond—Average statement—No duty to employ an average stater.*—Where, by an average bond executed at the port of discharge, consignees of cargo undertook to furnish to the shipowners a correct account and particulars of the value of the goods delivered, in order that the amount of average contribution to which they were liable might be ascertained and adjusted "in the usual manner,"

Held, that these words did not imply as a condition of the obligation that the shipowners should employ an average stater at the port of discharge.

Simonds v. *White*, [1824] 2 B. & C. 805, explained.

A shipowner may make out his own average statement, and is not bound to employ an average stater either at the port of discharge or elsewhere.—WAVERTREE SAILING SHIP CO. *v.* LOVE, *P.C.*

3. *Average—General average—Ship disabled on*

voyage—Necessary repairs—Damage to cargo.—A ship rendered unnavigable by an accident in the course of the voyage may, while lying in harbour perfectly water-tight and with her cargo uninjured, be in peril so as to make any unusual act done with her to render her once more navigable a general average act, and any damage incidental to such act a general average loss.

The *H. G.* was on a voyage from B. A. to London. While leaving B. A. she bumped on the harbour bar. On coming outside the harbour of L. P.—a station at which she was to coal—she became unnavigable owing to her screw going wrong. She was towed into the harbour. A large part of her cargo was perishable, and there was no proper accommodation for stowing it at L. P. The master, in order to repair the screw, tipped her by the head (with cargo still on board) by filling the fore ballast tanks with sea-water, and emptying the stern tanks. Unknown to the captain, one of the pipes through which the fore tanks were filled was fractured, and the sea-water going through it escaped into the cargo. The plaintiffs' goods were injured.

Held, that, while lying in L. P. harbour, the ship and cargo were in peril; that the master's act in tipping the ship by the head was a general average act; and that the damage to plaintiffs' goods was a general average loss.—McCall *v.* Houlder, *Q.B.D.*

4. *Bill of Lading—Excepted perils—Restraint of princes—Contraband of war—Risk of seizure—Contract of carriage partly performed—Justification of refusal to complete.*—The plaintiffs shipped goods which were contraband of war on the defendants' ship for carriage from London to Yokohama under a bill of lading containing the exception of "restraint of princes," and also a special clause that "if the entering of or discharging in the port (of discharge) shall be considered by the master unsafe by reason of war . . . the master may land the goods at the nearest safe and convenient port." The ship also carried goods belonging to other shippers. In the course of her voyage the ship arrived at Hong Kong, and on the day of her arrival there war was declared between China and Japan. There were at that time several Chinese war-vessels in and round the port of Hong Kong, and if the master had attempted to sail thence with the plaintiffs' goods on board there would have been a serious danger of their being seized and confiscated. The master accordingly landed them there. In an action for breach of contract to carry the goods to Yokohama:

Held, (1) that the risk of the goods being seized, if attempted to be carried further, amounted to a "restraint of princes" within the exception; (2) that such risk of seizure, on the voyage between Hong Kong and Yokohama, rendered the "entering of or discharging in the port" of Yokohama unsafe within the meaning of the special clause; and (3) that the master's duty to take care of the cargo justified him, apart from any exceptions in the bill of lading, in landing the plaintiffs' goods where he did.—Nobel's Explosives Co. *v.* Jenkins & Co., *Q.B.D.*

5. *Bill of lading—Proceedings in foreign court—Sale of ship in foreign port—Judgment* in rem.—A ship, the property of an English, company sailed to Bombay. Whilst at Bombay for the purpose of taking in cargo, her master, by the fraud of the company's manager there, was induced to sign bills of lading for goods which had not been placed on board. These bills were endorsed for value to an English bank. The ship sailed for Hamburg, but in the meantime a petition to wind up the company was presented in England, and a winding-up order was made on the very day, but a few hours before, the ship arrived at Hamburg. On her arrival there she was arrested by the Court of Hamburg on the information of the bank, and that court held that by German law the bills of lading were conclusive as against the company, and ordered the ship to be sold. The ship was sold for a sum less than the amount of the bank's claim, and the Court of Hamburg paid over the proceeds of the sale to the bank. The company then brought an action in the Queen's Bench Division against the bank, claiming that the money paid to the bank by the German court was money had and received by the bank to the use of the company for distribution amongst their creditors.

Held, affirming the judgment of Collins, J., that the proceedings in the German court were proceedings *in rem*, and that the judgment of that court was therefore good against the world; that the money received by the bank was not subject to any trust in favour of the creditors of the company, and that therefore the company could not recover.—Minna Craig Steamship Co. *v.* Chartered Mercantile Bank of India, *C.A.*, 338.

6. *Charter-party—Bill of lading—Damage to cargo—Liberty to fill up for steamer's benefit—Deviation.*—By charter-party the defendant's vessel was to load a cargo of wheat at Marianople for Gibraltar for orders for a port in the United Kingdom or on the continent between Havre and Hamburg, the master of the vessel, to avoid being frozen in at the port of loading, to be "at liberty to leave . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azoff or Mediterranean port for United Kingdom, Continent or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded. . . ."

The master, under this liberty, left Marianople with part of the cargo of wheat, and proceeded to Novorossisk, where he filled up for steamer's benefit with linseed. At Gibraltar he was ordered to deliver the wheat at Cardiff; but he first proceeded to King's Lynn, and there discharged the linseed. On the way between King's Lynn and Cardiff the wheat was damaged by fire. The plaintiffs, who were holders of the bill of lading incorporating the conditions of the charter-party, sued the defendants for the damage.

Held, that the defendants were liable as, between King's Lynn and Cardiff, they had become insurers of the consignees of the wheat, for, though the usual exceptions in the bill of lading and charter-party would have covered the loss if it had occurred in the ordinary course of the voyage, the defendants were not entitled to deviate by taking the wheat round by King's Lynn, and could only discharge the linseed at a port on the way.—"Dunbeth," The, *P.D. & Ad.D.*

7. *Charter-party—Construction—Salvage services—Limits of deviation.*—By a charter-party the shipowners agreed to supply the charterers with five steamers, to load between August and December inclusive, as nearly as possible a steamer a month, at an agreed foreign port, the charterers undertaking to supply cargo within twenty-four hours of notice of each ship's arrival. The charter-party expressly excepted perils of the sea, and allowed towage services.

The S. 1 should have arrived at the agreed port

on or about the 23rd of September, but did not as a fact arrive until the 8th or 9th of October, owing to heavy weather. *The S.* 2 arrived at her agreed time, on the 12th of October, and gave notice the same day that she was ready to receive cargo. None was tendered to her until the 24th of October, there not being sufficient labour at the port to load more than one steamer at a time. In an action for damages by the owners for the detention of *The S.* 2,

Held (affirming the award of the arbitrator and the decision of the Divisional Court), that the owners were entitled to damages.

The S. 3, on her voyage out, fell in with a disabled steamer and towed her to Mauritius on a salvage service. Such towage was out of the course of the voyage, and delayed the arrival of the vessel for three weeks. The arbitrator found that the towage service was not such as to frustrate the object of the adventure as between the charterers and the owners, and awarded damages.

Held, by the Court of Appeal, that such a salvage service was an allowable deviation within the meaning of the charter-party, and that the charterers were bound to present cargo on the arrival of *The S.* 3.—POTTER *v.* BURRELL, *C.A.*, 145.

8. *Charter-party—Delay in loading—"Weather-working days"—Mode of computation—Demurrage.*—A charter-party provided that cargo should be loaded at a certain rate per weather-working day. On certain days, owing to bad weather, cargo could only be loaded for a few hours.

Held, that the time so occupied in loading cargo was not to be reckoned against the charterers as a whole, but as a part only, of a weather-working day.

Where work is stopped by bad weather, but a substantial quantity of work is done, though not amounting to half a day, it is to be reckoned as half a day; where substantially more than half a day's work is done, though not amounting to a whole day, it is to be counted as a whole day; no smaller fraction than half a day should be taken into the calculation.—BRANCKELOW STEAMSHIP CO. *v.* LAMPORT, *Q.B.D.*

9. *Charter-party—Demurrage—Place of discharge—"Ready to discharge."*—By a charter-party a steamer when loaded with coal was to proceed to a certain port, "and as usual and customary deliver the same always afloat to the order" of the charterers "alongside any store craft steamer depot ship wharf or arsenal. . . . Time for delivery to count when steamer is ready to discharge." There was only one customary place of discharge at the port in question, and when the steamer arrived at the port that place was occupied. In an action for demurrage,

Held, that the steamer was not "ready to discharge," and that the time for delivery did not therefore commence until she was at the customary place of discharge in the port.—SANDERS *v.* JENKINS, *Q.B.D.*

10. *Charter-party—Discharge of timber cargo—Custom—Inconsistency with contract—"To be taken from alongside at merchants' expense."*—A custom that, in discharging long lengths of timber from a ship, the shipowner is bound to put the timber into lighters brought alongside by the consignees is not inconsistent with a charter-party which provides that the timber shall be taken from alongside at merchants' expense.—AKTIESELKAB HELIOS *v.* EKMAN, *C.A.*

11. *Charter-party—Excepted perils—Causes beyond charterers' control—Demurrage.*—The words "or other causes beyond their control" in the exception clause of a charter-party do not relieve the charterers from liability for demurrage, where the delay arose from the disorganization of workmen at the factory of the vendors of goods when such disorganization could have been avoided if the charterers had in the first instance made a better bargain with the vendors.—RICHARDSON AND SAMUELS CO., RE, *Q.B.D.*

12. *Charter-party—Inherent vice—"Damaged" cargo.*—The master of the plaintiffs' vessel signed bills of lading for cargo as "in good order and well conditioned . . . to be delivered in the like good order and condition" subject to the usual exception as to perils of the seas, and (by incorporation of the charter-party) with the further condition that the balance of freight was payable "on right delivery of cargo less value of cargo . . . damaged . . . not covered" by the exception.

The cargo consisted of fresh cut deals, shipped, as usual at the port of loading, without regard to the weather, which at the time was wet. During the voyage part of the cargo became tainted, discoloured, and out of condition. In an action for balance of freight,

Held, that the defendants, the holders of the bills of lading, were not entitled to deduct the amount of the deterioration of the cargo from the balance of freight, as the word "damaged" referred to damage due to breach of contract by the shipowner, and did not include damage arising from want of power in the cargo to bear the ordinary transit in a ship.—"BARCORE," THE, *P.D. & Ad.D.*

13. *Collision—Article* 18 *of the regulations for preventing—Reasonable delay.*—Article 18 of the Regulations under the Merchant Shipping Act, which says, "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary," is sufficiently complied with though a delay of a few seconds has occurred.

The Court is not bound to hold that compliance must be made the very moment when danger becomes apparent.

The Emmy Haase, [1884] 9 P. D. 81, approved.—"NGAPOOTA," THE, *P.C.*

14. *Collision at anchor—Duty of colliding vessel—Duty at anchor*—Onus probandi.—When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, the onus is on her to justify her conduct. She cannot be excused when it is shown that she had not a sufficient look-out. The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited, and to do everything in his power to avert or minimize a collision. If that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration, and it must be shown that any alternative course would have prevented or mitigated the collision.—THE MARY TUG CO. *v.* BRITISH INDIA STEAM NAVIGATION CO.; "MEANATCHY," THE, *P.C.*

15. *Collision — Compulsory pilotage — Distressed seamen—Passengers—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 190-193, 625, 627.—Distressed seamen shipped under an order of a British consular officer at a foreign port, pursuant to the Merchant Shipping Act, 1894, s. 192, are not

"passengers" within the meaning of section 625 of the Act, which exempts ships navigating within the limits of the port to which they belong "when not carrying passengers" from compulsory pilotage in the London district and in the Trinity House outport districts.

Where, therefore, a collision occurred in the River Thames, within the limits of the port of London, between a barge and a steamer belonging to that port which carried five distressed seamen shipped under an order of the British consul at Leghorn, and a Trinity House pilot who was in charge of the steamship was found solely to blame for the collision, it was

Held, that the owners of the steamship were liable for the damage done to the barge, as the steamship was not under compulsory pilotage.—"CLYMENE," THE, *P.D. & Ad.D.*

16. *Collision—Narrow channel—Proper course of navigation—Regulations for Preventing Collisions at Sea, art.* 21.—The channel between the Foulness or Whitaker and the Middle Sands at the entrance to the River Thames is a narrow channel within the meaning of article 21 of the Regulations for Preventing Collisions at Sea, and an inward-bound vessel navigating such channel contravenes article 21 if she passes the Swin Middle Lightship on her starboard hand.

Owing to alterations effected by the Trinity House in the lighting of the Swin Channel the rule laid down in the case of *The Minnie*, [1894] P. 336, no longer applies.—"OPORTO," THE, *P.D. & Ad.D.*

17. *Collision—Newport Harbour Bye-laws, art.* 13.—By article 13 of the Newport Harbour Bye-laws, 1894: "Every vessel shall, unless prevented by stress of weather, be brought into and be taken out of the harbour to the right of mid-channel."

Held, by the Court of Appeal (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.), that, in order to comply with this bye-law, every vessel proceeding inward from sea must keep outside the southernmost of the buoys marking the channel at the entrance to the River Usk until she can round in on her proper side between the buoys.—"WINSTANLEY," THE, *C.A.*

18. *Collision—River Tyne Regulations*, 1884, *bye-law* 20.—The plaintiff's outgoing ship and the defendant's incoming ship came into collision in the daytime about on the line of lights a quarter of a mile outside the pierheads of the River Tyne. Bye-law 20 of the Regulations of the River Tyne Commissioners provides that "every vessel shall . . . be brought into port to the north of the mid-channel, and be taken out to the south of the mid-channel."

Held, that the defendant's ship had not infringed bye-law 20, as it had left the plaintiff's ship sufficient room to go out and pass to the southward, provided the outgoing ship had seen the incoming ship over the pier and acted as soon as possible.

The Harvest, 11 P. D. 90, discussed.—"JOHN O'SCOTT," THE, *P.D. & Ad.D.*

19. *Damages — Contract overriding limitation of liability—Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.—Two yachts were entered by their respective owners for a club race, each owner undertaking with the club to be bound by the club sailing rules. By the rules the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom." One of the yachts in breach of a sailing rule, through improper navigation without the actual fault or privity of the owner, ran into and sank the other yacht.

Held, that there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other, and that upon the true construction of the rules the words "all damages" excluded the operation of section 54 of the Merchant Shipping Act Amendment Act, 1862, which limited the liability to £8 per ton.

The decision of the Court of Appeal, 43 W. R. 498, [1895] P. 248, affirmed.—CLARKE *v.* DUNRAVEN (EARL), "SATANITA," THE, *H.L.*

20. *Harbour — Obstruction — Wreck — Removal—Owner—Liability for expenses—Aire and Calder Navigation Act*, 1889 (52 & 53 *Vict. c. cxxii.*), *s.* 47 —*Summary remedy.*—Section 47 of the Aire and Calder Navigation Act, 1889, which incorporates the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), provides that, if any vessel shall be sunk in any part of the navigation, and the owner, or person in charge, shall not remove it, it shall be lawful for the undertakers to remove it, and recover the expenses of such removal from the "owner" in a court of summary jurisdiction.

Held, that the remedy being prescribed by the section which gave the right to recover the expenses, it was not competent for the undertakers to recover them by action in the High Court, and, in any case, an owner of a sunken ship who had abandoned it to the underwriters as a total loss before any expenses had been incurred was not "the owner" within the meaning of the section.—BARRACLOUGH *v.* BROWN, *H.L.*

21. *Harbour authority—Towage—Ribble Navigation Act*, 1883 (46 & 47 *Vict. c. cxv.*).—The defendants were the port and harbour authority for the port of Preston, and as such made a charge for towage, only allowing tugs licensed by them to tow within the harbour, and by the terms of the towage contract the master and crew of the tug became servants of the tow. The plaintiff's ship, in a pilot's charge, was being towed up the River Ribble by a tug of the defendants, preceded by two other vessels, each in charge of a pilot and being towed. The three vessels started in due time to save the tide, and followed each other, the channel being narrow. From some unexplained cause the tug chartered by the defendants to tow the leading vessel slowed down, and took over an hour, instead of thirty-five minutes, to do the last five miles. The water in the meantime fell, and the plaintiff's barque, which was the last and deepest of the three, on arriving at the shallowest part, grounded and remained fast. In an action for the damage so sustained,

Held, by the Court of Appeal (reversing the decision of the President), that the defendants were liable, as they had failed to rebut the *primâ facie* case against them of negligence in obstructing the fairway, for it was an implied term of the contract between the plaintiff and the defendants that the defendants would take, and it lay on them to show that they had taken, reasonable care to supply a properly-equipped leading tug, so as to enable the string of vessels to get up safely on the one tide.—"RATATA," THE, *C.A.*

22. *Light dues — Measurement of tonnage—Deck cargo—"Goods" — Horses and cattle — Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.—By section 23 of the Merchant Shipping Act, 1876, if any ship carries as deck cargo timbers, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's

registered tonnage the tonnage of the space occupied by such goods. The space so occupied shall be deemed to be the space limited by the area occupied by the goods, and by straight lines enclosing a rectangular space sufficient to include the goods.

Held, that live animals carried on deck were "goods" within the meaning of the section; and that the space to be measured was not the actual sheds occupied by them, but a rectangular space no larger than was reasonably necessary to enclose the animals, allowing reasonable facilities for their movements.—RICHMOND HILL STEAMSHIP CO. *v.* TRINITY HOUSE CORPORATION, *C.A.*, 6.

23. *Maritime lien—Damage by collision—Mortgagee—Scotland, Law of.*—The maritime law of Scotland being the same as that of England, the law of Scotland recognizes a maritime lien in cases of collision.

In order to render a ship liable to a maritime lien for injury caused the ship itself must be the instrument which causes the damage.

The Bold Buccleugh, [1851] 7 Moo. P. C. 267, approved.—CURRIE *v.* MCKNIGHT, *H.L.* (*Sc.*).

24. *Master—Seaman—Discharge at foreign port—Maintenance and passage home—Deposit of sum with consular officer—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 186, *sub-section* 2 (d).—The plaintiff's service as a seaman on board a ship of the defendants having terminated at a foreign port, the master attended before the British consul in order to comply with section 186, sub-section 2 (*d*), of the Merchant Shipping Act, 1894, which enacts that under such circumstances the master may "deposit with the consular officer such a sum of money as is by the officer deemed sufficient to defray the expenses of "the seaman's maintenance and passage home." The consul fixed a sum, which the master paid, and the consul gave the plaintiff a voucher for his passage home, which, however, did not include his maintenance on board.

Held, that the master had complied with the statute, and that no action lay at the suit of the seaman against the shipowners to recover the expenses of his maintenance during his passage home.

Judgment of Collins, J., *ante*, p. 553, affirmed.—EDWARDS *v.* STEEL, *C.A.*, 689.

25. *Necessaries—Bunker coal—Master's lien—Merchant Shipping Act*, 1894, *s.* 167.—The defendants, owners of a steamship, transferred it to a Glasgow firm by a contract under which the defendants were to remain the registered owners. The Glasgow firm appointed the plaintiff master, who, without notice of the contract, whilst on a voyage, drew two bills of exchange on the Glasgow firm for bunker coal. The bills were dishonoured, and the Glasgow firm becoming insolvent the defendants as unpaid vendors took possession of the vessel. The defendants then settled with the plaintiff an action *in rem* brought in the name of the plaintiff by the coal merchants for lien for necessaries (the coal) under section 167 of the Merchant Shipping Act, 1894.

Held, that the settlement of the action was void as against the coal merchants to whom the plaintiff was liable on the bills, although the coals were supplied on the credit of the Glasgow firm and not of the defendants whose property the ship was.—"RIPON CITY," THE, *P.D. & Ad.D.*

26. *Passage broker—Contract ticket—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 320, 341, 342.—Section 341 (1) of the Merchant Shipping Act, 1894, which defines a passage broker to be a "person who sells or lets, or agrees to sell or let, or is in anywise concerned in the sale or letting of steerage passages in any ship proceeding from the British Islands to any place out of Europe not within the Mediterranean Sea," refers to a sale or letting of a passage commencing at a definite time for a specified voyage in a named ship.

Section 320, which enacts that "if any person . . . receives money from any person for or in respect of a passage as a steerage passenger in any ship . . . proceeding from the British Islands to any port out of Europe and not within the Mediterranean Sea, he shall give to the person paying the same a contract ticket . . . ," refers to a receipt of money paid for a specified passage commencing at a fixed time in a named ship.

A person not a duly qualified passage broker within section 342 contracted for the sum of £22 to send a lad from Liverpool to Canada and to place him as pupil upon a farm in Ontario. He procured from a properly qualified passage broker a steerage passage in a steamship from Liverpool to Quebec together with a contract ticket. He received no commission upon the sale of the ticket, nor did he make any direct profit out of it.

Held, that neither the original contract nor the contract ticket was a sale or letting of a passage within the meaning of section 341 so as to make the person liable to a penalty under section 342.

Held, also, that in procuring the contract ticket the person was not "concerned in the sale or letting of a passage" within section 341.

Held, also, that the person was not guilty of an offence under section 320.—MORRISS *v.* HOWDEN, *Q.B.D.*, 221.

27. *Pilot—Compulsory pilotage—Exemption—Ship trading from port in Great Britain to port in Europe north and east of Brest—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 625 (3).—A ship engaged on a voyage from the River Plate to Rotterdam with a general cargo had liberty to carry some cattle to London. Having landed the cattle in London, she was proceeding on her way to Rotterdam in charge of a pilot, when she came into collision with another ship within the London district. In proceedings against her for damage, the plea of compulsory pilotage was set up.

Held, that the ship was, at the time of the collision, a ship trading from a port in Great Britain within the London district to a port in Europe north and east of Brest within the meaning of section 625 (3) of the Merchant Shipping Act, 1894, and that she was therefore exempt from compulsory pilotage.

Courtney v. *Cole*, 36 W. R. 8, 19 Q. B. D. 447, followed.

Decision of the Court of Appeal, *ante*, p. 38, [1896] P. 281, affirmed.—"RUTLAND," THE, *H.L.*

28. *Salvage—Award—Principles of assessment.*—Although there is no rule entitling the salvors of a derelict vessel, as of right, to a moiety, or other specific proportion, of the value of the property salved, and the reward is to be assessed upon the same principles as in other cases of salvage, still there are usually present, in the case of a derelict, at least three special elements which tend to enhance the award—namely, the high degree of danger to which the property to be salved is exposed, the difficulty of approaching the derelict vessel without any aid in boarding her, and the necessity, when taking her in tow, of supplying men to steer her, thereby exposing some of the

salvors to additional risk, and rendering the salving vessel short-handed.—"JANET COURT," THE, *P.D. & Ad.D.*

29. *Salvage*—Quantum meruit—*Contract entered into with shipmaster as agent for passengers—Non-liability of owner of passenger ship—Delay or deviation.*—There is no implication of law making the master of a wrecked passenger ship the agent of his owner to enter into a contract on his behalf for the passengers to be carried on in another ship where the passengers sent on have been landed from the wreck at a spot where they are in no danger of losing their lives from exposure or want of food or water, and cannot under their passenger tickets claim any damages for delay or detention.—"MARIPOSA," THE, *P.D. & Ad.D.*, 191.

30. *Salvage—Services rendered by request—No actual benefit resulting therefrom—Principle upon which awards will be made.*—Where a vessel stands by or renders services to another upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration.—"CAMBRIAN," THE, *P.D. & Ad.D.*

31. *Salvage—Tug and tow—Claim for salvage by tug by whose acts the necessity for salvage assistance has been in part occasioned—Instance of inequitable salvage agreement—Amount agreed on not awarded.*—The owners, master, and crew of a steam-tug engaged to tow a vessel are not entitled to salvage remuneration for services in the nature of salvage services rendered to the tow beyond the scope of the towage contract where it appears to the satisfaction of the court that the tug has by her own wrongful acts contributed to place the tow in jeopardy.

The court will refuse to award an agreed amount for salvage where the bargain to pay such sum is shown to it to have been manifestly unfair and unjust.—"ALTAIR," THE, *P.D. & Ad.D.*, 622.

32. *Wages—Set-off—Advances of wages made by master for the purchase of slops by seaman deserters—Gratuities—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 167, 221, 232.—A shipowner defending an action of master's wages is not entitled to set off against the plaintiff's claim the amount of wages advanced by the master during the voyage for the purchase of slops, although it appears that the seamen to whom the advances were made have deserted, and thereby forfeited their wages, and the owners lay claim to the amount forfeited to reimburse the expenses caused by the desertion.

The owners of a ship cannot set off against the claim of the master of the ship for wages the amount of gratuities presented to the master by the consignees of cargo.—"PARKDALE," THE, *P.D. & Ad.D.*, 368.

See also Insurance, 4-11.

SHOP.—See Factory.

SOLICITOR:—

1. *Charging order—Bankruptcy—Jurisdiction in chambers—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Power of registrar—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 93, 99—*Bankruptcy Rules*, 1886, *r.* 6.—The judge of the High Court in Bankruptcy has power as a judge of the High Court, though not under his bankruptcy jurisdiction, to make charging orders under section 28 of the Solicitors Act, 1860; and inasmuch as it is a power to be exercised in chambers, he can delegate that power to the registrar in bankruptcy.—WOOD, RE, FANSHAWE, EX PARTE, *Q.B.D.*

2. *Compromise—Authority—Compromising claim before action brought.*—A solicitor, who is instructed by a client to make a claim on a third person for compensation for personal injuries, has no authority, in the absence of express directions, to effect a compromise before action brought, so as to preclude his client from bringing an action.—MACAULAY *v.* POLLEY, *C.A.*, 681.

3. *Costs—Cause of action—Action for work done—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), 37—*Statutes of Limitation* (21 *Jac.* 1, *c.* 16), *s.* 16), *s.* 3, *and* (4 & 5 *Anne, c.* 16), *s.* 19.—In the case of work done by a solicitor in the course of his profession a cause of action accrues due immediately after the completion of the work he was retained to do, and the Statutes of Limitation runs from such date, and not from one month after the delivery of his signed bill of costs.—COBURN *v.* COLLEDGE, *C.A.*, 488.

4. *Costs—Infant made plaintiff without authority—Application by defendants—Liability of plaintiffs' solicitors.*—Upon the application of the defendants to an action in which an infant was made a co-plaintiff without proper authority, the solicitors who wrongly made him a co-plaintiff were ordered to pay the costs of the defendants occasioned by the infant being made a party, including the costs of the application.

The principle laid down by the Court of Appeal in *Fricker* v. *Van Grutten*, *ante*, p. 53, [1896] 2 Ch. 649, followed.—GEILIGER *v.* GIBBS, *Ch.D. Kekewich, J.*, 315.

5. *Costs—Lien—Compromise by plaintiffs and defendant behind solicitor's back—Collusion.*—Where the plaintiffs in proceedings for taxing a bill of costs had, without the knowledge of their solicitor, come to an agreement with the defendant to stay the proceedings, the defendant paying them the sum of £25 "towards their costs" in the proceedings, and stating that he did so gratuitously because "they had been clients of his for some time, and appeared then to have spent all their money," and the plaintiffs had withdrawn their retainer from their solicitor,

Held, on the facts, that the inevitable result of such agreement must be to deprive the plaintiffs' solicitor of his rightful costs; that the plaintiffs and the defendant must have been aware that this would be the consequence of their agreement; and that, consequently, it was a collusive agreement bringing the parties within the decision of *Price* v. *Crouch*, 35 SOLICITORS' JOURNAL 610, 60 L. J. Q. B. 767, 40 W. R. Dig. 248, and that the plaintiffs' solicitor was entitled to an order that his costs should be taxed as between solicitor and client and paid to him by the defendant.—MARGETSON, RE, *Ch.D. Kekewich, J.*, 645.

6. *Costs—Payment of costs to solicitor—Judgment reversed on appeal—Repayment of costs by solicitors—Solicitors' agents.*—A solicitor who has succeeded, after notice of appeal, in obtaining payment of his costs from the unsuccessful opposite party under an order which is afterwards reversed on appeal, cannot be personally ordered to repay such costs to the successful appellant. In cases where an appeal is intended and execution is not stayed, application should be made to the court requiring the solicitor of the successful party to give a personal undertaking to repay should the order for payment of costs be reversed.

Decision of the Court of Appeal (44 W. R. 487, [1896] 1 Q. B. 610) affirmed.

Fitzmaurice v. *Jordan*, 32 L. R. Ir. 112, 41 W. R.

Dig. 189, overruled.—HOOD BARRS v. CROSSMAN, *H.L.*, 465.

7. *Costs—Proceedings commenced by solicitor without proper authority—Stay of proceedings—Order for payment of costs against the solicitor.*—The old rule that, when a solicitor has commenced proceedings on behalf of a person from whom he has not received a proper authority, the person so made a party remains liable for the costs of the proceedings, and has no remedy except against the solicitor, has now been altered; and an order will be made staying all proceedings by or against the person improperly joined (including all proceedings under any order already made against him), and directing the solicitor to pay any costs which such person may have been ordered to pay, and to pay such person's costs as between solicitor and client.—FRICKER v. VAN GRUTTEN, *C.A.*, 53.

8. *Costs — Taxation — Agency charges — Country solicitor and London agent—Separate bills of costs.—Disbursements—Complete bill—Particulars of agency charges—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 37), *s.* 73.—Upon an application to tax a bill of costs after the expiration of twelve months from the date of the delivery of the bill, on the ground that certain items for agency charges are treated as disbursements, and no particulars of them are given, it must appear on the face of the bill that the applicant has not been furnished with such detailed information as will enable him to form a fair opinion as to whether he ought to proceed upon a taxation or not. When such items taken together do not represent a substantial part of the whole bill the court will hesitate to order a taxation on the ground that the bill is incomplete; but when such items bear a substantial proportion to the amount due under a separate heading in a particular matter which forms a part of the whole bill, the court will not limit an order for taxation to the particular matter, but will regard the whole bill as incomplete and taxable.—POMEROY AND TANNER (No. 2), RE, *Ch.D. Stirling, J.*

9. *Costs—Taxation—Common order—Moneys received by solicitor in different capacities—Counsel's fees.*—The clause in the common order to tax directing credit to be given for all sums received must be read as including and as confined to all moneys which the solicitor, in his character as solicitor or agent of the client, has received of, or on account of, or is legally or equitably liable to pay over to, the client, and against which, if sued for by the client, the solicitor could set off his costs when taxed.

Fees received, or alleged to have been received, by solicitors on account of a client, who was also a barrister, as counsel's fees are not included in the above clause, and therefore are not liable to be brought into account in the taxation of a bill of costs between the solicitor and such client.—LE BRASSEUR AND OAKLEY, RE, *C.A.*, 87.

10. *Costs—Taxation after bill delivered more than twelve months—Agency charges—Disbursements—Complete bill.*—The charges of the London agent of a country solicitor, as between the country solicitor and his client, are taxable items, and should not be treated as disbursements in the country solicitor's bill of costs.

A bill of costs which fails to set forth the details of such agency charges is not a complete bill so as to preclude taxation more than twelve months after delivery.—POMEROY AND TANNER, RE, *Ch.D. Stirling, J.*, 245.

11. *Costs — Taxation — Interest — Administration action—General Order, Solicitors' Remuneration Act*, 1881, *r.* 7.—The "person liable" and on whom demand for payment of a bill of costs due from a deceased client is to be made is the legal personal representative. Where, therefore, a bill of costs due from the deceased had been delivered by direction of the chief clerk to a creditor having the conduct of an action in which the estate of the deceased was being administered,

Held, that there had been no demand on the person liable within the meaning of rule 7 of the General Order under the Solicitors' Remuneration Act, 1881, so as to entitle the solicitors to interest under that rule.—MCMURDO, RE, PENFIELD v. MCMURDO, *Ch.D. North, J.*, 244.

12. *Costs—Taxation—Joint application of mortgagee-solicitor and his bankrupt client—Submission of solicitor to pay.*—A solicitor, who is mortgagee of the moneys coming to his client on the cash account and taxation of the bills of costs of his client's former solicitors, and who makes a joint application with his client for delivery of such cash account and bills of costs and for taxation, must join with his client in the usual submission to pay, and the fact that his client has been adjudicated bankrupt while such proceedings were pending will not relieve the solicitor from making such submission. —BATTAMS v. HUTCHINSON, RE, *Ch.D. Kekewich, J.*, 458.

13. *Costs—Taxation—"Person liable to pay"—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38—*Solicitors (Ireland) Act*, 1849, *s.* 3.—The beneficial owner of the residuary estate of a testator, is a "person liable to pay" the costs of the solicitor of the executor; and consequently is entitled, under section 38 of the Solicitors Act, 1843, to have the costs taxed.—EARLY, RE, *C.A.* (*Ir.*).

14. *Lien—Lunatic—Tenant for life and remainderman.*—A lunatic was tenant for life of lands of which B. and C. were remaindermen in fee as tenants in common. B., having been appointed committee of the lunatic, employed H. as solicitor in the lunacy, who, in that capacity, obtained the custody of the title-deeds. B. and C. being desirous of paying off a mortgage on the life estate, and charging the fee, presented a petition in the lunacy that the committee might be authorized to join in paying off the mortgage on the life estate, and creating a charge on the fee. H. acted as solicitor in connection with this petition.

Held, that H. was, after the death of the lunatic, entitled to a lien on the title-deeds as against B. and C. in respect of the costs of and incidental to that petition; but was not entitled to a lien against them in respect of any other costs incurred as solicitor of the committee.—STANNARD'S ESTATE, RE, *Ch.D.* (*Ir.*).

15. *Lien—Solicitors discharged by client—Delivery up of papers—Tender of balance—Costs.*—A firm of solicitors were discharged by their client. The new solicitor obtained the usual order for delivery of a bill of costs and taxation and afterwards tendered to them (but not in settlement) the amount claimed and requested delivery up of papers. Both the tender and request were refused on the grounds, as to the tender, that the solicitors were entitled first to their balance in settlement, and as to the papers, that they had a lien on them for their costs, including those of certain *habeas corpus* proceedings commenced against them and others on behalf of the client, and which they were defending, that they were entitled to have a sum paid into court to answer the costs of taxation, and also to an under-

taking to return the papers in case any balance was found due on the taxation to them.

On a motion for an order for delivery up of the papers,

Held, that the solicitors ought to have accepted the tender and to have delivered up the papers upon getting a receipt from the present solicitor and an undertaking for a return of the papers in case any sum was found due to them on taxation within a week after such taxation.

Re Beavan and Whiting, 33 Beav. 439, followed.

Held, also, that the costs relating to the *habeas corpus* not being taxable costs, charges, and expenses incurred by them as solicitors for the client could not be included in the lien.

Re Taylor, 64 L. T. N. S. 650, followed.

Re Galland, 31 Ch. D. 296, approved.—RE HANBURY, WHITING, AND NICHOLSON, *Ch.D. Stirling, J.*

16. *Managing clerk—Authority—Sheriff—Notice to postpone sale.*—The managing clerk of the solicitor of an execution creditor has no implied authority to require the sheriff to postpone a sale of chattels seized under a *fi. fa.*—WHYTE *v.* NUTTING, *Q.B.D.* (*Ir.*).

17. *Misconduct—Striking off rolls.*—Where the court, having rightly acquitted a solicitor of fraudulent intent in having ante-dated a mortgage deed which he had drawn for the mortgagor, and in having inserted in it the sum of £250 for £150, nevertheless ordered his name to be struck off the roll, for having put the mortgage in evidence on behalf of the mortgagee in an interpleader suit, without informing the court that the date was false,

Held, that the second charge fell with the first, it appearing that the date of the deed was not material in the interpleader issue; and consequently the solicitor's name was ordered to be restored to the roll.—RENNER, EX PARTE, *P.C.*

18. *Remuneration—Leases—Scale fee—Percentage—General Order under Solicitors' Remuneration Act*, 1881, *Schedule I., Part II.; and rule* 6.—The omission of the words "per cent." from the first scale in Schedule I., Part II., to the General Order under the Solicitors' Remuneration Act, 1881, in cases where the rent exceeds £100 is intentional. A solicitor, therefore, is not entitled to a proportional fee for fractions of £100 as remuneration for preparing a lease when the rental exceeds £100.—MCGAREL, RE, *Lun.*, 321.

19. *Remuneration—Lease—Premium—Negotiating fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order, Schedule I., Part II., rule* 5.—Where a lease is granted partly in consideration of a premium and partly in consideration of a rent, the lessor's solicitors are not entitled under rule 5 of Part II. of Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, to a fee for negotiating in respect of the premium further than what is included in the scale fee chargeable in respect of the rent.

In re Robson, 38 W. R. 556, 45 Ch. D. 71, discussed.—HORN AND FRANCIS, RE, *Ch.D. Chitty, J.*, 72.

20. *Remuneration—Sale carried out by underlease—Solicitors' Remuneration Act*, 1881 (45 & 46 *Vict. c.* 44)—*General Order under Solicitor's Remuneration Act, Schedule I., Part I., Part II.*—In the case of a sale carried out by means of an underlease the solicitor cannot claim to be remunerated according to the scale under Schedule I., Part II., of the General Order made under the Solicitors' Remuneration Act. If any scale applies it must be the scale under Schedule I., Part I.

But, *quære*, whether the scale applies at all to such a case.—STILL *v.* WEBB, *Ch.D. Stirling, J.*, 170.

21. *Remuneration—Sale of property subject to incumbrances—Sale by second mortgagee—Scale fees—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Schedule I., Part I., r.* 9.—Rule 9 of Schedule I. to the General Order made under the Solicitors' Remuneration Act, 1881, which provides that, where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, held to apply to a sale by a second mortgagee.—FORTESCUE *v.* MERCANTILE BANK OF LONDON, *C.A.*, 529.

22. *Unauthorized use of solicitor's name—Fraud—Liability of innocent solicitor—Negligence—Partnership.*—The name of a firm consisting of two solicitors had been used, improperly and without authority, in a fraudulent petition by means of which payment out of court of a sum of £4,000 was obtained by a person not entitled thereto. One partner in the firm knew nothing of the matter; the other had been told that proceedings were about to be taken, and knew, after an order for payment had been made, that the firm name had been used in proceedings of some sort. The Treasury having made good the £4,000,

Held, that the last-mentioned partner had not, by omitting to inform the court that the firm name had been used without authority in the petition, made himself or his firm liable to refund the sum misappropriated; and that the two solicitors were respectively liable to replace only such parts of the fund as they had respectively received in payment of the firm's costs.

There is not as a matter of law any usage that it is within the scope of a solicitor partnership for one of the partners to authorize the use of the firm name by a third person and to thereby bind his copartners. Such usage, if any, must be established by evidence in each case.

Judgment of Kekewich, J., 44 W. R. 462, varied.—MARSH *v.* JOSEPH, *C.A.*, 209.

See also Divorce, 15; Mortgage, 8; Practice, 15, 28.

SPECIFIC PERFORMANCE.—See Contract, 7, 8; Vendor and Purchaser, 4, 8, 10.

STAMP ACTS.—See Inland Revenue.

SUNDAY TRADING:—

Prosecution—Consent of chief constable—Institution of proceedings—Lord's Day Observance Act, 1676 (29 *Car.* 2, *c.* 7), *s.* 1—*Amendment Act*, 1871 (34 & 35 *Vict. c.* 87), *s.* 1.—The Lord's Day Observance Amendment Act, 1871, s. 1, provides that no prosecution shall be instituted under the Lord's Day Observance Act, 1676, except by or with the consent in writing of the chief officer of police of the district or of certain other persons.

Held, that the consent in writing must be given before the laying of the information.—THORPE *v.* PRIESTNALL, *Q.B.D.*, 223.

See also Factory, 3.

THAMES.—See *Certiorari*; River, 3, 4.

THEATRE:—

Public entertainment—Licence to perform stage plays—Licence granted conditionally on undertaking not to apply for excise licence—Discretion of licensing

committee—Theatres Act, 1843 (6 & 7 *Vict. c.* 68).—On an application for a theatre licence the licensing committee granted it on condition that the applicant did not apply for an excise licence, they being of opinion that there were sufficient public-houses in the immediate neighbourhood.

Held, that the licensing committee had properly exercised their discretion, and that they were justified in taking into consideration the fact that an excise licence might be applied for, and, in view of the facts of the case, in imposing a condition on the granting of the theatre licence.—REG. *v.* YORKSHIRE WEST RIDING COUNTY COUNCIL, *Q.B.D.*

THELLUSSON ACT.—See Settlement, 9.

TITHE.—See Poor Law, 15.

TOLLS:—

"*Coach*"—*Tramcar*—7 *Geo.* 3, *c. lxxiii.*—An Act of Parliament, passed in 1766, empowered the owners of a ferry across a creek to build a bridge over the creek and to demand certain tolls for the passage of the bridge, including amongst others the following: "For every coach, chariot, berlin, chaise, chair, or calash drawn by more than two horses, the sum of sixpence," and "for every wagon, wain, dray, car, cart, or sledge, or other carriage drawn by three or four horses or oxen, the sum of fourpence."

Held, that the toll payable in respect of a tramcar drawn by three horses was that payable in respect of a "coach."—PLYMOUTH TRAMWAY CO. *v.* GENERAL TOLLS CO., *C.A.*

TORT:—

Practical joke—False statement causing injury to health—Cause of action.—The defendant, by way of a practical joke, made a false statement to the female plaintiff to the effect that her husband, the male plaintiff, had met with a bad accident. The female plaintiff was thereby seriously injured in her health.

Held, that an action for damages would lie.—WILKINSON *v.* DOWNTON, *Q.B.D.*, 525.

TRADE-MARK:—

1. "*Fancy word not in common use*"—*Removing from register—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64.—The word "Bovril" is a "fancy word not in common use" within the meaning of section 64 of the Patents, Designs, and Trade-Marks Act, 1883, and is properly registered as a trade-mark under that Act; though possibly, as applied to meat extract, &c., it has "reference to the character or quality of the goods" within the meaning of section 10, sub-section 1 (*e*), of the Act of 1888, and therefore could not now be registered.—"BOVRIL" TRADE-MARK, RE, *C.A.*, 150.

2. *Geographical word—Word bearing a geographical as well as another signification—Word which has become descriptive of a particular article—Assignment of trade-mark where there is no goodwill—Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 70.—A word which in its primary signification is not a geographical name may be registered as a trade-mark under section 10 of the Patents, Designs, and Trade-Marks Act of 1888 (which takes the place of section 64 of the Act of 1883), notwithstanding that it has also acquired a secondary signification in which it may be regarded as being a geographical name.

Thus the word "Magnolia" was held not to be incapable of registration by reason of its being used as the name of numerous towns and villages in the United States, seeing that in its primary signification it was not geographical, but had reference to the tree of that name.

A word which has been so used as to become the descriptive name of a particular article of manufacture has "reference to the character of the goods," and cannot be registered as a trade-mark.

Thus the word "Magnolia," which was the only name for a particular metallic alloy, was held disqualified for registration.

Decision of Kekewich, J., *ante*, p. 406, affirmed on these points.

By section 70 of the Patents, Designs, and Trade-Marks Act of 1883 a trade-mark can be assigned "only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill."

Where a trade-mark was registered in Class 6 in respect of "Anti-friction metal bearings,"

Held, on the facts of the case (reversing on this point the decision of Kekewich, J., *ante*, p. 406), that the trade-mark above mentioned passed on an assignment by the registered proprietors of their goodwill and trade-marks.—MAGNOLIA METAL CO.'S TRADE-MARKS, RE, *C.A.*

3. *Registration—Change of name of proprietor—Register of trade-marks—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 87.—Where a limited company being the registered owner of a trade-mark changes its name, it is the duty of the comptroller on request to substitute the new name for the old name on the register.—NEW ORMONDE CYCLE CO. (LIMITED), EX PARTE, *Ch.D. North, J.*

4. *Registration — Dissolution of partnership — Application by partners for separate registration of old firm's trade-marks—Patents, &c., Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 72.—The prohibition under section 72 of the Patents, &c., Act, 1883, of the registration by the comptroller of a trade-mark identical with one already on the register or having such a resemblance to it as to be calculated to deceive is intended to protect the public as well as benefit the owners of trade-marks. The court, therefore, in the exercise of whatever discretion it may have under section 72, will, in considering whether it ought to encourage two concurrent applications for the registration of similar or identical marks by directing the comptroller to proceed with them, be governed by the principle laid down in the case of *In re Dewhurst's Trade-Marks*, 44 W. R. 672, [1896] 2 Ch. 137, and refuse the application unless satisfied that no harm is likely to arise by reason of such registration causing either confusion or deception; and the fact that the applicants were formerly partners and are asking for the registration in their respective names of the trade-marks used by the old firm is not sufficient to induce the court to accede to their application.—ERHMANN'S TRADE-MARKS, RE, *Ch.D. Stirling, J.*, 698.

5. *Registration—Removal from register—Proper subject-matter — "Distinctive device" — Portrait of manufacturer—Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-section* 1 (*c*).—The portrait of the manufacturer of goods is a "distinctive device" within the meaning of section 10, sub-section 1 (*c*), of the Patents, Designs, and Trade-Marks Act, 1888, and may properly be regis-

tered as a trade-mark to be used by him in connection with his goods.

In re Anderson's Trade-Mark, [1884] 26 *Ch.D.* 409, explained.—ROWLAND *v.* MITCHELL, ROWLAND'S TRADE-MARK, IN RE *C.A.*

6. *Registration—Royal crown—Practice of the Trade-marks Office—Instructions to applicants—Trade-marks Rules*, 1890, *r.* 30—*Validity.*—By No. 30 of the instructions issued in 1890 to persons applying for the registration of trade-marks it is provided that the royal arms, and arms so nearly resembling them as to be calculated to deceive, and representations of the royal crown will not be registered.

The comptroller having refused to register a trade-mark on the ground that the device was similar to the royal crown,

Held, that the device did not in fact so closely resemble the royal crown as to be calculated to deceive.

The practice of the Trade-marks Office considered. —KONIG AND EBHARDT'S TRADE-MARK, RE, *Ch.D. Stirling, J.*, 230.

7. *Registration—"Solio"—Photographic paper—Invented word—Word having reference to the character or quality of the goods—Practice in Patent Office as to devices and words referring to the sun—Patents, &c., Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-section* 1 (d), (e).—An application was made to register the word "Solio" in connection with photographic paper. The Comptroller-General had objected to register it on the ground that it was the practice of the Office to refuse registration as trade-marks in respect of photographic papers of marks which consisted merely of the word "Sun," or its equivalent "Sol," with the addition of some ordinary termination or affix, as having reference to the character or quality of the goods, within the meaning of section 10, sub-section 1 (*e*), of the Patents, &c., Act, 1888.

Held, that the court was bound by *Re The Trade-mark Application of Farbenfabriken, vormals Fredr. Bayer & Co.*, "*Somatose*," [1894] 1 Ch. 645, and *Re Densham & Sons' Trade-mark* "*Mazawattee*," [1895] 2 Ch. 176, to decide that if an invented word had reference to the character or quality of the goods to which it was to be applied as a trade-mark it could not be registered; that although "Solio" was undoubtedly a newly-coined word, and in that sense was an invented word, yet it could not be said to have no reference to the character or quality of the goods to which it was intended to be applied—viz., photographic paper; and that therefore the refusal to register it was perfectly right.—EASTMAN PHOTOGRAPHIC CO.'S TRADE-MARK, RE, *C.A.*

See also Inland Revenue, 17.

TRADE-NAME:—

1. *Injunction—Sale of appellant's goods as respondent's—Misleading purchasers.*—A trader cannot pass off goods of his own manufacture as those of another, though the purchaser has no knowledge of the particular manufacturer.

The respondent had for many years made and sold, in large quantities, a sauce by the name of "Yorkshire Relish." The composition of the sauce was a trade secret, and, before 1894, no other sauce had been sold under that name.

In 1894 the appellants put upon the market a sauce very like, but not identical with, the respondent's, which they sold at a cheaper rate as "Yorkshire Relish." The appellant's labels and wrappers were distinct from the respondent's, but there was evidence that purchasers who asked for "Yorkshire Relish" had been supplied with the appellants' manufacture instead of the respondent's.

Held, that the appellants should be restrained by injunction from selling their goods as "Yorkshire Relish" without further distinguishing them from the respondent's manufacture.—BIRMINGHAM VINEGAR BREWERY CO. *v.* POWELL, *H.L.*

2. *Injunction—Trade-mark—Rival traders—Passing off—Deception—Intent to deceive—Evidence of intent—Admissibility—Account of profits, form of.*—The principle that "nobody has any right to represent his goods as the goods of somebody else," *Reddaway* v. *Banham*, [1896] A. C. 199, 204, has no limit as regards name, origin, honesty of manufacture or sale, or otherwise. Thus, a trader whose goods have acquired a reputation under a particular name can restrain the user of that name in any way whatever by a rival trader in connection with the latter's own goods, even though that reputation has been acquired by the exertions or enterprize of the rival trader as an importer and vendor on behalf of the plaintiff.

In an action for an injunction to restrain the use of a trade-name, if the defendant's goods, on the face of them and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary, the rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts; but if, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then evidence of intention to deceive is admissible, and this evidence may be supplied by admissions, oral or in writing, or by inference from conduct.

Reddaway v. *Banham*, [1896] A. C. 199, discussed.

Where an injunction was granted restraining the defendants from passing off their goods under the plaintiff's trade-name, an account of profits was directed, as a necessary consequence, in the form allowed in *Lever* v. *Goodwin*, [1887] 36 Ch. D. 1, 4 Rep. Pat. Cas. 492, although there was no evidence that the defendants' goods had been actually mistaken for the plaintiff's.—SAXLEHNER *v.* APOLLINARIS CO., *Ch.D. Kekewich, J.*

TRADE UNION:

Strike—Picketing—Conspiring to induce persons not to enter into contracts—"Watching or besetting"—Interlocutory injunction—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 2—*Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7.—Watching or besetting the works or place of business of an employer for the purpose of persuading or otherwise preventing persons from working for him, or for any purpose except merely to obtain or communicate information, is illegal within the meaning of section 7 of the Conspiracy and Protection of Property Act, 1875, and will be restrained by interlocutory injuction.—LYONS *v.* WILKINS, *C.A.*, 19.

TRAMWAYS.—See Nuisance, 2.

TRUSTEE:—

1. *Breach of trust—Investment—Unauthorized investment—Discretion of court as to relief of trustee—Solicitor-trustee—Indemnity—Third-party notice—Judicial Trustee Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3.—No general rule can be laid down for the manner in which the court will give the relief provided under the Judicial Trustee Act, 1896, s. 3; in each case arising thereunder the court will

exercise its discretion having regard to the particular facts of the case.

In cases where there are two or more trustees, one of whom is solicitor, the trustee or trustees who are not solicitors will not be excused for a consequence of a breach of trust unless they have acted with the same caution as they would in their private affairs, but he or they may nevertheless be entitled to a complete indemnity from the solicitor-trustee.—TURNER, RE, BARKER *v.* IVIMEY, *Ch.D. Byrne, J.*, 495.

2. *Breach of trust—Neglect to provide fund for payment of annuity—Account—Statutes of Limitation—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—Where a trustee has committed a breach of trust by neglecting to accumulate a fund to secure the payment of an annuity, section 8 of the Trustee Act, 1888, protects him from any claim for an account of moneys received by him more than six years before action brought.—HOW *v.* WINTERTON (EARL), *C.A.*, 103.

3. *Breach of trust—Practice—Married woman restrained from anticipation—Indemnity—Pleading—Third-party notice—Liberty to apply—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 45—*R. S. C., ord.* 16, *r.* 55.—In an action for breach of trust in which the trustees of a settlement and the tenant for life, a married woman restrained from anticipation, were defendants, the defendant trustees in their defence alleged that the breach was committed at the request of the defendant tenant for life, and that her interest ought to be impounded by way of indemnity; but they did not raise this point either by way of third-party notice under ord. 16, r. 55, or by way of counter-claim.

Held, that upon the allegations respectively contained in the statement of claim of the plaintiff, and in the defence of the defendant trustees, the court had jurisdiction to give the defendant trustees liberty to apply in chambers in the action, to enforce any right of indemnity they might have against the tenant for life; and that under section 45 of the Trustee Act, 1893, the court could make an order impounding the life interest of a married woman restrained from anticipation, by way of indemnity.—HOLT, RE, HOLT *v.* HOLT, *Ch.D. Byrne, J.*, 650.

4. *Constructive trust—Leaseholds devised to successive tenants for life with remainders over—Purchase by tenant for life in remainder of reversion expectant on determination of lease — Purchaser whether a trustee for remaindermen.*—By his will, J. L., the lessee of certain leaseholds (not renewable) gave the same to his brother for life, with remainder to E. J. L. for life, with remainder for the benefit of the children of E. J. L. During the life of the first tenant for life, E. J. L. purchased the reversion expectant on the determination of the lease. On a summons taken out in these circumstances to ascertain whether the purchaser was a trustee for the remaindermen,

Held, that, there being no case in which the doctrine of *Keetch* v. *Sandford*, Wh. & T. L. C. 53, had been applied to leaseholds not renewable by contract or custom, the purchaser was not a trustee for the remaindermen.

Randall v. *Russell*, 3 Mer. 197, applied.—LONGTON *v.* WILSBY, *Ch.D. Stirling, J.*

5. *Investment—Company incorporated by Act of Parliament.*—Where the testator had empowered the trustees of his will to invest "in or upon the bonds, debentures, or debenture stock of any company incorporated by Act of Parliament,"

Held, that the trustees were not empowered to invest on the bonds or debenture securities of a company incorporated by registration under the Companies Act of 1862.—SMITH, RE, DAVIDSON *v.* MYRTLE, *Ch.D. Kekewich, J.*, 29.

6. *Investment—Will—Absolute trust for sale—Discretionary power to postpone—Trustees not agreed.*—A testator devised and bequeathed all his real and leasehold estates to trustees upon trust for sale, and, after providing for investment of the proceeds and payment of the income thereof to his widow for her life, and afterwards for distribution among certain persons, he declared "that it shall be lawful for my trustees or trustee, with the consent of my said wife, during her life, to allow any part or parts of my said residuary estate to remain in their actual state of investment at the time of my decease; and that it shall not be necessary for them to sell my real or leasehold estates, or any part thereof, during the life of my said wife, unless she shall in writing request them so to do." The trustees were not agreed as to the expediency of a sale; but the remaindermen desired it.

The testator's widow had not made any request in writing to the trustees.

Held, that it was not obligatory on the trustees to sell the real and leasehold estates during the life of the testator's widow, unless she should in writing request them so to do, or unless the trustees were both of opinion that a sale ought to take place; but that, if they did not so agree that a sale was desirable, and there was no such request in writing, then they could not be compelled to sell.

Decision of Stirling, J., 75 L. T. Rep. 383, reversed.—LEVER, RE, CORDWELL *v.* LEVER (No. 2), *C.A.*

7. *Mortgages of agricultural land—Will authorizing such investments—Duty to call in—Liability for retaining—Trustees acting honestly and without wilful default.*—Trustees under a will authorizing investments in mortgages of real estate will not, if they have acted honestly and with reasonable care, be held liable for loss caused by their retention for more than twelve months after the testator's death of mortgages of agricultural land originally made to the testator himself. Nor is the fact that the trustees never had the mortgage securities valued by a professional surveyor conclusive against them.

Decision of Kekewich, J., 44 W. R. 311, reversed.—CHAPMAN, RE, COCKS *v.* CHAPMAN, *C.A.*, 67.

8. *New trustee—Vesting order—Reduction of number of trustees—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 26, 35.—Where one of four trustees was an absconding bankrupt, the court made an order vesting the trust estate in the other three trustees, although the number of trustees was thereby diminished.—LEES' SETTLEMENT TRUSTS, IN RE, *Ch.D. Chitty, J.*

9. *Partnership—Inspectorship deed—Trusts as to partnership assets and separate assets of partners—Trusts as to separate assets, whether express or constructive—Limitation, Statutes of.*—By an inspectorship deed, executed in 1833, the debtors, who were partners, covenanted to collect and get in the partnership assets, and to pay the moneys received into the banking-house of the firm and apply them so far as the same would extend in satisfaction of the debts due to their creditors named in the deed; and each of them further covenanted to collect and get in the assets belonging to his separate estate and apply them in payment of his separate debts, and pay the surplus (there being none in the events

which happened) into the banking-house of the firm, to be applied for the benefit of the creditors of the firm according to the first covenant above-mentioned.

A claim having been made by a creditor of the firm to funds which subsequently accrued standing to the credit of the account of the legal personal representative of the last surviving partner for distribution among certain persons as part of the separate assets,

Held, on the construction of the deed, that there was no express trust thereby constituted as regarded the separate assets of the partners, and that, the period fixed by the Statutes of Limitation having expired, the claim was barred. — TREVOR *v.* HUTCHINS, *C.A.*

10. *Precatory trust—Gift—Words of request.*—Upon the marriage of a lady with the heir-presumptive to a peerage certain family jewels were given to her "for her life with a request that at her death they might be left as heirlooms."

Held, that these words did not create a precatory trust, and that the wife took the jewels absolutely. —HILL *v.* HILL, *C.A.*, 371.

See also Banker, 2; Charity, 3, 4; Executor, 3; Frauds, Statute of; Mortgage, 2; Practice, 47; Settled Land, 3-5; Vendor and Purchaser, 13; Will, 9.

VACCINATION :—

1. *Justices—Notice—Service—Proof – Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.—No particular mode of service is necessary in the case of a notice under section 31 of the Vaccination Act, 1867, requiring a parent to procure the vaccination of his child. It is for the justices to determine whether they are satisfied on the evidence that the notice reached the person for whom it was intended.—HOLLOWAY *v.* COSTER, *Q.B.D.*, 319.

2. *Justices—Proceedings against parent—Summons—Order signed by a different magistrate—Non-compliance with order—Defence—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31.—It is no defence to proceedings under section 31 of the Vaccination Act, 1867, against a parent, for non-compliance with an order directing him to have his child vaccinated, that the magistrate who issued the summons did not sign the order. If the order were bad on that ground proceedings should have been taken to quash it; but

Semble, as the Summary Jurisdiction Acts apply to proceedings under the Vaccination Acts the order was not bad.—SOUTHCOMBE *v.* YEOVIL UNION, *Q.B.D.*, 318.

3. *Proceedings against parent to enforce vaccination—Vaccination officer—Authority—Minute of appointment—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Local Government Board General Order*, 31*st of October*, 1874, *articles* 16, 17.—A vaccination officer appointed by a minute of the guardians has authority to institute proceedings under section 31 of the Vaccination Act, 1867, against a parent for non-compliance with a notice requiring him to procure the vaccination of his child, without a special authority from the guardians.—BRAMBLE *v.* LOWE, *Q.B.D.*, 366.

VENDOR and PURCHASER :—

1. *Building estate—Light—Implied grant—Derogation from grant—Obstruction—Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.—W. conveyed in fee, as beneficial owner, to B. a plot of land with a building recently erected thereon with windows overlooking an adjoining plot of land belonging to W. The adjoining plot was marked on the plan as "building land," but no right to build on such plot was expressly reserved. W. having built on the adjoining plot so as materially to interfere with the access of light to B.'s windows, B. commenced an action for an injunction and damages.

Held (reversing Kekewich, J.), that W. was not entitled to build so as materially to interfere with the access of light to B.'s windows. B. admitting that W. could have built so as not to interfere with his lights, an injunction was not granted, but an inquiry was directed as to the damage sustained by B. through W.'s interference with his light.

Swansborough v. *Coventry*, 2 Moo. & Sc. 362, 9 Bing. 305, approved.

Birmingham, Dudley, and District Banking Co. v. *Ross*, 36 W. R. 914, 38 Ch. D. 295; and *Myers* v. *Catterson*, 38 W. R. 488, 43 Ch. D. 470, considered. —BROOMFIELD *v.* WILLIAMS, *C.A.*, 469.

2. *Building society—Mortgage—Power of sale—Sale by transferee.*—A power of sale can only be exercised by the person designated for the purpose in the instrument which creates the power. Accordingly, in the case of a mortgage by a member of a building society to the trustees of the society which contained a power of sale limited to the trustees of the society,

Held, that the power in question could not be exercised by a transferee of the mortgage.

Whether a mortgage by a member to the trustees of a building society can be validly transferred by them to a stranger without the consent of the mortgagor, *quære*.—RUMNEY AND SMITH'S CONTRACT, RE, *C.A.*, 678.

3. *Conditions of sale—"Outgoings"—Agreement by vendor to discharge outgoings up to completion—Order to take down dangerous structures—Expenses of demolition—Liability of vendor.*—By conditions of sale of land within the metropolis the date fixed for completion was the 8th of May, all outgoings up to that day being cleared by the vendor. Before the 8th of May a magistrate made an order to take down dangerous structures on the land. This order was not complied with, and after the 8th of May the county council took down the structures, and demanded and received from the purchaser the expenses of so doing.

Held, that, the liability having been incurred before the 8th of May, the expenses were "outgoings" within the meaning of the conditions, which the purchaser was entitled to recover from the vendor.

Midgley v. *Coppock*, (1879) 4 Ex. D. 309, followed. *In re Boor, Boor* v. *Hopkins*. (1889) 40 Ch. D. 572, distinguished.—TUBBS *v.* WYNNE, *Q.B.D.*

4. *Contract—Rescission—Purchaser let into possession before completion—Failure to pay moneys due under agreement—Action by vendor for rescission of agreement—Motion that purchaser give up possession in default of making payments due under agreement—Appointment of receiver.*—An agreement for the sale of a leasehold interest in land provided that possession should be given to the purchaser on payment of a specified part of the purchase-money, he undertaking to pay the rent and other outgoings, and also, on taking possession, paying to the vendor the cost of a new fence. The specified part of the purchase-money having been paid, the purchaser was let into possession, but he failed to pay the cost of the fence and did not pay the rent and taxes, so that the vendor had to pay them in order to prevent the forfeiture of the lease. The

vendor commenced an action for rescission of the agreement on the ground that he had been induced to enter into it by misrepresentation, and moved in the action for an order on the defendant to deliver up possession of the land in default of his making the payments due under the agreement.

Held, that the motion, seeking in effect the specific performance of some of the terms of the agreement, was inconsistent with the claim for rescission made by the writ, and must therefore be refused.

But a receiver was appointed for the purpose of securing the payments in question.—COOK *v.* ANDREWS, *Ch.D. North, J.*

5. *Contract for sale of land—Sale by auction—Authority of auctioneer or his clerk to sign memorandum on behalf of purchaser—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—Upon a sale by auction the clerk to the auctioneer has no implied authority to sign on behalf of a purchaser a memorandum of the contract within the Statute of Frauds.

The implied authority of an auctioneer to sign such a memorandum on behalf of a purchaser does not extend to authorize the auctioneer to sign such a memorandum seven days after the sale by auction.

Semble, the auctioneer's authority merely enables him to sign at the sale.—BELL *v.* BALLS, *Ch.D. Stirling, J.*, 378.

6. *Custody of title deeds—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 2, *r.* 5.—A vendor of land cannot, in the absence of express stipulation, retain possession of title deeds because they relate to personal estate also in which he still retains an interest.—FULLER AND LEATHLEY'S CONTRACT, RE, *Ch.D. North, J.*, 627.

7. *Partnership—Judgment in action for dissolution and sale—Sale by tender—Purchase by one partner of moiety of other partner—Copyholds described as freeholds*—Bonâ fide *mistake of both parties—Compensation.*—The plaintiff and defendant had been partners in a brewery to which a number of tied houses were attached. In an action between them an order was made for dissolution and sale by tender. By the chief clerk's certificate the defendant was declared the purchaser, as being the highest bidder, of the moiety of the plaintiff.

The conditions, which were prepared by the plaintiff's solicitor and approved by the defendant's solicitor and the defendant, provided that the title should be accepted as it stood, the properties being well known to both parties, and nothing was said about compensation. It subsequently transpired that certain of the properties which were to be conveyed as freeholds were copyholds. Negotiations thereupon took place between the parties and their legal advisers, and as it was feared that there would be delay (the properties being in mortgage), a conveyance was executed by the plaintiff in the form settled by counsel. The defendant, having had to pay a large sum in respect of enfranchisement of the copyholds, took out a summons in the action, in which he asked that the plaintiff might be ordered to pay him one-half of that sum in effect by way of compensation.

Held, that the principle laid down in *Mortlock* v. *Buller*, 10 Ves. 315, and *Castle* v. *Wilkinson*, L. R. 5 Ch. App. 536, which allowed the purchaser to insist on having all the vendor could convey, with a compensation for the difference, was confined to the class of cases where the vendor knew the title and the purchaser did not, and had no application to the present case. And that, therefore, it was unnecessary to consider whether compensation could be enforced by a purchaser after the money was paid and the conveyance executed. The summons was accordingly dismissed.—HOPCRAFT *v.* HOPCRAFT, *Ch.D. Stirling, J.*

8. *Public-house—Agreement for sale—Specific performance—Licence—Vendor's obligation in respect of—Licence indorsed or otherwise affected—Licensing Acts* (9 *Geo.* 4, *c.* 61, *s.* 11; 5 & 6 *Vict. c.* 44, *s.* 1).—Unless the vendor of licensed premises specially contract that the licence shall be renewed at the general annual licensing meeting, or that he will obtain from the magistrates a transfer of the licence to the purchaser's nominee at the next special sessions, or *interim* authority for the nominee to use the licence between the date fixed for completion and the next special sessions, the vendor does not take upon himself any of the above risks. All that he is bound to do, in the absence of any such special provisions, is to have a valid and effectual licence existing at the date fixed for completion of the purchase, which he can indorse in the usual way, and upon or in respect of which the purchaser could apply at once for *interim* protection and without undue delay under 9 Geo. 4, c. 61, s. 11, at the next special sessions.

The statement in Dart's Vendors and Purchasers, 6th ed., vol. 1, p. 483, to the effect that if the vendor could not, by the day appointed for completion, procure a transfer of the licence, the purchaser might repudiate the contract, is not justified by the cases.

An option to determine a contract for the sale and purchase of licensed premises if the licence became affected,

Held not to become operative, on the magistrates refusing an irregular application by the purchasers for a temporary authority under section 1 of 5 & 6 Vict. c. 44.—TADCASTER TOWER BREWERY CO. *v.* WILSON, *Ch.D. Romer, J.*, 428.

9. *Purchaser with notice—Recitals—Estoppel.*—The plaintiff obtained a conveyance to himself of the legal estate in certain land, with express notice that the defendants were transferees of D.'s interest therein. The grant of D.'s interest to the defendants' predecessor in title contained an erroneous recital of D.'s earlier title.

Held, that the defendants were not precluded from showing what interest really passed under D.'s grant, even if it was contrary to the recitals.—TRINIDAD ASPHALTE CO. *v.* CORYAT, *P.C.*, 225.

10. *Specific performance—Agreement for sale of land—Parcels—Identity—Admissibility of parol evidence—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—By a written agreement, signed by both parties and dated the 12th of February, 1896, A. agreed to sell and B. to purchase "twenty-four acres of land freehold, and all appurtenances thereto, at T. . . . Possession to be had on the 25th of March next, the vendor guaranteeing possession accordingly."

Held, in an action for specific performance, that A. was entitled to prove by parol evidence that he was the owner of 24a. 1r. 26p. of freehold land at T., and that on the morning of the day on which the agreement was signed the defendant inspected that land with the plaintiff.

Decision of Byrne, J., *ante*, p. 498, reversed.—PLANT *v.* BOURNE, *C.A.*

11. *Time essence of contract—Negotiations continued after date fixed for completion—Action by sub-purchaser against original purchaser*—Lis pendens

—*Title accepted and draft conveyance approved—Ten days' notice to complete—Reasonable notice.*—The agreement for sale of a public-house as a going concern fixed the 31st of December, 1896, as the date of completion. Shortly after the date of the agreement the purchaser sold the benefit thereof to another person, who, after considerable delay, sold his interest therein to a third person, and the original vendor had notice of these transactions. In addition to this an action, of which the original vendor had notice, was subsequently commenced against the original purchaser by a fourth person for specific performance of an alleged agreement for the sale of the public-house to him by such purchaser, and was registered as a *lis pendens*, which prevented the original purchaser from borrowing on the security of the public-house the money necessary to complete her purchase. Meanwhile negotiations between the original vendor and purchaser continued after the date fixed for completion; and when the title had been accepted and the draft conveyance approved, the original vendor on the 13th of February, 1897, gave notice to the original purchaser to complete in ten days, to which the latter replied that she had already commenced proceedings to get the *lis pendens* vacated, and, when this was accomplished, would complete as soon as possible, and objected that a ten days' notice was not reasonable under the circumstances. The original vendor, however, at the expiration of the ten days, notified to the original purchaser that the contract was at an end. Upon motion by the latter for an injunction to restrain the original vendor from dealing with the public-house without regard to her rights under their agreement,

Held, that the notice was reasonable under the circumstances; and the motion was dismissed.—SMITH *v.* BATSFORD, *Ch.D. North, J.*

12. *Voluntary settlement—Title of purchaser for value—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—Notwithstanding section 47 of the Bankruptcy Act, 1883, a *bonâ fide* purchaser for value under a voluntary settlement prior to the bankruptcy of the settlor acquires a good title as against any future trustee in bankruptcy.

In re Brall, Ex parte Norton, 41 W. R. 623, [1893] 2 Q. B. 381, and *In re Holden*, 36 W. R. 189, 20 Q. B. D. 43, approved.

In re Briggs & Spicer, 39 W. R. 377, [1891] 2 Ch. 127, *overruled.*—CARTER & KENDERDINE'S CONTRACT, RE, *C.A.*, 484.

13. *Will—Trustees—Power of sale—Charge of legacies on residue—Insufficiency of personal estate to pay debts and specific legacies—Legal estate—Title—Concurrence of beneficiaries.*—A testator, after directing payment of his debts, funeral and testamentary expenses, and certain specific legacies, gave his residuary real and personal estate to trustees upon trust as to part thereof as therein mentioned, and he then gave the rest and residue of his real and personal estate to certain persons absolutely in equal shares.

Subsequently, by a codicil he revoked the gift to those persons and substituted other persons in their stead, and in all other respects confirmed his will. The testator's personal estate was insufficient to pay his debts, &c., and the specific legacies; and, in consequence of this, the trustees put up for auction residuary real estate of the testator. A purchaser of a portion of such estate objected that the trustees had no power to make a valid assurance, and required the concurrence of the residuary devisees.

Held, that the vendors, the trustees, had made a good title.—DYSON & FOWKES' CONTRACT, RE, *Ch.D. Kekewich, J.*, 28.

See also Contract, 7, 8; Practice, 54.

VEXATIOUS ACTIONS ACT, 1896:—

Vexatious proceedings instituted before the passing of the Act—"Reasonable ground."—An order under the Vexatious Actions Act, 1896, may be founded upon vexatious legal proceedings commenced before the passing of that Act. In dealing with an application for such an order the court will consider the number, general character, and results of the proceedings alleged to be vexatious, and may make the order although there may have been reasonable ground for the proceedings in each case considered by itself.—CHAFFERS, RE, ATTORNEY-GENERAL, EX PARTE, *Q.B.D.*, 365.

VICTORIA, LAW of:—

1. *Administration and Probate Act*, 1890 (54 *Vict. No.* 1060), *s.* 97—*Valuation of testator's estate—Bank deposit receipts—Liability on bank shares.*

Held, that in a statement of a testator's estate under section 97 of the Administration and Probate Act, 1890, bank deposit receipts should be valued at the price which they would fetch in the market, and not according to the amounts appearing on the face of them to be payable; also, that sums payable in respect of bank shares at the times mentioned in various schemes for the reconstruction of those banks are debts of the deceased, and may be deducted from the sum total of the assets in order to ascertain the balance liable to probate duty.—MASTER IN EQUITY OF SUPREME COURT OF VICTORIA *v.* PEARSON, *P.C.*

2. *Probate—Statement by executors—Debts chargeable on foreign assets—Law of Victoria—Administration and Probate Act*, 1890, *No.* 1060, *s.* 97, *sub-section* 2.

Held, that, under section 97, sub-section 2, of the Administration and Probate Act of 1890, the statement which an executor is required to furnish relates to all assets within the Colony of Victoria, and to such debts as are properly chargeable on these Colonial assets in assessing them for duty so as to show the assessable balance in the Colony.

Consequently, where the testator was domiciled in Victoria but had foreign assets, these latter, to which Victorian probate gives no title, need not be stated, nor any debts chargeable thereon, except so far as they are in excess of the security, and to the extent of that excess are chargeable on the Victorian assets.

Blackwood v. *Reg.*, 8 App. Cas. 82, followed.—HENTY *v.* REGINA, *P.C.*

WATER:—

1. *Diversion of spring—"Stream"—Lease—Covenant—Warrandice clause.*—Water percolating discontinuously through or along strata cannot be described as a "stream."

A lessor demised by lease a distillery, cottages, thirteen and a-half acres of land, with two ponds, "together with right to the water in the said ponds and in the streams leading thereto." The lease also contained the usual warrandice clause. The lessor sunk a tank on ground outside but adjoining the demised subjects, and drew off from marshy ground percolating water which would have found its way eventually into one of the ponds,

Held (Lord Halsbury, L.C., dissenting), affirming the decision of the Second Division of the Court of Session, that water percolating through the

ground towards the pond was not water in any stream leading to the pond;

Held, secondly, by the whole House, that, assuming an implied obligation on the part of the lessor not to diminish the water supply to the ponds, there had been no breach.—MCNAB *v.* ROBERTSON, *H.L.* (*Sc.*).

2. *Rating—Annual value—House and garden—Supply of water for domestic purposes—Basis of assessment—Justices—Exclusion of part of premises—Grand Junction Waterworks Act*, 1852 (15 & 16 *Vict. c. clvii.*), *s.* 46—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 68.—Section 68 of the Waterworks Clauses Act, 1847, provides that the water rate shall be payable according to the annual value of the "tenement supplied with water," and if any dispute arise as to such value, the same shall be determined by two justices.

Held, that the justices, in determining under this section the annual value of premises consisting of a dwelling-house and garden occupied as one residence, cannot exclude the garden or any part of the premises, but must take into consideration the whole premises as being the "tenement supplied with water."—GRAND JUNCTION WATERWORKS CO. *v.* DAVIES, *Q.B.D.*, 687.

3. *Supply — Local Government — Alteration of boundaries — Construction of waterworks — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 52—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 59—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 36 (2).—Where an area has been added to the district of a local authority by an order of the county council, the local authority acquire a right to supply the added area with water under section 51 of the Public Health Act, 1875. But this right is controlled by section 52 of the same Act, and, therefore, before "constructing" waterworks within the added area, notice must be given to every existing water company whose limits of supply include the added area. And laying pipes to extend the local authority's existing water system into the added area is "constructing" waterworks within section 52.

Cleveland Water Co. v. *Redcar Local Board*, 43 W. R. 90, [1895] 1 Ch. 168, approved but distinguished.

Decision of North, J., *ante*, p. 436, reversed.—HUDDERSFIELD CORPORATION *v.* RAVENSTHORPE DISTRICT COUNCIL, *C.A.*, 642.

See also Landlord and Tenant, 7.

WEIGHTS and MEASURES:—

Coal—Weight ticket—Delivery of total quantity expressed in ticket—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 21.—A quantity of coal exceeding two hundredweight was in course of being delivered from a vehicle to a purchaser, and the ticket delivered therewith expressed that the purchaser would receive two tons of coal in twenty sacks each containing 2cwts. When eleven of the sacks had been delivered the remaining sacks were weighed, and some were found to contain less and some more than 2cwts. each, but the deficiency in those weighed exceeded the excess. The magistrate found as a matter of fact that the whole quantity of two tons was delivered.

Held, that, as the whole quantity expressed in the ticket had in fact been delivered, the seller could not, by reason of some of the sacks containing less than 2cwts. each, be convicted under section 21 of the Weights and Measures Act, 1889, of having delivered a less quantity of coal than the quantity expressed in the ticket.—GODFREY *v.* RADFORD, *Q.B.D.*

WILL:—

1. *Class—Gift to class at twenty-one—Discretionary trust of income during minority—Vesting.*—A testator gave his residuary estate to trustees upon trust to divide the same between a class upon their respectively attaining the age of twenty-one years, and empowered the trustees to apply the whole, or such part as they should think fit, of the annual income of the share of any of the class during minority for his, her, or their education or maintenance.

Held, that the shares were not vested in members of the class who died under twenty-one.

Fox v. *Fox*, 23 W. R. 314, L. R. 19 Eq. 286, not followed.—WINTLE, RE, TUCKER *v.* WINTLE, *Ch.D. North, J.*, 91.

2. *Class—Postponement of distribution—Substitutional gift—Death before class ascertained.*—A testator, after giving a life estate to his widow, gave the residue "to my brothers and sisters in equal shares and proportions, the lawful child or children of any deceased brother or sister taking his, her, or their deceased parent's share."

Held, that the children of a brother who died after the date of the will, but before the testator, could not take.

Thornhill v. *Thornhill*, 4 Madd. 377, followed.—HANNAM, RE, HADDESLEY *v.* HANNAM, *Ch.D. North, J.*, 613.

3. *Construction—Absolute gift in confidence—Precatory trust—Condition.*—Where a testator gave his residuary estate to his wife absolutely in fullest confidence that she would carry out his wishes—viz., during her life pay the premiums on a policy on her own life (which was her own property), and at her death bequeath the moneys arising therefrom, and also from another policy on the testator's life, to his daughter.

Held (Rigby, L.J., *dissentiente*), that the words "in fullest confidence" were only an expression of desire on the part of the testator, and that the wife therefore took the residuary estate free from any obligation either by way of precatory trust or condition.—WILLIAMS *v.* WILLIAMS, *C.A.*, 519.

4. *Construction—Alternative or substitutional gift—Charitable trust—Scheme.*—A testator by his will bequeathed £10,000 to his trustees upon trust to pay one-tenth of the income arising therefrom to "the Protestant Alliance, 1851, or some one or more kindred institutions having for their object the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty."

Held, that the language of the will imported not a substitutional but an alternative gift, and that the testator's intention was to benefit a class of institutions of which the Protestant Alliance was a type; that a scheme for the application of the fund should be prepared, under which, *primâ facie*, the Protestant Alliance would take the chief, if not the entire, benefit.—DELMAR'S TRUSTS, RE, *Ch.D. Stirling, J.*, 630.

5. *Construction—Devise to E. and her issue—Issue to take on attaining twenty-one—Rule in* Wild's case.—By his will a testator devised and bequeathed his residuary estate, subject to certain life interests, to E. and "to any lawful issue she may have, such issue to take a vested interest in my said property upon attaining the age of twenty-one years." The testator died leaving both real and personal pro-

perty. E. survived the testator, and died intestate and without ever having been married.

Held, (1) as to the realty, that the direction that the issue should take vested interest on attaining to twenty-one was inconsistent with the use of the word issue as a word of limitation; that E. and her issue took concurrently as purchasers; that E. took a vested interest on the death of the testator liable to be divested *pro tanto* on the birth of issue, an event which never happened; that therefore the real estate went to E.'s heir-at-law.

(2) As to the personalty, that there was nothing to take the case out of the ordinary rule that under a gift to one and his children, the parent and children take *primâ facie* concurrently as joint tenants; that, consequently, the personalty belonged to E.'s legal personal representative.—WILMOT, RE, WILMOT *v.* BETTERTON, *Ch.D. Stirling, J.*, 492.

6. *Construction—Estate* pur autre vie—*Special occupant—Devolution of estate—Wills Act* (1 *Vict. c.* 26), *s.* 6.—In order to find that there is a special occupant of property devised *pur autre vie* either the word "heir" must be expressly mentioned in the gift or it must be otherwise shown that the testator intended the heir of the devisee to take. The owner of the freehold devised to trustees upon trust for three persons and their issue equally during their lives and the life of the longer liver of them. One of the beneficiaries having died intestate,

Held, that there was no special occupant designated by the testator, and that the share consequently devolved on the personal representatives of the beneficiary according to the 6th section of the Wills Act.

Wall v. *Byrne*, 2 Jo. & Lat. 118, and *Philpotts* v. *James*, 3 Doug. 425, distinguished.—SHEPPARD, RE, SHEPPARD *v.* MANNING, *Ch.D. Romer, J.*, 475.

7. *Construction — Gift to "issue" — Illegimate children.*—A testatrix gave shares of income of her residuary estate to certain named nephews and nieces with a gift over to the respective issue of any who should die during the lifetime of two other named persons.

M. A., one of the nieces named, had married F. A., her deceased sister's husband, and had by him a daughter G. and a son F. M. A. was called in the will by her married name, was described as the wife of F. A., and G. was described as their daughter. M. A. died within the period mentioned.

Held, that, under the circumstances, G., though illegitimate, could, under the gift to issue, claim her mother's share of income.

Megson v. *Hindle*, 28 W. R. 866, 15 Ch. D. 198, commented upon.—WALKER RE, WALKER *v.* LUTYENS, *Ch.D. Romer, J.*, 647.

8. *Construction—Gift to nephews—Illegitimacy.*—A testator by his will gave to his "wife's nephew, J. W. R. (*nominatim*), all my silver spoons and my gold spectacles," and he gave one moiety of his residuary estate to trustees upon trust for "all and every the nephew and niece and the nephews and nieces of my said wife."

J. W. R. was the illegitimate son of a brother of testator's wife.

Held, following *In the Goods of George Ashton*, [1892] P. 83, 40 W. R. Dig. 203, and *In re Deakin, Starkey* v. *Eyres*, 43 W. R. 70, [1894] 3 Ch. 565, that the testator had sufficiently indicated his intention that J. W. R. should take, and that therefore, notwithstanding his illegitimacy, he was included in the class of "the nephews and nieces of my wife."

Bagley v. *Mollard*, 1 Russ. & My. 581, and *In re Hall, Branston* v. *Weightman*, 35 W. R. 797, 35 Ch. D. 551, considered and not followed.—PARKER, RE, PARKER *v.* OSBORNE, *Ch.D. Kekewich, J.*, 536.

9. *Construction—Gift of specific property to trustees to sell and set apart portions to answer settled legacies—Gift of residue upon trust for children in equal shares—Power to retain investments—Right of trustees to appropriate specific funds without sale.*—A testator gave specific property upon trust to sell and invest the proceeds, and set apart portions to answer settled legacies, and he gave power to the trustees to retain any part of his personal estate in the investments in which they were at the time of his decease, and the residue he bequeathed upon trust for all his children and the issue of such as should be dead, in equal shares, the shares of daughters to be settled. Part of the securities held by the testator at the time of his death consisted of shares in a brewery which had been very successful. Some of these the trustees appropriated to answer one of the settled legacies, and the remainder to the same legatee in part satisfaction of her share of residue.

On a summons asking whether they were justified in so doing,

Held, (1) as to the settled legacies, that there was power to appropriate, having regard to the power to retain existing investments.

(2) As to the residue, that these shares being an authorized investment, there was no duty to sell and invest on security of the like nature, and that they therefore might be appropriated, even in advance; that all such appropriations must be fairly made, and, there being no allegation of unfairness, that the trustees had acted within their powers.—BROOKS, RE, COLES *v.* DAVIS, *Ch.D. Stirling, J.*

10. *Construction—"Ready money in bank"—Deposit receipts.*—A gift by will of "ready money in bank" held to include money on deposit receipt which could be withdrawn without previous notice to the bank; but, not to include money on deposit receipt as to which previous notice of withdrawal was necessary.—MAYNE *v.* MAYNE, *M.R.* (*Ir.*).

11. *Gift in reversion to "lady superioress" of convent* — Persona designata — *Period of ascertainment.*—Testatrix devised real estate to her brother and sister for life with remainder after the death of the survivor of them to "the lady superioress" of a certain convent "for the benefit of the school attached thereto."

Held, that the person who was lady superioress at the date of the death of the testatrix was the person to take, and not the superioress at the date of the death of the survivor of the life tenants.—LAFFAN AND DOWNES' CONTRACT, RE, *M.R.* (*Ir.*).

12. *Hotchpot clause.*—Where a testator declares that a sum of money settled by him on a child's marriage shall be taken in or towards satisfaction of the share in the testator's residuary estate bequeathed to such child, and shall be brought into hotchpot and accounted for accordingly, any reversionary interest which the testator may have reserved to himself under the trusts of the settlement in such sum of money will, by the conjoint effect of the gift of residue and the hotchpot clause, pass to the child.

C., on the marriage of his son R. in 1885, covenanted with the trustees of R.'s marriage settlement to pay to them within six months of his death £10,000, upon trust to invest and pay the

income to R. for his life, remainder to the wife of R. for her life if she should survive him, remainder for the issue of the marriage, and in default of issue the ultimate trust was for C. absolutely. C. died in 1886, having by his will given his residuary estate equally between his son R. and his daughter L. C., directed that any sum of money which he had already covenanted or agreed to give to any child of his on his or her marriage should be taken in or towards satisfaction of the share of such child, and should be brought into hotchpot and accounted for accordingly. After C.'s death his executors paid to the trustees of R.'s settlement a sum of £10,000, and divided the residue of the estate equally between R. and L., counting in such division the £10,000 as part of R.'s share. R. died in 1894, leaving a widow and no issue. By reason of the failure of issue, L. claimed to be entitled to one moiety of the £10,000 (subject to the life interest of R.'s widow) as part of C.'s estate.

Held, reversing the decision of Chitty, J., that the executors of R. were entitled to the whole of the £10,000.—COSIER, RE, HUMPHREYS *v.* GADSDEN, *C.A.*, 376.

13. *Hotchpot clause—Advanced child—Period of distribution—Interest on advance—Rate of interest.*—A testator bequeathed £30,000 to his trustees upon trust to pay the income thereof to his wife during her life, and after her death to transfer one-fourth to his son and permit the remaining three-fourths to fall into residue; and he bequeathed the residue (comprising all his real estate and his residuary personalty) to his trustees upon trusts for conversion and division among his three daughters. There was a provision that any advance made to any daughter should go towards satisfying the portion under the residuary gift, and it was expressly directed that this provision should apply to a sum of £6,000 payable under a covenant by the testator to the trustees of the marriage settlement of one of the daughters. The testator died in 1878, leaving personalty to the amount of £3,700 and real estate valued at £62,000. The trustees, in exercise of their discretion, did not realize the real estate at once, but sold portions from time to time. The testator's debts, including the £6,000, amounted to £13,000, and of this sum a considerable portion (including the £6,000) was raised on mortgage. Interest on the £30,000 legacy was paid by the trustees to the widow out of the income of the real estate till 1894, when a sufficient amount of real estate had been sold to answer the legacy. After payment of all interest on the mortgage and the legacy there remained a surplus income of £200 a year, which was divided between the two unadvanced daughters. On the death of the widow in 1895 the £30,000 became divisible.

Held, that the advanced daughter must bring the £6,000 into hotchpot and also pay the interest thereon at the rate of 3 per cent. per annum from the date on which the payment of the £6,000 was actually made, but that the period of distribution was the death of the testator.

In re Rees, Rees v. *George*, 29 W. R. 301, 17 Ch. D. 701, followed.

In re Dallmeyer, 44 W. R. 375, [1896] 1 Ch. 372, discussed.—LAMBERT, RE, MOORE *v.* MIDDLETON, *Ch.D. Stirling, J.*, 661

14. *Hotchpot—Settlement—Referential trust in will—Accretion.*—By a marriage settlement, certain funds were settled upon certain usual trusts for the benefit of the husband and wife and their children, and it contained a hotchpot clause. By the will of the wife's mother, made subsequently, a portion of her personal estate was bequeathed to the trustees to pay and transfer the same to the trustees of the settlement, to be held by them upon and for the same trusts and purposes as were therein expressed concerning the property thereby settled. On a summons taken out by the trustees of the settlement to ascertain the effect of this bequest, it was contended by parties to whom but small appointments under the settlement had been made that the bequest was to be treated as an accretion to the settlement, so as to make the hotchpot clause applicable by bringing into account the funds already appointed under the settlement.

Held, that, inasmuch as there was no context in the will importing that the use of the words "same trusts" implied an accretion of the settlement trust fund, that the bequest must be deemed to be of an independent fund, to which the hotchpot clause in the settlement was not applicable.—NORTH, RE, MEATES *v.* BISHOP, *Ch.D. Stirling, J.*

15. *Intestacy—"Next-of-kin in blood"—Settlement—Construction.*—Consols were settled on trust after the death of M. A. Gray for "the next-of-kin in blood to the said M. A. Gray . . . in case she had so died intestate and unmarried."

Held, that children of deceased brothers and sisters of M. A. Gray were entitled as well as living brothers and sisters to share in the fund.—GRAY'S SETTLEMENT, RE, AKERS *v.* SEARS, *Ch.D. North, J.*

16. *Latent ambiguity.*—A testator by his will devised and bequeathed his residuary estate "unto the children of the deceased son (named Bamber) of my father's sister, share and share alike." The sister had three sons who predeceased the testator, all of whom left children.

Held (reversing Kekewich, J.), that the gift was void for uncertainty.

Hare v. *Cartridge*, 13 Sim. 165, commented on and distinguished.—STEPHENSON, RE, DONALDSON *v.* BAMBER, *C.A.*, 162.

17. *Legacy—Condition—Marriage with consent of testator—Legacy charged on land.*—A legacy charged on the real estate of testatrix, conditional on the marriage of the legatee with the sanction of testatrix, does not fail by reason of the death of the testatrix before the marriage of the legatee; the condition being only applicable to the event of marriage of the legatee in the lifetime of testatrix.—CURRAN *v.* CORBETT, *M.R.* (*Ir.*).

18. *Pecuniary legacy—Charge on real estate—Subsequent specific devise of the real estate—Laches.*—Testator bequeathed pecuniary legacies to his three daughters to be "charged upon and payable out of" his real estate, if his personal estate should be insufficient; he then devised the lands of A. to his eldest son in fee; and also devised to his eldest son, "subject as aforesaid," all his residuary real and personal estate. By a codicil, testator gave further pecuniary legacies to each of his three daughters "in addition to the moneys already left them, the total sum to be subject to the same conditions as the fortunes he had already left them."

Testator died in 1860, and at that time his personal estate was sufficient to pay his debts and the pecuniary legacies, and one of the daughters received her pecuniary legacy. The other two daughters received interest on their legacies—first, from the testator's executors, and afterwards from testator's eldest son. In 1878 the eldest son mortgaged the lands of A. to a bank, with a statutory

declaration that all his father's debts and legacies had been paid, and died in 1879.

Interest was paid to the daughters on their pecuniary legacies by the executor of the eldest son until 1886.

In 1893 the lands of A. were sold in the Land Court and the proceeds paid into court.

Held, (1) that on the true construction of the testator's will and codicil, the pecuniary legacies of the daughters were charged on the lands of A.; (2) that in the events which happened they were a subsisting charge on the lands of A., although at the time of the testator's death the personal estate of the testator was sufficient to pay them; (3) that there was no *laches* or acquiescence on the part of the pecuniary legatees, the two daughters, and consequently that they were entitled to payment out of the proceeds of sale of the lands of A. in priority to the mortgage of the bank.

Richardson v. *Morton*, L. R. 13 Eq. 123, dissented from.—McCarthy *v.* McCarthy, *C.A.* (*Ir*).

19. *Power—Gift for life—Power to dispose—Default of appointment—Gift by implication.*—Under her marriage settlement a wife had a general power of appointment by will over certain real estate. By her will she gave the property to her husband for life and gave him "power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards other property which I have under my marriage settlement." There were several children of the marriage, but the husband died without having exercised the power of disposition given to him by the will.

Held, that the power was a mere power and not a power coupled with a trust, and that there was no gift by implication to the children in default of appointment.

Healy v. *Donnery*, [1853] 3 Ir. C. L. Rep. 213, followed.—Weekes' Settlement, Re, *Ch.D. Romer, J.*, 265.

20. *Remoteness—Perpetuity.*—Testator bequeathed £2,000 to the trustees of the General Assembly of the Presbyterian Church for the erection of a mission hall, and if the trustees of certain premises called the Bethell would sell them, and hand the amount received to the trustees for the purposes specified in his will, then the testator further devised certain freehold property called D. to the said trustees of the General Assembly.

Held, that the devise of the freehold property called D. was void for remoteness.—Kingham *v.* Kingham, *V.C.* (*Ir.*).

21. *Tenant for life and remainderman—Leaseholds—Conversion—Rule in* Howe *v.* Lord Dartmouth.—The rule in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, will be applied unless indications of the testator's intention that it shall not be applied can be discovered from the language of the will. Neither a direction to pay "rents and profits," nor a power of distress on "land" given to annuitants, nor both together are sufficient indications of intention on the part of a testator to exclude the operation of the rule.

Harris v. *Poyner*, 1 Dr. 174, and *Craig* v. *Wheeler*, 8 W. R. 172, 29 L. J. Ch. 374, followed.

Crowe v. *Crisford*, 2 W. R. 45, 17 Beav. 507; *Wearing* v. *Wearing*, 23 Beav. 99, 6 W. R. Dig. 102; and *Vachell* v. *Roberts*, 32 Beav. 140, 12 W. R. Ch. Dig. 131, dissented from.—Game, Re, Game *v.* Young, *Ch.D. Stirling, J.*, 472.

22. *Tenant for life and remainderman—Leaseholds Repairs.*—Where a testator directed that the income derived from certain leasehold houses should be paid to his widow for her life,

Held, that the words "income derived" meant net income, and not gross income, and that, consequently, the tenant for life must bear the expense of all outgoings incurred after the testator's death.

In re Courtier, 35 W. R. 85, 34 Ch. D. 136, discussed.

In re Baring, Jeune v. *Baring*, 41 W. R. 87, [1893] 1 Ch. 61, dissented from.—Ridding, Re, Thompson *v.* Ridding, *Ch.D. Stirling, J.*, 457.

23. *Tenant for life—Remainderman—Leaseholds—Rent and outgoings—Repairs—Insurance.*—Testator directed his executors to allow his wife, if she pleased, to occupy his leasehold house during her life, with the use of the furniture, and after her death that the premises be sold, and the proceeds divided among the testator's children.

Held, that the widow was liable to pay all head-rent and taxes payable in respect of the period during which she occupied the premises; and to keep them in such repair as a tenant would, in the absence of express contract to the contrary, be liable for; but that the trustees of the residuary estate—not the widow—were bound to keep the premises insured against fire.

Jeune v. *Baring*, [1893] 1 Ch. 61, not followed.—Kingham *v.* Kingham, *V.C.* (*Ir.*).

24. *Tenant for life and remainderman—Onerous and beneficial estates, devise of.*—A testator devised various real estates in England to A. for life, with remainder to his first and other sons in tail male. On some of the estates the charges exceeded the rents and profits, and the assignees of the tenant for life desired to give up possession of these estates while retaining the estates which returned a profit.

Held, that the estates being all given in one gift, the onerous estates could not be disclaimed.

Syer v. *Gladstone*, 34 W. R. 565, 30 Ch. D. 614, commented on.—Frewen *v.* Law Life Insurance Co., *Ch.D. North, J.*

See also Charity, 3-5; Conflict of Laws; Executor, 8; Inland Revenue, 7; Married Woman, 11; Practice, 46; Probate, 12-19; Trustee, 6, 7; Vendor and Purchaser, 13.

[THE END.]

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